DESAI'S

All India Century Digest

(CIVIL)

1811-1912.

VOL. I.

A

BY

B R. DESAI,

High Court Pleader,

Baroda.

(Author of Desai's Index of cases judicially noticed 1811—1909; Desai's All India Century Criminal Digest 1811-1910 in two volumes & Desai's All India Decennial Digest 1901-1910 cri. in one vol. & civil in 3 vols.) and publisher of Desai's Hand book of criminal cases being in a verbatim reprint of all Cri. cases reported in the I. L. R. four series for 1900—1906 in two volumes & for 1907—1911 in one volume).

Prices :—Rs 7 per vol. (cloth gilt).
Ans. 8 Extra per vol. for Eng. Leather-binding. } **Postage Extra.**

Printed at the "**Vidya Vilas Printing Press**" by **M. V. Shah** for the author
Lehripura road—**BARODA.**

(All rights reserved)

1912.

भारती-२

क्रमिक
विभाग

DEDICATED.

With feelings of gratitude

To

The members the Legal Profession.

Whose warm appreciation

and

Substantial Patronage

Has emboldened me to undertake this publication.

PREF

The absence of a truly comprehensive and exhaustive Digest of Indian Case-law has been felt somewhat more keenly in the last decade than ever before. The circumstances that have created this want are but too well-known to all lawyers to require detailed notice. Years after the want was felt, I put to myself the question whether I should not undertake to supply the want, but the gigantic dimensions of the task staggered me notwithstanding that by that time I had acquired considerable experience in the line—I mean the publication of compiled works. It was only in 1908, that I was able to make up my mind--but having decided, I at once applied myself to the first and –in case of all works of reference—the most important part of my task, viz , the plan or the arrangement of the Digest. With an ambitious programme before my eyes, I looked upon the question of arrangement as one of prime importance and accordingly I devoted a good deal of time to the consideration of various plans of arrangement. But when the plan was finally settled, the work of compilation progressed satisfactorily enough, and I announced the Digest publicly. The ever appreciative public responded to my invitation to subscribe so cordially that it at once removed from my mind the last vestige of a doubt as to the success of my Digest and their continued patronage has since served to cheer my toils. I should have been able to put before the public the result of my labours in a tangible form long before this, had not my other Digests that were passing through the press at the time distracted my attention. As it is, I am today able to put before the public the first Volume of my Digest and it is now for them to Judge of it.

While I was passing through the period of indecision and uncertainty, I heard that the veteran law publisher of Trichinopoly, Mr. Sanjiva Row was also going to publish a similar Digest It is, indeed, unfortunate, that Mr. Sanjiva Row passed away from amongst us before his Digest saw the light of day. His energetic nephew is now carrying on the work, and the public have the advantage of having before them two sets of Digests to choose from.

Speaking of the other Digests it may be said that there is not one that can be truly called either comprehensive or exhaustive. Until recently a lawyer had to refer to not one, not two, but a dozen or more Digests of different Law Reports by different compilers before he could fairly acquaint himself with the authorities touching a particular law-point He must first go to " Woodman" for cases reported in the authorised Law Reports (for, of Private Reports, few have the honour of being recognised in it), then he must patiently take up one by one, the independent Digests of ten or eleven different private Law Reports and passing on with a sigh of regret for the absence of digests pertaining to other private Law Reports that have not yet published their digests, he must finally go to Digests of printed but unreported cases and rulings. Add to this the vexation caused by the different arrangements adopted by different

compilers in their various digests and the reader will not stand in need of any apology on my part for ushering a new Digest in the field, which being comprehensive and exhaustive is not merely an addition to the number of already existing digests, but is an improvement in every possible way upon all the existing digests put together and much more besides.

It was originally intended to publish a mixed Digests of Civil and Criminal Cases; but an esteemed friend of mine, Mr. Ratanlal Ranchhoddas B. A. LL. B., Vakil High Court Bombay, and one of the able editors of the Bom. Law Reporter made a timely and valuable suggestion of separating the Civil and Criminal Cases and consolidating them in independent Civil and Criminal Digests. The suggestion was readily accepted for obvious reasons. My heartfelt thanks are due to Mr. Ratanlal for his valuable suggestion.

SOME SPECIAL FEATURES :--

(1) **This is the only Digest which brings the Indian Case-law down to the end of 1912 in a consolidated form.**

(2) **This is not a mere Digest,** for in it, every case that has been the subject of Judicial notice at all, has its whole history given under it, while previous cases on the point are also referred to in the head-note itself The reader is thus enabled to find, at a glance, the whole case-law on a given point collected at one place and has not to go into the several head-notes of all the cases thereon, which again are given in their proper places without any omission, notwithstanding that they are repeated in the historical notes of other cases. In other words this Digest is a consolidation of the Digest and the Index of cases judicially noticed-**a feature, the value of which cannot be overrated.**

(3) **Arrangement of Cases**-Cases are arranged in a connected form instead of throwing them together in a confused mass

All the cases belonging to a particular subject are divided into Principal Headings and sub-headings and the catch words of every single case or group of cases are noted down under the sub-heading to which it belongs with the number of that case.

In other words every subject is preceded, as it were, by a short digest of its own. This will enable the busy prectitioner to find out a required case at a moment's notice without going through the head-notes *in extenso* of hundreds of cases under a particular heading.

(4) **Tables of contents**—Very often the reader does not remember the section relating to a particular subject and has therefore to go to the Act to find it out and then only he can refer to the Digest. To avoid this inconvenience tables of contents of big Acts are given.

(5) **Tables showing the corresponding sections**–In order to avoid similar inconvenience as regards the corresponding sections of the new and old Civil Pro. Codes, and the Limitation Acts, comparative tables of such sections are also given.

(6) **Names of parties**—are given at the end of every case summarised in this Digest.

(7) **As to cross-references**–In almost all the other digests cross-references are made merely by vol and page of the report. This mode of giving cross-references is circuitous and therefore inconvenient to a busy practitioner.

A practical illustration will best give an idea of the inconvenience:—

Thus, a Cross-reference to a case under "Hindu Law-Alienation" is given in other digests in some such way as this—"Hindu Law-Alienation" see "Mortgage" "9 C. P. L. R. 35; 19 Bom. 363."

Now on goingito the heading of "Mortgage" the reader is confronted by a long series of cases, perhaps more than 800, out of which he has to hunt out the two cases referred to viz 9 C. P L. R. 35 and 19 Bom 363. If he, in the course of his attempt to do so forgets either the Vol or the page of either of the cases, he finds himself in the position of a mariner who has lost his compass. The difficulty increases in proportion to the number of cases referred to.

In order to avoid such a circuitous and troublesome mode of giving cross-references, I have numbered consecutively all the cases under a general heading and a cross-reference is made by referring simply to the number of the case under that heading. Thus in my Digest the above cross-reference will appear as under :—

"Hindu Law-Alienation" see "Mortgage" case No. (251) 19 Bom 363, and so on.

(8) **The classification**—adopted in this Digest is better suited to a busy practitioner than that adopted in other Digests. In the latter, the various cases that could be arranged under one convenient general heading are scattered at as many places as there are Imperial or Provincial Acts touching the subject.

(9) **Overruled cases**—As a general rule overruled cases and cases on repealed statutes are also included on the ground that by way of historical interest these are as useful as the living case-law.

I will consider myself highly obliged if members of the legal profession would inform me of any errors or omissions in this Digest.

I cannot conclude this preface without expressing my sense of obligation to the learned editors of the Bom. L. R: *C. L. J*; *A. L. J.* & *M. L. T.* for their kind permissions accorded to me to utilize their head-notes for my Digests and also to my brother pleaders Messrs *C.* J. Sutaria B. A. LL. B; G. H. *Zimye* B A LL B M.V. Desai B A LL B; P. V. Patel M A LL B for rendering me valuable assistance in various ways in the preparation of this Digest.

I owe a special acknowledgment to my printers for their services and I wish to put on record here my sense of satisfaction at the prompt, neat and careful work done by them. The credit belongs, of course, to the diligent and hard-working manager Mr. M V Shah of the Vidya Vilas Printing Press.

15th July, 1912.

BARODA.

B. R. DESAI.

भा

क्रां

वि

DESAI'S

ALL INDIA CENTURY DIGEST

(CIVIL)

1811—1912.

Table of Headings, Sub-headings and Cross references.

Abadi

Abandonment

Abandonment by managing Khot

Abandonment notice of

Abandonment of appeal

Abandonment of claim

Abandonment of easement

Abandonment of excess claim

Abandonment of holding

Abandonment of issue

Abandonment of partnership

Abandonment of point

Abandonment of proceedings

Abandonment of right

Abandonment of tenancy

Abandonment of tenure

Abandonment of user

Abandonment of wife

Abandonment of wordly affair

Abandonment, Relinquishment or surrender of tenure

Abated suit or appeal

Abatement of appeal

Abatement of rent

- (1) Grounds of rent
- (2) Effect of former suit for abatement
- (3) Claim to abatement
- (4) Who can sue
- (5) Form of suit
- (6) Rate of reduction
- (7) Procedure
- (8) Civil Court's decree effect of on revenue Court's decree

Abatement of Execution proceedings

Abatement of nuisance

Abatement of part of claim

Abatement of part of rent

Abatement order of

Abatement of suit.

- (1) Suit Land washed away
- (2) Death of sole plaintiff
- (3) Insolvency of plaintiff
- (4) Survival of cause of action

Abatement of appeal

- (1) Death of appellant
- (2) Death of Appellant—during pendency of appeal
- (3) Death of one of two joint decree-holders
- (4) Death of principal pending appeal.
- (5) Death of respondent

Abandonment of wrong

Abbreviation of time

Abdication

Abduction & seductions of daughter

Abkari Act

Abkari Laws

Abkari Renter

Abkari sale

Absconding debtor

Absconding offender

Absence

Absence from British India

Absence of defendant at an adjourned hearing

Absence of defendant from British India

Absence of entry of acceptance in drawer's book

Absence of foreclosure clause in a mortgage deed

Absence of intention to grant zamindari partible.

Absence of natural father at Datt—Homom

Absence of reasonable and probable cause

Absence or want of notice no ground for review by another judge

Absent co owner claiming property after seven years absence

Absentee Co sharers

Absentees

Absolute estate

Absolute grant

Absolute occupancy holding

Absolute occupancy Tenant

Absolute privilege

Abstract of title

Abuse

Abuse defamation and slander
Abuse of process of Court
Abuse suit for damages
Abusive language
Abutting or adjoining a public road
Abwab
Acceleration of Estate
Acceptance
Acceptance of an instalment over-due
Acceptance of Executorship
Acceptance of gift
Acceptance of goods by buyers
Acceptance of Patta not in accordance with Law
Acceptance of Vakalat
Acceptance or renunciation of executionership
Acceptance what amounts to
Accepting lower rent than that entitled to for long time
Acceptor
Accession
Accession to Land
Accident loss by
Accidents
Accommodation acceptor
Accommodation drawer
Accord and satisfaction
Account
(1) General Cases
(a) Power of Court to order account instead of referring party to separate suit.
(b) Suit on account not signed
(c) Accounts taken in one suit adopted in another
(d) Mode of taking account
(e) Current mutual account
(f) Suit for balance on running account
(g) Court's order to furnish.
(h) Decree for contribution
(i) Caste inspection of books right of
(j) Form of an executor
(k) Judgment-debtors paying off decree against estates account
(l) Account kept in course of business
(m) Common Law right of the member to inspect books of the corporation
(n) Inventory and account
(2) Mis-cellaneous Cases
(a) Payments made by agent
(b) Partnership account
(c) Custom of trade
(d) Dishonest conversion by partner
(e) Hard and unconscionable bargain
(f) Executor's right to call for inventory and account
(g) Guardian's liability to render account
(h) Entry in Government Gazettee Account book
(i) Leave to bring suit for accounts
(j) Receiver's Accounts
(k) Commissioner to examine
Accountability
Account adjustment of
Accountant
Account Books, entries in
Account made in course of usual dealing
Account mutual open and current
Accounts
Account sales
Account settled
Account settled but not signed
Account Stated
Account stated or adjusted (ruzu khata)
Account, suit for
(1) Liability to account
(2) Lumberdar
(3) Mahomedan widow in possession for dower
(4) Mother appointed administratrix of minor son.
(5) Right to an account-Person with title barred by lapse of time
(6) Landlord and tenant
(7) Principal and Agent
(8) Refusal to account
(9) Right to re-open settled account
(10) Running account for portion of which hundis are given
(11) Necessity to go into accounts in suits for profits
(12) General cases.
Accretion
(1) New formation of alluvial land
(2) Rivers or change in course of rivers
(3) Churs or islands in navigable rivers
(4) Reformation after diluviation
(5) Procedure
(6) Right of purchasers to accretions
Accrual of cause of action
Accrual of right
Accrual of right to sue
Accrual of right to sue on death of widow
Accumulations
(1) Income
(2) Right of Hindu widow

Accumulations, period upto which they may be dealt with
Acknowledgment
Acknowledgment of debt
Acknowledgment of title
Acknowledgment differsfrom agreement
Acknowledgment effect of, on illegitimate children
Acknowledgment of adoption
Acknowledgment of debt after period of limitation has expired
Acknowledgment of liability
Acknowledgment of mortgage
Acknowledgment of mortgagor's title by one of several mortgagees as agent for the others
Acknowledgment of other rights
Acknowledgment of son
Acknowledgment of tenancy by receipt of rent
Acquiescence
(1) Laches
(2) Delay
(3) Delay in bringing suit
(4) Delay in enforcing rights with knowledge
(5) Delay in making objection
(6) Delay in opposing erection of building
(7) Erection of building without objection
(8) Cutivating land without objection
(9) Cutivation and changing character of land
(10) Acquiescence in title by conduct
(11) Conduct defeating title
(12) Presumption from allowing grant of certificate unopposed
(13) Not objecting to sale
(14) Pre-emption
(15) Account made in course of usual dealing
(16) Sending agent to settle rent
(17) Receipt of rent in lieu of grant in land
(18) Accepting lower rent than that entitled to for long time
(19) Long possession by tenant without lease
(20) Allowing part owner to work forfeiture of tenure as if full owner
Acquiescence in lease granted by executor
Acquiescence of landlord, effect of
Acquiescence of owner
Acquired property
Acquisition
Acquisition by Government of land subject to a mortgage
Acquisition of Easement
Acquisition of gain
Act VII of 1835
Act V of 1836
Act IX of 1837
Act XXVII of 1837
Act XI of 1838
Act XVI of 1838
Act XXIII of 1838
Act XXV of 1838
Act XXV of 1838 (Wills)
Act II of 1839
Act XIV of 1839
Act XX of 1839
Act XXIV of 1839
Act XXXII of 1839
Act IV of 1840
Act XIV of 1840
Act XV of 1840
Act XVII of 1840
Act XXIII of 1840
Act I of 1841
Act X of 1841 (Registration of ships)
Act XI of 1841 (Military Courts of request)
Act XIX of 1841 (Succession property protection)
— XX of 1841 (Collection of debts on succession)
— XXI of 1841 (Local nuisances)
— XXIX of 1841 (Dismissal of suits and appeals Bengal and Madras)
— IV of 1842
— XII of 1842
— XVI of 1842
— III of 1843
— V of 1843
— XI of 1843
— XIV of 1843
— XIX of 1843 (Registration of certain deed)
— Act V of 1844 (Private Lotteries)
— Act XIX of 1844
— XX of 1844
— I of 1845 (Sales of land for revenue arrears)
— XVI of 1845 (Re-admission of appeals, Bengal and Madras)
— XXIX of 1845 (Joint-zilla and sessions Judges)
— I of 1846 (Legal practitioners)
— IX of 1846
— I of 1847 (Boundaries)
— VII of 1847
— IX of 1847
— XIII of 1848
— XV of 1848
— XVIII of 1848
— XXI of 1848 (Wages)
— VI of 1849 (Pensions)
— VIII of 1850
— IX of 1850

— X of 1850
— XVIII of 1850 (Judicial Officer's protection)
Act XXI of 1850 (Caste disabilities removal).
Act XXVI of 1850 (Improvements in towns).
Act XXIV of 1850
Act XLII of 1850
Act VIII of 1851
Act XII of 1851
Act V of 1852 (Marriage by registrars).
Act XI of 1852
— XXV of 1852
— XV of 1853
— XVI of 1853
— XIX of 1853 (Rescusant Witness)
— VI of 1854 (Supreme Courts)
— VII of 1854
— IX of 1854 (Civil appeals)
— XVII of 1854
— XVIII of 1854 (Railways)
— II of 1855 (Evidence)
— VI of 1855 (Execution, Supreme Courts)
— VII of 1855
— VIII of 1855 (Administrator-General)
— XI of 1855 (mesne profits and improvements)
— XII of 1855 (Legal representative suits)
— XIII of 1855 (Fatal accidents)
— XVIII of 1855 (Pardens & reprieves)
— XXII of 1855 (Ports and ports dues)
— XXVIII of 1855 (Usury Laws repeal)
— XXXVI of 1855
— XXXVII of 1855
— VI of 1856
— VII of 1856
— IX of 1856
— XII of 1856 s. 3
— XV of 1856 (Hindu widow's remarriage)
— II of 1857
— VI of 1857 (Acquisition of Land for public purposes)
— XI of 1857
— XIX of 1857
— XXV of 1857 (Forefeiture)
— III of 1858 (State prisoner)
— X of 1858 (Confiscation)
— XI of 1858 (Corporal punishment)
— XXI of 1858 (Native passenger ships)
— XXX of 1858
— XXXI of 1858
— XXXIV of 1858
— XXXV of 1858
— XXXVI of 1858 (Lunatic Asylum)
— XL of 1858 (Minors)
— I of 1859 (Merchantshipping)
— III of 1859 (Cantonment Joint Magistrates)
— VIII of 1859 (C P C)
— IX of 1859 (Forfeiture)
— X of 1859
— XI of 1859
— XIII of 1859 (Workman's breach of contract)
Act XIV of 1859
Act XV of 1859 (Patents)
Act VII of 1860
Act VIII of 1860 (Electric Telegraphs)
Act X of 1860 (Custom duties)
Act XXI of 1860 (Societies Registration)
Act XXII of 1860
Act XXVII of 1860
— XXVIII of 1860 (Boundary marks)
— XXXII of 1860 (Income-Tax)
— XXXVI of 1860 (Stamps)
— XLII of 1860
— XLIII of 1860 (Amending Act VIII of 1859)
— XLVIII of 1860 (Police presidency Town amending Act)
— LIII of 1860
Act V of 1861 (Police)
Act IX of 1861 (Minor)
Act X of 1861 (Repealing Enact-ments relating to Civil Procedure)
Act XI of 1861 (Amending Act XIV of 1859)
Act XVI of 1861
Act XXI of 1861 (Income Tax)
Act XXIII of 1861 (Code of Civil Procedure)
Act XXIX of 1861
Act XXXI of 1861
Act IV of 1862
Act VI of 1862 (Annexing schedule to Act IV of 1862)
Act VIII of 1862
Act X of 1862
Act XV of 1862
Act XX of 1862 (Presidency High Courts)
Act II of 1863 (Appeals to queen in Council)
Act IX of 1863 (Amending Act X of 1859 in the Province of Agra)
Act XIV of 1863
Act XVIII of 1863
Act XIX of 1863 (Partition of Revenue Paying Estates)
Act XX of 1863 (Religious End wments)
Act XXI of 1863
Act XXIII of 1863 (Waste-lands claims)
Act II of 1864
Act III of 1864 (Foreingers)
Act XI of 1864 (Native law offi rs)
Act XIII of 1864 (Emigration f native labourers)

Act XVI of 1864 (Registration assurances)
Act XVII of 1864 (Official Trustees)
Act XX of 1864
Act XXII of 1864
Act XXVI of 1864 (small cause Courts presidency-towns)
Act III of 1865 (Carriers)
Act V of 1865
Act VII of 1865 (Government Forests)
Act VIII of 1865 (Validating Imprisonment of certain persons)
Act X of 1865
Act XI of 1865
Act XV of 1865 (Parsi marriage and divorce)
Act XIX of 1865
Act XX of 1865 (Pleaders and Mukhtears and Revenue Agent)
Act XXI of 1865 (Parsi intestate succession)
Act XXVII of 1865
Act XXVIII of 1865
Act IV of 1866
Act V of 1866 (Policies of Insurance Marine and fire assignment)
Act X of 1866 (Companies)
Act XII of 1866 (Private Water-courses)
Act XIII of 1866
Act XIV of 1866 (Post office)
Act XX of 1866
Act XXI of 1866 (Native converts' marriage dissolution
Act XXV of 1866 (Unclaimed deposit)
Act XXVI of 1866
Act XXVII of 1866 (Trustees)
Act XXVIII of 1866
Act III of 1867
Act X of 1867 (References by mufussil small cause courts)
Act XII of 1867 (Presidency jails)
Act XV of 1867
Act XVIII of 1867
Act XXIV of 1867 (Administrator general)
Act XXV of 1867 (Press and Registration of Books)
Act XXVI of 1867 (stamp-duties)
Act XXVII of 1867 (Duty Commissioner)
Act XXIX of 1867
Act I of 1868
Act VI of 1868 (N W P Municipal Improvement Act)
Act VII of 1868
Act VIII of 1868
Act IX of 1868
Act XIII of 1868
Act XIV of 1868
Act XVI of 1868
Act XIX of 1868
Act XXVIII of 1868
Act I of 1869
Act IV of 1869
Act V of 1869
Act IX of 1869
Act XIV of 1869.
Act XVI of 1869
Act XVIII of 1869
Act XXII of 1869 (Garo Hills)
Act VII of 1870
Act X of 1870 (Land Acquisition)
Act XIV of 1870
Act XXI of 1870 (Hindu Wills)
Act XXIII of 1870 (Colnage)
Act I of 1871 (Cattle Trespass)
Act VI of 1871
Act VIII of 1871
Act IX of 1871
Act XV of 1871
Act XXIII of 1871 (Pensions)
Act XXV of 1871
Act XXXII of 1871
Act XXXIII of 1871
Act I of 1872
Act III of 1872 (special marriage)
Act IV of 1872 (Punjab Laws Act)
Act V of 1872
Act VI of 1872
Act VII of 1872
Act IX of 1872
Act XV of 1872 (Christian Marriage)
Act XXII of 1872
Act III of 1873
Act IV of 1873
Act VIII of 1873
—IX of 1872
—X of 1873
—XV of 1873
—XVII of 1873
—XVIII of 1873
—XIX of 1873
Act I of 1874
—II of 1874
—III of 1874
—VI of 1874
—XIV of 1874
Act XV of 1874
Act I of 1875 (Distress)
Act IV of 1875 (merchant shipping)
Act IX of 1875 (majority)
Act X of 1875 (Advocate General's powers)

Act XII of 1875
Act XIII of 1875
Act XIV of 1875
Act XVII of 1875
Act XVIII of 1875 (Indian Law Reports)
Act XX of 1875
Act VI of 1876
Act VIII of 1876 (Native passanger ships)
Act X of 1876
Act XI of 1876 (Presidency Banks)
Act XII of 1876 (Repealing Act)
Act XVII of 1876
Act XVIII of 1876
Act I of 1877
Act II of 1877
Act IV of 1877
Act X of 1877
Act XV of 1877
—XVII of 1877 (Salt)
Act I of 1878 (Opium)
—VI of 1878 (Treasure trove)
—VII of 1878 (Forest)
—VIII of 1878 (Sea custom)
—XI of 1878 (Arms)
—XII of 1878
—XVII of 1878 (Northern India Ferries)
Act I of 1879 (General stamp)
Act IV of 1879 (Railways)
—VIII of 1879
—XII of 1879 (Registration & Limitation Act, Amendment Act)
—XIII of 1879
—XIV of 1879 (Hackney carriage)
—XVII of 1879
—XVIII of 1879 (Legal practitioner's Act
Act III of 1880 (Cantonment)
Act IV of 1880
Act VII of 1880 (Merchant shipping)
Act XV of 1880
Act V of 1881
Act XII of 1881
Act XV of 1881 (Factories)
Act XVIII of 1881
Act XXI of 1881
Act XXII of 1881 (Exercise)
Act XXIII of 1881
Act XXVI of 1881
Act II of 1882
Act IV of 1882
Act V of 1882
Act VI of 1882 (Companies)
Act XII of 1882 (salt)
Act XIV of 1882
Act XV of 1882
Act XX of 1882 (paper currency)
Act XXII of 1882
Act V of 1883 (Merchant Shipping)
Act IX of 1883
Act XV of 1883
Act XIX of 1883 (Land Improvement Loans)
Act II of 1884
—V of 1884
—XII of 1884 (Agriculturists' Loans)
—XIII of 1884
—XVIII of 1884
Act III of 1885
—VIII of 1885
—II of 1886 (Income Tax)
—IX of 1886
—X of 1886 (Criminal Law)
—XIV of 1886
—XVII of 1886
Act I of 1887
Act VII of 1887
—IX of 1887
—XII of 1887 (Bengal Agra & Assam Civil —Courts)
—XVI of 1887
—XVII of 1887
—V of 1888 (Inventions and designs)
—VI of 1888
—VII of 1888 (C P C. Amendment)
—X of 1888 (Presidency small cause courts Law)
—XII of 1888
—XIII of 1888
Act IV of 1889 (merchandise marks)
—VI of 1889
—VII of 1889
—X of 1889 (Ports)
—XI of 1889
—XIII of 1889 (Cantonments)
—XIV of 1889
Act I of 1890 (Revenue Recovery)
Act VIII of 1890
Act IX of 1890 (Railways)
Act XI of 1890 (Prevention of cruelty to animals)
Act XX of 1890
Act III of 1891
Act VIII of 1891
Act XII of 1891 (Amending Act)
Act XIII of 1891
Act XIV of 1891
Act XVIII of 1891 (Banker's Books evidence)
Act XX of 1891
Act IV of 1892(Limitation Act and C P C Amendment)

Act VI of 1892
Act IV of 1893 (Partition)
Act I of 1894 (Land acquisition)
Act V of 1894 (C P C Amendment)
Act VIII of 1894 (Tariff)
Act I of 1895
Act VI of 1895
Act XII of 1895 (Companies memorandum of association)
Act XV of 1895 (Crown grants)
Act I of 1896
Act XI of 1896 (Amending Legal practitioners Act)
Act XII of 1896
Act III of 1897 (Epidemic Diseases)
Act IX of 1897 (Provident Funds)
Act X of 1897 (General Clauses)
Act VI of 1898 (Post-office)
Act X of 1898
Act II of 1899
Act VI of 1899
Act IX of 1899
Act XI of 1899 (Court-fees Amendment)
Act XXII of 1899 (Coinage and paper currency)
Act II of 1902 (Contonment House accommodation)
Act IV of 1903
Act III of 1905 (Paper Currency)
Act III of 1907
Act V of 1908
Act IX of 1908
Act XVI of 1908
Act III of 1909
Act, construction of
Act done by husband in pursuance of common business, binding on wife
Act done in official capacity
Act done in the exercise of severeign powers
Act of Bankruptcy
Act of foreign power
Act of God
Act of Insolvency
Act of Parliament
Act of state
Act Repeal of
Actionable claim
Actionable wrong
Action cause of
Action for damages
Action for deceit
Action for recission of a contract
Action for slander
Action form of
Action framed in Tort
Action in Rem
Action of public servant ultra vires not binding on government
Action of salvage
Action on contract
Actio personalis moriter cumpersona
Active prosecution of a contentious suit
Actor sequitur forum rei
Acts
Acts amounting to waiver of covenant
Acts and grant of certificate
Acts done by the defendant in his official capacity
Acts done in exercise of sovereign powers
Acts in force in the Punjab
Acts of a judicial officer protected though done erroneously, illegally
Acts of bad faith committed by applicant for declaration of insolvency antecedently to his application
Acts of mother and guardian how for binding on minor son
Acts of ownership
Acts of user necessary to establish adverse possession
Acts, Retrospective effect of
Actual pecuniary damage suit for
Actual possession
Adat-kacchi
Adat pakki
Adding a defendant in a suit where have to sue under cl. 12 of the letters patent 1865 was necessary
Adding of parties
Adding parties as plaintiffs
Adding parties to suit
Additional court-fees on claim for mesne profits.
Additional District Judge.
Additional Evidence.
Additional Evidence in appeal.
Additional rent.
Additional rent for excess land.
Additional Subordinate Judge.
Additional written statement.
Addition of a defendant residing out of jurisdiction in a suit brought against other defendant under clause 12 of Letters patent 1865
Addition of a party in second appeal
Addition of a respondent by the appellate Court
Addition of a witness's signature subsequent in execution of bond is a material alteration
Addition of fixtures

Addition of parties
Address
Address sufficiency of
Ademption of Legacy
Aden
Aden Civil & Criminal justice Act
Aden Court Resident at
Aden Courts Act
Adequancy of consideration
Adhiras
Adhlapi Tenure
Adhyapakam office
Adimayavana Tenure
Ad-interim injunction
Adinterim Protection
Adjective Law
Adjournment
Adjournment of attendance of witnesses
Adjournment of sale
Adjudication
Adjudication by collector as to stamp duty chargeable
Adjudication of claim
Adjudication of Insolvency
Adjudications
Adjustment not certified
Adjustment of account suit or decree
Adjustment of decree
Adjustment of decree barred by limitation
Adjustment of decree by stranger
Adjustment of decree invalid
Adjustment of decree out of Court
Adjustment of partition decree after attachment
Adjustment of suit
Adjustment of decree suit upon
Adjustment of decree without certificate of Court
Adjustment of decrees more than three years old
Adjustment of satisfaction of decree
Administration
Administration bond
Administration Certificates Act
Administration de bonisnon
Administration decree
Administration of part of claim
Administration of the estate of a Shiah Mahomedan under his will
Administration pendente life
Administration Letters of
Administration Reports
Administration suit
Administration with will annexed
Administrator
Administrator, decree against
Administrator General
Administrator General's Act
Administrator Pendente life
Administratrix Washing estate
Admiralty
Admiralty and vice jurisdiction
Admiralty cases
Admiralty jurisdiction
Admiralty or Vice—Admiralty jurisdiction
Admissibility of evidence
Admissibility in evidence of finding in former case not between same parties
Admissibility in evidence of judgment in former case
Admissibility of documents in evidence in former case.
Admissibility of documents in evidence compulsorily registerable
Admissibility of evidence
Admissibility of evidence of consideration of unstamped document
Admissibility of oral evidence
Admissibility of oral evidence to contradict the nature of a contract in writing
Admissibility of petition and written statement filed in a previous proceeding
Admissibility of unregistered sale-deed in evidence
Admission
(1) Admission in statements and pleadings.
(2) Admission by or against third person
(3) Miscellaneous Cases
Admission by Agent
Admission by a party
Admission by auction purchaser
Admission by co-defendant
Admission by defendant
Admission by executors
Admission by heirs
Admission by husband
Admission by lumberdar
Admission by mortgagor
Admission by not traversing allegations
Admission by one defendant relavent against other defendant
Admission by or against third persons
Admission by pleader on behalf of client
Admission by raiyat
Admission by several joint tenants
Admission by Zamindar of mokurari right
Admission effect of against person not party to suit
Admissibility of documents in evidence in former case
Admission in a mortgage as to amount of land excepted from its operation

Admission in pleading
Admission in former suit
Admission in statements and pleading
Admission in verified petition
Admission in written statement of defendant
Admission made arguando
Admission made by one co-sharer
Admission made in former arbitration proceeding
Admission not acted on
Admission not amounting to estoppel
Admission of appeal after time
Admission of document in evidence: subsequent rejection too late.
Admission of Jenmi's title
Admission of lessor
Admission of liability contained in a memorandum of appeal in different suit
Admission of part of claim
Admission of plaint
Admission of pleader recorded in judgment
Admission of rate of rent
Admission of receipt of purchase-money
Admission of tenancy
Admission of tenancy, effect of
Admission of title in pleading
Admission of unstamped in evidence on payment of stamp duty & penalty
Admission of Vakil
Admission on appeal of evidence rejected by lower Court
Admission of point of law
Admission or rejection of evidence
Admission or summary rejection of appeal
Admission general
Adna & Ala Malik
Adna Malik
Adopted son's right to impeach alienation unnecessarily made by his adoptive mother before his adoption
Adoption
Adoption a condition precedent to the boy taking under the will
Adoption among Brahmans
Adoption by daughter-in-law
Adoption by deceased's widow
Adoption by elder brother's widow after younger brother's death.
Adoption by grand-mother without the consent of her daughter-in-law
Adoption by karnavan for a marumakk tayam
Adoption by last member of a Nambudri illom
Adoption by mother after the death of her son, who has left neither child nor widow
Adoption by mother who has succeeded as heir to her son after the death of his widow
Adoption by Naikin or dancing girl
Adoption by son's senior widow without consent of junior widow
Adoption by temple dancing woman
Adoption by unmarried man
Adoption by untonsured widow
Adoption by widow
Adoption by widow whose husband died while a minor
Adoption by widow relating back to her husband's death
Adoption by widow with express authority from her husband to adopt
Adoption by younger widow without consent of elder widow invalid although child selected by both widows
Adoption by zamindar in conjunction with one of his two wives
Adoption, Caste Custom prohibiting
Adoption directed by will
Adoption directed to be made not by the testator's widow but by son's widow
Adoption divesting an estate which had already vested in another person
Adoption during pollution of adoptive purent
Adoption during pregnancy of wife
Adoption from corrupt & improper motives
Adoption in a united family
Adoption in dwya mushyayana form
Adoption in Gujrat
Adoption, injunction to restrain
Adoption made by a widow to defeat the claim of her co-widow to a share in her husband's estate
Adoption made the day after the adoptive father made his will
Adoption made on understanding that the Dispositions of the will be observed
Adoption, necessity of, there being gift and acceptances of the adopted child
Adoption of a girl by temple dancing woman
Adoption of an adault
Adoption of an only son
Adoption of daughter
Adoption of Devadasi for illegal purpose
Adoption of more than one daughter at a time
Adoption of sister's son
Adoptions
Adoptive mother under pollution
Adoptive parents
Adoptive son bound by the will of testrator
Adultery

C. C. III

Advalorem fee
Advancement
Advancement out of minor legatee's share for his benefit
Advances by factor on consignment
Advances by mortgagees to original mortgagor on same security
Adverse possession
Adverse possession against mortgagee when effectual also as against the mortgagor
Adverse possession against widow
Adverse possession against widow for more than 12 years bars the right of a subsequent adopted son
Advese possession by sub-mortgagee
Adverse possession for 12 years by taking fruit
Adverse possession of defendant supplemented by previous adverse possession of widow by whom defendant was adopted
Adverse possession of one member
Adverse title
Advertisements
Advocacy
Advocate
Advocate—General
Advocate—General barred by decree in prior suit brought by trustees of charity
Advocate—General's Powers Act
Affidavit
Affidavit of documents
Affidavit of documents where there are several plaintiffs some of whom are in England
Affiliation
Affiliation of son
Affirmative Commands & negative prohibitions, distinction between
After acquired property of insolvent
Agakhan
Agarwal Banias of Ludhina City
Age
Age of assured
Age of cerimonial Competence
Age of majority
Age of minority
Agency
Agency to sell, coupled with interest
Agency tract
Agent
Agent & sub Agent
Agent authority of to make payment
Agent duly authorised
Agent holding a power of attorney authorising him to act & appear for a party to a suit
Agent of a company not resident in India
Agents, pleader's Mukhtars and Revenue Act
Agent's right to execute decree obtained as agent
Agent of minor
Agent duly authorised
Agents
Agra Bengal and Assam Civil Courts Act
Agra Land Revenue Act
Agra Local Rates Act
Agra Rent Act
Agraharam
Agra Tenancy Act
Agreement
—acknowledging a debt
—adjusting suit
—admitted in pleading
—against public policy
—altering decree
—and conveyance
—as to payment of decretal money
—at Delhi to pay money in Bombay
—at marriage not to remove wife from parent's house
—at time of adoption affecting son's rights
—before decree by the decree-holder not to recover costs which the decree might award
—between adoptive mother and natural father
—between government & solicitor
—between husband and wife
—between landlord and tenant
—between pleader and client
—between pleader and person retaining him
—breach of by insolvent
—breach of, to pay a certain sum
—by a guardian to give a word in marriage on payment of a sum of money
—by correspondence
—by mortgagor to sell mortgaged premises to mortgagee
—by occupancy tenant to relinquish his holding
—by plaintiff and defendant not to bid against each other at an auction
—collteral to lease
—coming to an end with the extinction of the equality of redemption
—Contary to terms of lease
—entered into with one party to a suit by an attorney
—executed both in England and India
—exempting from liability in case of loss of carrying ship
—extending time of payment without sanction of Court
—for an undivided share in bhag
—for differences

—for division of family property in equal shares
—for not enforcing payment of instalments
—for, or to give time for satisfaction of judgment debt
—for payment by Deputy to the watandar out of the cash allowance for procuring the Deputy's nomination
—for payment by instalments
—for satisfaction of judgment debt
—for the management of a public charity, illegal
—Illegal
—in regard to the equity of redemption
—in respect of family property
—in respect of free vatan election
—in satisfaction of judgment debt
—no bar to partition
—not certified to Court
—not sanctioned by Court
—not to alienate ancestral property
—not to appeal
—not to execute a decree
—not to execute decree regarded as satisfaction of decree
—not to partition
—not to partition and restraint on partition
—not to work for a rival tradesman
—of parties
—of parties to suit to refer matters in dispute to decision of Court
—of relinquishment, validity of
—of service-vatan Inam land by holder of it
—of share by a co parcener
—opposed to public policy
—or memorandum of agreement relating to the
—sale of shares
—restricting right of occupancy
—running with land
—sanctioned by Court executing decree
— secret
—to become a member of association
—to carry out decree
—to compensate for services rendered during defendant's minority
—to divide, effect of
—to extend time for enforcing decree by execution
—to forego legal proceedings
—to give time to judgment. debtor
—to give time to the judgment debtor for payment of decreed money
—to lease
—to lend money on mortgage
—to liquidate decree by instalments appeal by judgment—debtor subsequent to
—to pay additional rent for excess land
—to pay interest
—to prevent acquisition of easement not document creating a right in immoveable property
—to procure marriage in consideration of money payment
—to procure re admission into caste
—to re-convey on re-payment of purchase money
—to refer
—to refer mother in dispute to arbitration
—to refer to arbitration
—to relinquish exproprietary right
—to remain united
—to renew a kanom and to credit as renewal fees a sum of money then due by plaintiff to defendant
—to rent pasture ground
—to sell
—to sell land
—to share property after litigation if successful
—to share property the subject of suit
—to supply money for another person's suit
—unregistered
—void if not sanctioned by the court
—voluntary or by Act of law
—with respect to the property of the deceased husband by his heirs pendente life
Agricultural holding
Agricultural Land
Agricultural lease
Agricultural purposes
Agricultural Tenancy
Agricultural Tenant
Agricultural year
Agriculturist
Agriculturist also owner of Inam villages & persioner
Agriculturist, an Inamdar can be an
Agriculturist Bhagdar
Agriculturists Relief Act Dekhan
Agriculturists loanas Act (XII of 1884
Ahban Thakurs
Ahirs
Ahmedabad Talukdars Act 1862
Air
Air and light
Ajmere Court Regulation
Ajmere land Revenue Regulation
Akyab
Ala & Adna Maliks
Ala lambardar
Ala malik
Alien

Aliens
Alienability
Alienable interest
Alienation
Alienation of istamrari estate
Alienation by manager of religious institution
—by guardian
—by defacto manager of an endowment
—by a mortgagee
—by mulgenidar
—by widow
Alienation during attachment
—Limitation Ancestral land act
—of charitable trust
—of Endowed property
—of Lands Act Bundelkhand
—of Land Act Punjab
—Restraint upon
Alienee from widow bound to inquire if legal necessity to alienation
—of trustees not necessary parties
Alimony
Aliasantan a Law
Allegans contraria nanauditur
Allegation of fraud
Allocature
Allonge
Allotment
—on partion
Allowable deduction
Allowance to Bankrupt
—for maintenance of infant
—for maintenance of Lunatic
Allowance for spoiled stamps
Allowances Act. Toda Giras
Allowing objection not taken
Alluvial & diluvial lands
Alluvion
Almanac
Altama grant
Altamah Enam
Alteration
—of character of suit
—by party
—by the Court
—of acknowledgment
—of date
—of deed
—of document
Alteration of easement
—or amendment of decree
Alterations and erasures in a will
Altering decree on appeal where respondent makes on objection
Alternative claim
—claim on original consideration
Alternative pleadings
—pleas
—prayer
Alternative relief in ejectment suit
Alya Santan Law See Alia Santan Law
Amalnamah
Amaram Grant
Amaram tenure
Ambassador
Ambiguity
Ambiguous Documents
Ameen
Amendment
Amendment of decree
—of decree after execution
—Error in probate
—of issue
Amendment of Mukhtear-Namah
—of Patta
—of plaint by begining on a new plaintiff on second appeal
—or alteration of decree.
—of pleadings
Amin
Amins effecting partitions, remuneration of
Analogous cases
Anomalous mortgage
Anandravan
Ancestor
Ancestral business
Ancestral estate, sons interest in
Ancestral estate held jointly by family under the mitakshara Law
Ancestral property
Ancestral property, assigned to wife in lieu of maintenance, devolution of on her death
—Property in the lands of the son liable for father's death
Ancestral trade
—Carried for benefit of minor by natural guardian
Ancestral Zamindari sold in execution of decree for money against the father in chiding the son's right of succession
Ancient documents
Ancient holdings
Ancient lights, obstruction of
Ancient rights
Angle of 45 degrees

Animal
Animals ferae nature
Annual Jamas Tenancy
Anna chattra
Annual tenancy
Annuity
—Creation of
—Value of
Annulment of incumbrances
—of sale
Antecedent debts
Ante—nuptial agreement
—Contracts
—Settlement
Anticipation, Restraint on
Anticipatory attachment
Antiquities not proved to have any market value
Anubhavam tenure
Anumatipara
Apostacy
Apostate father
Appeal
(1) Appeal newly given by law
(2) Right of appeal effect of repeal on
(3) Acts
(4) Arbitration
(5) Bengal Acts
(6) Bombay Act
(7) Certificate of Administration (Act XXVII of 1860 & VII of 1889)
(8) Costs
(9) Decrees
(10) Default of appearance
(11) Exparte cases
(12) Execution of decree
(13) Grounds appeal
(14) Madras Acts
(15) Management of attached property
(16) Measurement of lands
(17) N W P Acts
(18) Orders
(19) Probate
(20) Receivers
(21) Regulations
(22) Sale in execution of decree
(23) Objections by respondent
(24) Grounds of appeal
(25) Dismissal of appeal
(26) Appeal against favourable decree
(27) Requisities of a valid appeal
(28) Attachment
(29) Consideration of appeal
(30) Costs
(31) Court fee
(32) Estoppel
(33) Final decree
(34) Judgment
(35) Limitation
(36) Parties
(37) Practice
(38-39) Reference to Collector
(40) Re-hearing
(41) Resjudicata
(42) Review
(43) Revision
(44) Right of appeal
(45) Second appeal
(46) Sale in execution
(47) Miscellaneous Cases
Appeal admission of. after time
Appeal after expiration of period fixed by decree
Appeal against an order under s. 258 Act (XIV of 1882) C P C
—Against decree by instalments, how valued
—Against order that a plaintiff be made defendant
—Against order refusing leave as a pauper
—Against part of decree any
—Against whole decree by one defendant only
—By one plaintiff against another
Appeal by one of several plaintiff's claiming under a joint right
—By some only of the judgment debtors
—From amended decree
—From appellate decree
—From decision of a judge exercising admiralty or vice admiralty jurisdiction
—From exparte decree
—From exparte decree wrongly admitted
—From insolvency order
—From order of High Court refusing extension
—From order of Judge in Privy Council Department refusing to extend time for furnishing security for costs
—From order of remand
—From order permitting with drawal of suit
—From order setting aside sale
—From interlocutory orders
Appeal newly given by law
—On full Court fee from decree dismissing suit in part
—On the question of costs
—Pending sale
—Presented meaning of
—To High Court from order of remand

Appeal to privy Council
(1) Cases in which lies or not
(a) Appealable orders
(b) Substantial questions of law
(c) Concurrent judgments on facts
(d) Valuation of appeal
(2) Practice and procedure
(a) Leave to appeal
(b) Time for appealing
(c) Miscellaneous cases
(3) Stay of execution pending appeal
(4) Effect of Privy Council decree or order
Appearance
Appellant-meaning of
Appellate Court
(1) General duty of appellate Courts
(2) Exercise of powers in various Cases
(a) General Cases
(b) Special Cases
(3) Evidence and additional evidence on appeal
(4) Rejection or admission of evidence admitted or rejected by Court below
(5) Errors affecting or not, merits of case
(6) Interference and power to vary order of Lower Court
(7) Objections taken for first time on appeal
(a) General Cases
(b) Special Cases
(8) Appellate Court (Forum)
Appellate Court defective judgment of
Appellate Court duty of, to direct examination of Witnessess
—Duty of, of form its own opinion on the evidence or record reasons for findings
—Judgment of
Appellate Court's power to amend plaint
Appellate Court production of additional evidence in
Appellate Court remand to
Application
Appointed daughter
Appointment
—Of another assessor by Judge without notice to claimant
—Of arbitrator by the Court
—Of arbitrators and umpires
—Of commissioner
—Of creditors as agents to collect rents and appropriate part towards debts
—Of daughter
—Of executors by implication
—Of guardian
—Of officers of mosque
—Of receiver
—Of heirs
Apportionment
—Of tax
Appraisement proceedings
Appropriation of payments
(1) Payment of Rent
(2) Payment of debt
(3) Appropriation towards interest
(4) Application of rules regarding appropriation of payments realisation of land revenue
(5) Appropriation by creditor of payments towards interest
(6) Appropriation of goods unascertained at the time of contract of sale
(7) Appropriation of payment towards interest without specification by debtor not saving limitation.
Arbitration
(1) Arbitration under special Acts and Regulations
(2) Reference or submission to arbitration
(3) Appointment of arbitrators and umpires
(4) Duties and powers of arbitrators
(5) Submission of award.
(6) Remission to arbitrators.
(7) Revocation of, or withdrawal from arbitration.
(8) Awards
(9) Private arbitration
(10) General Cases
Arbitration Act
Arbitration award
Arbitration award on one point only
Arbitration by Court
Arbitration order giving leave to sue under S. 18 of Act XX of 1863
Arbitration—Private-arbitration
Arbitration, Reference and award
Arbitration Rules, construction of
Arbitration under Special Acts and Regulations
Arbitration under the Civil Procedure Code
Arbitration without intervention of Court
Arbitrator
Arbitrator charge of corruption against by party to suit
Arbitrator receiving evidence from one side in absence of other side
Arbitrators
Architect
Ardass

Arguments on appeal
Arhat
Ariyat, Law as to
Armenian christian
Armenians
Arms Act (XI of 1878)
Army
Army Act 1881
Army discipline Act 1879
Army discipline Act 1881 (44 & 46 Vic c 58)
Army discipline Act 1888 (51 Vic c 4) S, 7.
Arrangement.
Arrangement, deeds of.
Arrangements between widow & reversioners
Arrays of parties in appeal.
Arrears.
Arrears of assessment, suit to recover
Arrears of maintenance
Arrears of maintenance due under a bond of agreement, suit for
—of maintenance right to sue for
Arrears of rent
Arrears of revenue
Arrears of subscription of a news paper
Arrest (Civil)
Arrest and commitment of judgment—debtor to jail
Arrest of decree
Arrest of defendant before judgment
Arrest of pleader while acting in his professional capacity
Arrest-successoin
Arrest when perfected
Articled clerk
Articles
Articles of association
Articles of association and liability of share-holders
Artificers
Artizan
Asceties
Assam
Assam Forest Regulation (VII of 1891)
Assam Land & Revenue Regulation (1 of 1886,
Assam Local Rates Regulation
Assam Regulation
Assault
Assented Taxes
Assessment
(1) Suit for arrears of assessment
(2) Levy of assessment by Government
(3) Liability for assessment levied after date of mortgage.
(4) Other Cases.
Assessment, exemption from
Assessment Land Revenue Act
Assessment payment of
Assessment of price of crops belonging to an evicted tenant
Assessment of reformed land after diluviation
Assessors
Assets
Assignability of tenancy.
Assignee
Assignee of decree
Assignee of interest in suit
Assignment
Assignment after decree
Assignment by official assignee
Assignment by operation of law of a share in a decree
Assignment by payee of all his property including the note whether amounts to negotiation in the absence of endorcement
Assignment of actionable claim
Assignment of administration Bond
Assignment of all his property by debtor to trustees for payment of creditors
Assignment of bond
Assignment of chose in action.
Assignment of contract
Assignment of debt
Assignment of debt for value
Assignment of debts secured on land
Assignment of decree
Assignment of equity of redemption to third person for value, but with notice of agreement
Assignment of interest pending suit
Assignment of interest under decree directing annual payments
Assignment of Land Revenue for benefit of shrine
Assignment of mortgage
Assigner and assignee
Assizes
Association
Association & dissassociation
Assurance
Assura Marriage
Atel property
Attachable property
Attaching creditor
Attaching creditor of decree holder respondent seeking to be brought on to the record as a respondent

Attachment
(1) Subjects attachment
(a) Annuity or pension
(b) Books of account
(3) Building and house materials
(d) Debts
(e) Decrees
(f) Equity of redemption
(g) Expectancy
(h) Immoveable property charged with maintenance
(i,jj Joint family and Reversionary interest
(k) Maintenance
(l) Partnership property
(m) Perishable Articles
(n) Property and interest in property
(o) Right of suit
(p) Slary
(q) Trust property
(r) Wages
(s) Wearing appeal and ornaments
(2) Attachment before judgment
(3) Attachment of person
(4) Mode of attachment and irregularities in attachment
(5) Priority of attachment
(6) Alienation during attachment
(7) Attachment pending appeal
(8) Liability of wrongful attachment
(9) Striking of execution proceedings, effect of, on attachment
(10) General Cases
Attainder, Law of
Attempt by one co-sharer to mortgage his undivided share on his account
Attempted adoption of sister's son by Brahman
—family settlement in purpetuity
Attempt to attach surplus after fulfilment of trust
Attempt to establish trust for claimants as to part of Talukdari estate
—sell mortgaged property in execution of money decree fer rent
Attestation
Attestation & proof of wills
—of deedeffect of
—of documents by the court or its officer
Attestation of will by two witnesses
Attesting witness
Attorney
Attorney and client
Attorney-General
Attorneyship Examination
Attornment
Auction & auctioneer
Auctioneer
Auction purchaser
Auction-sale
Auditor
Aulad Dukhtari
Author
Authorised Agent
Authorities on Law of adoption
Authorities on Law of Inheritance
Authority
Authority of Agents
—of counsel to compromise case on behalf of his client
—of father to give girl in marriage
—of, to bind client
—of wife to pledge husband's credit
Autrefais convict
Ava, kingdom of
Average profits
Average rate of rent
Avubhavom tenure
Award
Award by arbitrators
—One arbitrator only effect of
Award made but not filed within the time specified by order of court
Award making and filling of
Award not disposing of all the matters of referred
Award of arbitrators for division of family property
Award of commissioners conclusive
Award of compensation
Award set aside on the ground of misconduct of arbitrator
Award, suits concerning
Ayautaka Stridhan.

DESAI'S

ALL INDIA CENTURY DIGEST

(CIVIL)

1811-1912.

VOL. I.

Abadi.

See also cases under:—

(1) **Landlord and Tenant.**
(2) **Common Land.**
(3) **Co sharers.**
(4) **Punjab Tenancy Act.**
(5) **Partition.**

1—Building house with consent:—Right of transfer.

A person who builds a house in the village abadi with the consent of the proprietor acquires no right to the site. Such a person has no right of transferring his house and the site thereof when he leaves the village. **Thakur Nihal Singh v Thakur Sardar Singh & Hira Lal. 3 C P L R 7.**

2—Land-holder and tenant—Rights of tenants in village abadi-Wajibularz-Suit to remove building created by tenant without permission of the Zamindars.

In the courtyard of a tenant lawfully in possession of a house site in the Village abadi was "some sort of a thatched shed" used in fact by the tenant and other Muhammadans of the village for the purpose of religious observances. The wajibularz of the village provided that "no cultivator can build a new house outside the compound of his dwelling house without the permission of the Zamindar. He is at liberty to do so in his compound" Held that the tenant in question was not at liberty to convert the thatched shed in his court-yard into a "pacca" mosque without the permission of the Zamindars. **Basa Mal and others v Ghayasuddin. 1904 A W N 176=2 A L J 27=27 All 556.**

Abadi-(*Contd.*)

3—Abadi—Building sites—Town. There is nothing in the Wajibularz to show that the owner of a house in a place like Harda may not transfer it and purchaser may not enlarge it or rebuild it. **Debi Parsad v Shalig Ram. 5 C P L R 124.**

4—Non-agriculturists resident—Ground belonging to a house—Malguzar's right.

A non-agriculturist resident of a village sold a strip of the ground belonging to his house to a person living in his immediate neighbourhood. The Malguzar sued them both for possession of the site. *Held* that in the absence of anything to show that the Malguzar was entitled to curtail the defendants' enjoyment of the land he could not claim possession. (8 C P L R 29; 3 C P L R 7; 5 C P L R 76, ref.) **Bhondusao v Jagat Ram 12 C P L R 146.**

5—Adverse possession—Landlord and tenant—House in abadi.

The fact that a tenant built a house in the abadi of a village and occupied it for over 12 years, is not sufficient to establish a title against the Zamindar by adverse possession. 1 A L J R 479, dis-

Abadi-(*Contd.*)

tinguished. **Jaikishun Singh v Motichand 3 A L J 627=(1906) A W N 258**

6—Tenant—Occupying room in the abadi ouster—Adverse-possession.

Where a tenant has been occupying a room in the abadi for a period of thirty years he cannot be ejected therefrom by the Zamindar. If the room is appurtenant to his holding, he cannot be ousted during the continuance of the tenancy, and if not appurtenant thereto, he must be taken to have acquired a right of occupying it by adverse possession. **Nazir Hasan v Shibba. 1 A L J 479=(1905) A W N 90= 27 All 556.**

7—Village homestead land. Rights of landholders in-Sale by tenant-Acquiescence-Principal and Agent Per Knox A C J.

A person, agriculturist or agricultural tenant who is allowed by a Zamindar to build a house for his occupation in the abadi, obtains, if there is no special contract to the contrary, a mere right to use that house for himself and his family so long as he maintains the house and does not abandon it by leaving the village ; he has no interest which he can sell by private sale, except his interest in the timber, roofing and wood work of the house. 1 A W N 114 F B. and I L R 20 All 248 referred to.

The property of or rights in the property of an absentee minor cannot be given away by an agent looking on and allowing tenant to spend money. Unless it can be brought home to a principal that he knew that person dealing with his agent so dealt in consequence of their believing that all statements made by him had been warranted by the principal, and, knowing this, the latter allowed the persons so dealing to expend money in the belief that the agent had an authority which in fact, he had not, those persons can enforce no equity against the principal. L. R. 1 E and 7 All 129 followed Per Aikman J. Where the defendant at great expense reconstructed the house he had brought believing that he had a right to do so, and the plaintiff or his agent must have known that the defendant was spending money in this belief and yet allowed him to do so the plaintiff could not years after the house was finished sue for possession of the house or its removal. The dictum in L. R. 20 All 241 at 258 declaring a custom permitting tenant to transfer houses on

Abadi-(*Concld.*)

village homestead land to be bad, is *obiter* and has been dissented from more than one Judge of the High Court. **Rajnarain Mitter v Budh Sen. 1 A L J 673=27 All 338 =A W N (1904) 420.**

Abadi—Land in the city of Lucknow obtained by Nuzal under a settlement decree Renunciation of right of Government, as to.—See **9 O C 249.**

Abandonment.

See cases under.

(1) Bengal Acts (Tenancy S. 87)
(2) Landlord and Tenant.
(3) Limitation Act S. 14 arts 142, 144.
(4) Mortgage (Relinquishment).
(5) Possession.
(6) Right of Occupancy.
(7) Occupancy holdings.

1—S. 92, Proviso (f)—Registered partition deed—Subsequent disposal of property mentioned therein—Oral evidence to prove it admissible -Land suit-Long delay in suing no abandonment in law—The Punjab Courts Act XVIII of 1884, Ss. 3 and 70—The Punjab Tenancy Act XVI of 1887 S. 4-Indian Contract Act IX of 1672, Ss. 44, 62, and 63-Admissibility of evidence in question of law within S. 70.

169 P R 1883 ; 30 P R 1884. 14 P R 1889. 9 All 249; 11 Bom 47. 14 Bom 472, Fol. By Chatterji Dist. By Johonstone; 22 Mad 264 ; 26 Mad 195 27 Mad 368, Fol. By Johnstone and Diss. By Chatterji ; 5 C W N 296 Fol. By Johnstone : 62 P R 1879 Ref By Chatterji; P L R (1900), 459, Ref By Johnstone. 20 P R 1894 : C A 1190 of 1906 (unpublished), Fol 31 P R 1906, Dist 85 P R 1892: 51 P R 1898 43 P R 1901 Fol.

Choudhri Bhagwan Singh v Choudhri Narain Singh, 129 P W R 1908

See also (1) "Practice"
(2) Pleadings.

Abandonment by managing Khot.

See Co-sharers.

Abandonment Notice of.

See (1) Insurance—Marine Insurance.
(2) Utabandi Tenancy.

Abandonment of Appeal.

See Withdrawal of suit.

Abandonment of claim.

See (1) Relinquishment or omission to sue for portion of claim.
(2) Pleadings,
(3) Landlord and tenant—Abandonment, relinquishment, or surrender of tenure,

Abandonment of Easement

See (1) Limitation Act (IX of 1908) S. 26.
(2) Easements.
(3) Easement Act S. 28.

Abandonment of excess claim.

See Vendor and purchaser.

Abandonment of holding

See (1) Landlord and tenant-abandonment, relinquishment or surrender of tenure.
(2) Right of Occupancy.

Abandonment of issue.

See Pleadings.

Abandonment of part of claim.

See Cases under Relinquishment of, or omission to sue for, Portion of claim

1—C. P. C. S. 47 (1882) S. 244)—Party—Person against whom claim has been abandoned.

A person against whom the plaintiff abandons the claim, not being able to serve him with notice, is not a party to the suit within the meaning of S. 244 C P C. **Venkatapathy Naidu v Subraya Mudali.** 17 M L J 416.

2—A deed of abandonment executed in reliance upon the generosity of the party benefited was held to be without consideration.
Ismail Khan v Imtiazunnissa. 4 A L J 792.

Abandonment of partnership

1—Advance agreement to—A money—Refusal—Abandonment of partnership by laches.

That a mere refusal by a partner in an undertaking to advance further sums for the purpose of the taking in terms of the partnership agreement is not an abandonment by him of the undertaking and does not amount to a dissolution of the partnership. Even assuming that the subject-matter of the partnership was as precarious as a mining speculation, it is a matter of inference to be drawn from the facts of each case whether or not there has been abandonment or loss of interest by laches 19 Ves 144 (1812) ref to. **Moung Tha Hnyin v Mah Thein Myah.** 5 C W N 114=28 Cal 53=27 I A 189.

Notes.—Dist 11 M L J 353=25 Mad 149.

See also cases under.

(1) Partnership.
(2) Contract Act, Ss. 239—266.

Abandonment of Point.

1—Counsel abandoning a point. The suit was brought by the sons of the reversioner S of the last male owner G on the death of G's widow M. P for possession of immoveable property.

The last male owner died 40 years before suit, the widow in 1896, and the plaintiff's father through whom the plaintiffs claimed in 1889. The whole question in the case was one of plaintiff's father relationship to the last male holder. The defendant was the nephew of the last male holder who took possession of the properties on the widow's death. The first Court found that the plaintiffs had proved the pedigrees filed by them and gave a decree. On appeal the Judicial Commissioner held as follows—"The oral evidence to prove the pedigree in the plaint is in my opinion of as little value as the documentary evidence on which the plaintiffs relied and at the hearing of the appeal practically no attempt was made to support the finding of the Subordinate Judge.

The only contention was that accepting the pedigree filed by the appellant Mathura Prashad, the plaintiffs are heirs of G and according to it they are Samanodakas and therefore in the absence of other nearer heirs they exclude the defendant" and gave a decree for possession of the property on the ground that there were other

Abandonment of Point-(*Concld.*)

persons in the same degree of relationship to the last male owner. Held that in the circumstances the plaintiffs were not estopped by what happened before the Judicial Commissioner.

Kelka Pershad v Mathura Pershad 8 C L J 447=11 C W N 340=(1908) 5 A L J 701=18 M L J 424=10 Bom L R 1088=13 C W N 1=35 I A 166=30 All 510

See also cases under.

(1) Plerder
(2) Pleadings
(3) Counsel
(4) Practice

2—Abandonment of plea in lower appellate Court—Effect in second appeal. It is not open to a litigant to practically abandon a portion of his contention in one Court, and then at his convenience to resuscitate it in another. Where the Judge of the lower appellate Court expressly stated that a plea of *res judicata* was not pressed on him, that plea was disallowed in the second appeal. **Dalip Rai v Deoki Rai. 20 All 471 =A W N 1898, 116; on appeal 21 All 204.**

Abandonment—What amounts to—See **13 P W R 1910=5 Ind Cas 840=48 P L R 1910.**

3—Authority of, to bind client, abandoning issue. A vakil's general powers in the conduct of a suit include the abandonment of an issue, which, in his discretion, he thinks it inadvisable to press. **Raja Venkata Narasimha v Bhashyakarlu.** (4 Bom L R 543.)

Abandonment of Proceedings.

See Civil Pro Code O. 9, r. 9.

See Resjudicata—Judgments on preliminary points.

Abandonment of right.

See Estoppel—Estoppel by conduct.

„ Trade, mark.

„ Damages—Measure and assessment of damages—Torts.

Abandonment of tenancy.

See—Landlord and tenant—Abandonment, relinquishment and Surrender of tenure.

Abandonment of tenure.

See Cases under Landlord Tenant—Abandonment, Relinquishment, and Surrender of Tenure.

See Cases under Right of Occupancy—Transfer of Right.

Abandonment of User.

1—Abandonment of user—Dedication, implied—Dedication to public use as burial ground-Title to land, no necessity for passing—Reversion to owner. An implied dedication arises by operation of law from the acts of the owner and is really founded upon the principle of estoppel: it proceeds not upon the principle that a grant has actually been made but rather on the principle that the owner having allowed the public to enjoy the same for any particular purpose is estopped from denying the right of the public to the enjoyment of such use. Exclusive and continuous user by the public, with the owner's knowledge and acquiescence for the prescriptive period will raise the presumption of a grant and dedication to the public. It is one of the essential elements of a good declaration that it be made to the public, that it be irrevocable, and that the land be for ever dedicated for the designated public use. 8 C B N., S. 848; 42 Cal 541, ref. to. An owner may appropriate land to public use and yet retain in himself all such rights in the soil as are compatible with the full exercise and enjoyment of the public use to which the property has been devoted. It is not essential to constitute a valid dedication that the legal title should pass from the owner; nor is it inconsistent with an effectual dedication that the owner should continue to make any and all uses of the land which do not interfere with the uses for which it is dedicated. **See** 79 Bom 47; 9 Cal 75. But after a valid dedication has been made, if the use for which the property is dedicated becomes impossible of execution, or if the object of the use wholly fails, there is an abandonment in consequence of which the rights of the public therein fail and a reversion takes place, as the dedication has spent its force when the use ceases. If

Abandonment of User-(*Concld.*)

land is dedicated for cremating or burial purposes, and there is subsequently an abandonment, the property reverts to the dedicator or his heirs. 24 I A 177 dist. **Chairman Howrah Municipality v Khettra Krist Mitter. 10 C W N 1044= 4 C L J 342=33 Cal 1290.**

See also cases under:

(1) Limitation Act art, 144.
(2) Adverse Possession.

Abandonment of Wife.

See cases under:

(1) Husband & Wife.
(2) Restitution of conjugal rights.
(3) Hidnu Law (Maintenance.)
(4) Marriage.

Abandonment of wordly affairs

1—Abandonment of wordly affairs—Custom-Succession—Abandonment of wordly affairs—Gossains.

A broad distinction is to be drawn as regards the powers of inheriting property between *faqirs* or members of a religious order who have, and those who have not, entirely renounced the world the latter class not being disqualified from succession in their natural families.

In a case where it appeared that the plaintiff, though he left his village and joined a religious order (*Gossains*), had not renounced the world, but, on the contrary, was the father of three children who appeared to be grown up, *held*, that plaintiff had never reached the stage of complete asceticism which would disqualify him from inheritance, and that he was entitled to succeed to the estate of his nephew in preference to the defendant, who, if a relation at all, was a distant one. **Sadhu v Misri. 92 P R 1898.**

2—Udasi faqir——Abandonment of civil rights. A man who has become an Udasi faqir, though he generally renounces worldly affairs and loses his civil rights, may yet show that though he became a faqir, he did not intend to give up worldly affairs and his civil rights. **Badhawa Singh and Sochet Singh v Anaukha. 7 P R 1892.**

See also cases under.

(1) Custom (Punjab) Inheritance.
(2) Gossain.
(3) Hindu Law (Inheritance.)

Abandonment, Relinquishment or surrender of tenure.

1—Abandonment, relinquishment or surrender of tenure—Abandonment—Joint holders—Survey number—Surrender—Tenancy Act s. 35-Land Revenue Act s. 67 A—67 1—Relinquishment—Merger.

The abandonment by one of two joint holders of a survey number does not necessarily enure in favour of the other joint holder. **Nanha Bairagi v Mansing Gond. 15 C P L R 28.**

See also.

(1) "Landlord & Tenant"
(2) Rights of Occupancy.

Abated suit or Appeal.

See costs.

Abatement of Appeal.

See (1) Abatement of Suit—Appeals.
(2) Costs—Abated Suit or Appeal
(3) Civil Procedure Code (1908) O XXII.

Abatement of Rent.

(1) Grounds of Abatement 1—33
- **(a) General (1)**
- **(b) Dilluvion (2—13)**
- **(c) Damage to land by Vis-major (14)**
- **(d) Mis-statements as to the measurement of the land (15—19)**
- **(e) Mis-representation and Fraud (20—23)**
- **(f) Breach of Contract (24)**
- **(g) Reduction of rent allowed to Landlord by Government (25)**
- **(h) Loss of portion of land (26)**
- **(i) Land acquired by Govt for public purposes (27—33)**

(2) Effect of former suit for abatement (34)
(3) Claim to Abatement (35)

Abatement of Rent (Grounds of Abatement)-(*Cont'd.*)

(4) Who can sue (36—38)
  (a) Patnidar (36)
  (b) Howaldar (37)
  (c) Tenant not entitled to occupancy (37A)
  (d) Under-tenant (38)
(5) Form of suit (39—41)
(6) Rate of reduction (42—43).
(7) Procedure (44 & 45—47)
(8) Civil Court's decree effect of, on Revenue court's decree (48—49)

(1) GROUNDS OF ABATEMENT.

(a) GENERAL.

1 Ground of Abatement-Causes beyond control—Act X of 1859, s. 18.

The real meaning of s. 18, Act X of 1859, is that the grounds for which an abatement of rent may be claimed by a raiyat must have resulted from causes beyond his control. **Munsoor Ali v. Harvey. 11 W R 291.**

(b) DILUVION.

2—Diluvion—Act X of 1859, s 18 (Bengal Act VIII of 1869, s. 19)—Deduction in suit for arrears of rent.

Rent of a talukh may be abated if a portion of the talukh be washed away Independently of s. 18, Act X of 1859, a suit for abatement of rent will lie by a talukhdar on the ground that part of the talukh has been washed away. A deduction may be made on such ground in a suit for arrears of rent. **Afsuroodeen v Shorooshee Bala Dabea Marsh 558 Savi v Obhoy Nath Bose 2 W R Act X 27.**

3 -Mokurari lease—Abatement of rent—Diluvion—Bengal Tenancy Act (VIII of 1885), Ss, 52 178, 779.

A tenant holding under a permanent *mokurari* lease is not entitled to get abatement of rent by reason of a portion of the land in his occupation having been diluviated by the action of a river. **Nunda Lal Mukherjee v Kymuddin Sardar. 9 C W N 886.**

4-Onus probandi.-The onus lies on thedefendant in a suit for arrears of rent of proving to what deduction he is entitled, and of showing precisely what lands have disappeared. **Savi v Obhoy Nath Bose 2 W R Act X 27**

5—Landlord and Tenant—Partial eviction if operates to suspend entire rent—Diluvion loss of tenant's land by—Reformation and settlement with stranger—Eviction.

Where land forming part of a tenant's holding was lost by diluvion, but subsequently reformed and was settled by the landlord with third parties.

Held—That there was no eviction of the tenant by the landlord, and the tenant could not claim a suspension of the whole rent.

The tenant in such a case may claim a proportionate abatement of the rent.

Per *Mookerjee J.*—The rule that when a landlord is responsible for the partial eviction of his tenant from the demised premises, there is a suspension of the entire rent, has been adopted in England, not without considerable divergence of opinion. It would not be right to extend the application of such a rule, which may often operate harshly to cases to which the principle on which it is founded is clearly inapplicable. (3 Camp 513 (n); 1 Hudson and Brooke 449; I Cr M & R 3; 1 F & F 636, 17 Com Bench 30, 24 Cal 296, 28 Cal 188; 34 Cal 191 Ref. **Rai Churn Das Mazumdar v Administrator General of Bengal. 13 C W N 853=9 C L J 578=36 Cal 856 =2 Ind Cas 169.**

6. -Diluvion—Right of occupancy—A tenant, whether with or without a right of occupancy, is entitled to abatement of rent for land washed away unless precluded by the term of his kabuliat from claiming any abatement. **Enayutoolah v Elahebuksh. W R 1864 Act X 42.**

7.—Cause of action—When a diluvion takes place a right of suit to obtain an abatement of jumma accrues from the time when the plaintiff is compelled to pay the rent named in his pottah without the allowance of the abatement claimed by him. **Barry v Abdool Ali. W R 1864. Act X 64.**

8.—Talukh created before 1790.—Quære—Whether the proprietor of a talukh created before the Permanent Settlement cannot claim abatement of rent on the ground of diluvion. **Ram Churn Bysack v Lucas. 16 W R 279.**

Abatement of Rent (Grounds of Abatement-(*Contd.*)

9—Holding over, effect of — Rent kept in abeyance in kabulyat—Omission to specify reason — Oral evidence, admissibility of, to prove reason——Evidence Act (I of 1872), S. 92 and proviso (2).—

Where a tenant holds over upon the expiration of the term of his lease and pays rents, the tenancy is renewed upon the same conditions as those contained in the expired lease.

Therefore, the mere circumstance that the term of a lease has expired does not entitle the tenant to contend successfully that he has been absolved from the obligation which he may have undertaken at that time.

In a lease the rent was stated to be a certain sum, but a deduction on account of rent in suspense was allowed and a lesser sum was actually payable. The plaintiff sued upon the lease and alleged that the deduction was allowed because a quantity of land was not at that time fit for cultivation, but that there was an oral agreement to the effect that the rent in suspense would be revived as soon as the quality of the land improved.

Held, that under proviso 2, S. 92, of the Evidence Act, the oral agreement could be proved, because the lease omitted to specify the reasons for which the rent was kept in suspense and the period during which it was to continue in abeyance, and that the plaintiff might establish that the contingency upon which the rent was agreed to be revived had happened. 28 Cal 227, Ref: 11 Cal 486; 12 C L R 163 and 9 C L R 301, Ref.

Satish Chandra Basu Mallik v. Kamini Mohan Goswami, 7 Ind Cas 721.

10—Waiver of right to deduction. In a suit for arrears of rent of land adjacent to a river where defendant claims deduction on account of diluvion, and it is found that the agreement under which he holds requires measurement to be made once in three years, no account being taken of accretion or decretion occurring within that period: if the tenant has waived his right of measurement and has held over, it must be presumed that he elects to continue to hold at the same jumma as before and his claim to deduction cannot be allowed. **Kristo Kinkur Puramanick v. Ramdhun Chettangia. 24 W R., 326**

Abatement of Rent (Grounds of Abatement-(*Contd.*)

11—Kabuliat—Sale by tenant of his tenure—Suit against the purchaser—In a suit against the purchaser at an auction sale of a tenure under a kabuliat, by which it was agreed that the former tenant should not be entitled to abatement of rent on any ground and should be liable for interest at a particular rate for all arrears of rent, the defendant pleaded that as auction purchaser he was not bound by the terms of the kabuliat; that he was entitled to abatement on the ground of diluvion of portion of the demised lands, and only bound to pay interest at a reasonable rate upon arrears of rent. *Held*, that defendant was bound by the terms of the kabuliat entered into by his predecessor. **Ishan Chunder Chowdhry v. Chunder Kant Roy. 13 C L R 55.**

Notes.—Fol; 21 Cal 383. Dist: 24 Cal 37.

12—Right of tenant's transferee to abatement—A tenant has a right to claim an abatement of rent, where the area of the land under tenure, has been diminished by diluvion, and when the tenure is sold, the right passes to the purchaser. 23 W R 275 distinguished. **Kali Prasanna Rai v. Dhananjai Ghose 11 Cal 625.**

13-Bengal Act VIII of 1869, S.18—A raiyat cannot sue for abatement of rent simply because the lands which he holds are rated higher than those of the same description and with similar advantages held by raiyats of the same class in the vicinity. Bengal Act VIII of 1869 s 18, refers to an alteration of area owing to a portion of the land having gone away by diluvion or otherwise—not to some difference in the length of the measuring pole in use at different periods. **Babun Mundle v. Shib Koomaree Burmonee 21 W R 404.**

Appr:-**Pertab Chunder Banerjee v. Omur Sirdar 25 W R 89.**

Affirmed in **Omur Sirdar v. Pertab Chunder Banerjee 25 W R 212.**

(C) DAMAGES TO LAND BY VIS MAJOR.

14—Damage to land by Cyclone—Right of under-tenant to get remission of rent.—A landlord receiving remission from Government on account of damage done to his estate by a cyclone is not on that account bound to allow a remission to his under-tenants, unless he received the former on the understanding or agreement

Abatement of Rent (Grounds of Abatement—(*Contd.*)

that he would allow it in turn. **Goluck Chunder Mytee v. Parbutty Churn Dass. 15 W R 167**

(D) MISSTATEMENTS AS TO THE MEASUREMENT OF THE LAND.

15—Apportionment of rent—Decree—Mukurari lease—Lessee getting possession of less land than stated in lease—Act XI of 1859 S. 54—Abatement of rent—Right of lessee-A decree had determined that lands leased in mokurari to a lessee with a fixed rent, were less in area than specified in pottahs that comprised them, the lessors not being entitled to the whole; the less estate was possessed by the lessor:—*Held*, that lessee was entitled to a corresponding abatement of the rent reserved. The revenue paying mehal within which were lands subject to a mokurari, such lands being shares of mouzahs therein, was afterwards sold for arrears, under Act X of 1859. The purchaser at that sale was sued by mokuraridar to make good her incumbrance under S. 54 of the Act. The decree that followed maintained the lease but only as to part of the shares specified in the pottahs, and the lessee for possession of that part only In this suit for mesne profits brought by the lessee against the heir of the purchaser who filed a cross suit against her for rent, it held that, as the lessee had not proved that she having had possession under the leases, had been dispossessed by the purchaser, there had not been an eviction in the proper sense of the term. But when, in her suit for possession, part only was decreed to her and she was precluded by the result from getting a substantial part, her position was the same as if she had been evicted. She, therefore had the same equity for an apportionment, as on eviction. On the facts it was rightly judged by the Court of first instance the leases were not taken with knowledge on the part of the lessee that the title was doubtful **Imambandi Begum v Kamleswari Pershad 21 Cal 1005; L R 21 I A 118 PC.**

Notes:—Ref: 10 C L J 570.

16—Landlord and tenant—Abatement of rent of portion of which tenant did not obtain possession—Bengal Tenancy Act (VIII of 1885)

Abatement of Rent (Grounds of Abatement—(*Contd.*)

ant who did not obtain possession of a portion of the lands let out to him, pleaded that he was not bound to pay rent of that portion.

Held,—that he was entitled to say so and it was not necessary for him to bring a separate suit for abatement of rent.

That a suit under Ss. 38 and 52 of the Bengal Tenancy Act was not necessary, as those sections do not apply where the tenant has never been put into possession by the landlord. **Siba Kumari Debi v. Biprodas Pal Chowdhury. 12 C W N 767.**

17—Error in measurement of land—Land found to be less than stated.—A lease providing for enhancement if the lands are found on measurement to exceed the quantity stated in the lease, does not necessarily give the right to abate if the lands are found to be less than that stated in the lease. **Ram Kant Chowdhry v. Bindabun Cnunder Gope 2 W R Act X, 71**

18 - Construction of pottah—Default of tenant.

Though a pottah provided for an abatement of defendant's rent if on measurement the land was found to be less than 145 bighas, yet it was held that if defendant came to be in possession of that less quantity by his own default and not that of the lessor, the mere fact of defenant having been in possession of less than 145 bighas would not entitle him to an abatement.

Seetanath Bose v. Shamchand Mitter 17 W R 418.

19—Raiyat having paid no rent—Bengal Act VIII of 1869, s. 19.

A raiyat who has held his land for a few months, and paid no rent at all, cannot sue for an abatement of rent on the ground that the land, on measurement, is less than the quantity mentioned in his pottah. **Brojonath Koondoo Chowdry v Unant Ram Dutt 17 W R 449.**

(E) MISREPRESENTATION & FRAUD.

20—Misrepresentation as to quantity of land—In a suit by a puruidar to recover rent in accordance with the terms of a dur putni lease, the defendant claimed an abatement of his putni

Abatement of Rent (Grounds of Abatement)—*Contd.*

rent on the ground that his pedecessor had obtained such abatement in a previous rent suit, in which it appeared that the lessor's share was slightly less than what was described in the lease. —*Held*, that unless the defendant could show that he had been damaged by the plaintiff's misrepresentation as to the extent of his share, he could not be relieved from his contract, in this form of suit at least. **Gour Mohun Roy v. Radha Romun Singh** 21 W R 372.

21——Misrepresentation as to quantity of land. Delay in suing——In 1859 G entered into negotiation with respect to the purchase of a certain talook at premium of Rs 42,411 and an annual rent of Rs. 48,070, and in January 1860 he signed a sale-bond which contained an enumeration of the mouzahs purchased, the actual sale being completed in the 2nd June following. Until his death in December 1861 he paid the stipulated rent according to the terms of the deed. Subsequently his widow brought a suit for abatement of the rent on the ground that her husband had been misled as to the amount of rent payable by the under-tenants,—Held, (affirming the decision of the High Court of Calcutta) that under the circumstances the suit could not be maintained **Darimbya Debbya v. Nilmoney Singh Deo** 5 C L R 465

22—Act X of 1859, ss 18 and 23, cl. 3—S. 18, Act X of 1859, is not applicable to a case in which a plaintiff patnidar sues for an abatement of rent on the ground of fraud caused by the concealment from him of the existence of an intermediate tenure created by the zemindar. Cl. 3. s. 23 of that Act, is wide enough to admit of such a suit being tried by the Revenue Courts. **Shokoor Ali v Umola Ahalya** 8 W R 504

23—Denial of right to assess lands in tenure A suit in which the plaintiff alleges that rent was wrongly assessed on him for lands not covered by his pottah, and contends that in assessing his rent these lands should be included, is not in the nature of a suit for abatement of rent. **Obhoy Gobind Chowdhry v Kenny** 8 W R 518

BREACH OF CONTRACT.

24—Breach of Contract —Jurisdiction of Civil Court—In a suit for damages by a lessee, where the plaint shows a distinct prayer for abatement of rent and also sets forth as the main ground of the suit in fraudulent breach of contract by misrepresentation and refusal of deduction and refund stipulated for, so much of the claim as refers to abatement is, by cl. 3, s. 23, Act X of 1859 beyond the jurisdiction of the Civil Court; but the rest of the suit is properly cognisable by such Court. **Nilmony Singh v. Issur Chunder Ghosal** 9 W R 92

Notes—Ref; 3 C L J 143

(G) REDUCTION OF RENT ALLOWED TO LANDLORD BY GOVERNMENT.

25.—Reduction of rent payable by landlord to Government—Act X of 1859, Ss. 17 and 18.

Sections 17 and 18 were passed for the benefit of the ryot, and not for the protection of the zemindar. Section 18 was intended to give the ryot a right to abatement in certain cases, but not to protect the zemindar from liability to make abatement in any other case. In a suit for abatement of rent on the ground that the jumma payable to Government had been reduced upon condition that the rents of the ryot should be reduced in a like proportion.—*Held*, that the right to abatement applies only to the case of rents of which the amount had been fixed before the jumma was reduced by Government, and not to rents fixed by pottahs or kabuliats entered into subsequently. **Sukhawatoollah v Puthoo Goldar.** 1 Ind Jur O S 7

(H) LOSS OF PORTION OF LAND.

26.—Loss of portion of land—Suit for declaration of liability to pay less rent—Equitable relief.—A suit by a tenant against his original lessors for a declaration that he is not liable to pay them the whole rent payable under his pottah in consequence of a third person having, subsequently to the grant of such pottah, by suit established a right to a share of the rent, is not a suit for abatement of rent. But where, under such circumstances, the tenant is holding more land than is covered by his pottah, it is not necessary that his landlords, if desirous of enhancing the rent, should be referred to a separate suit for that purpose. The suit of the tenant being for equitable relief, the claim of the

Abatement of Rent (Grounds of Abatement)-*Contd.*

landlords must be taken into consideration in determining what relief the plaintiff is entitled to obtain. **Chandmoni Dali v. Loke Nath Chatterjee.** 6 C L R., 494.

(I) LAND ACQUIRED BY GOVT. PUBLIC PURPOSES.

27—Land taken for public purposes.—Suit to recover share of money taken as compensation for land.—In a suit to recover the proportion of money paid into Court as compensation for land taken for a railway, to which the plaintiff, a dur-putnidar, may be entitled, and in which suit the zemindar and putnidar are defendants, the plaintiff cannot claim abatement of rent under Act X of 1859, section 18, since such a claim is cognizable only in a suit instituted under that Act. **Gordon Stuart & Co. v. Mohatab Chand** Marsh, 490

28—Claim to deduction from rent.—A claim for rent being a recurring cause of action, a tenant is entitled to set up against it for any particular year any right which he had to a deduction or abatement, notwithstanding that he has paid full rent for several previous years. When land is taken away for railway purposes, and compensation made, which is divided between the zemindar and those holding under him, any deduction of rent claimed, from the zeminder must be reckoned with reference, not to the gross amount of compensation, but to the portion which passed into his hands. **Mohatab Chand v. Chittro Coomaree Bibee** 16 W R 201

29—Abatement of rent, Suit for—Suit for refund of excess rents:—In a suit brought by a putnidar for a declaration that he was entitled to an annual abatement of the putni rent in consequence of some lands comprised in the putni having been required for the purposes of a railway, and also for the refund of the excess rents which he had been compelled to pay for some years. *Held:* per *Mookerjee*, J :—That this was a claim for abatement of rent and for recovery of damages for illegal exaction of rent within the meaning of clauses (2) and (3), S. 23 of Act X of 1859. The proper course for the plaintiff, therefore, was to sue in the first instance for abatement of rent in the Revenue Court which was the only court of competent jurisdiction for that purpose. Per *Harington, J., contra*, treating the case as though it were one of first impression :—Although

Abatement of Rent (Grounds of Abatement)-*Contd.*

under S. 23 of Act X of 1859 a civil court had no jurisidiction to entertain a suit for abatement of rent, still the suit in so far as it related to a claim for refund of the excess rents paid by the putnidar was properly cognizable by the civil court and should not be dismissed for want of jurisdiction because one of the steps which plaintiff should have to take in establishing his right to have the money repaid to him would if it had stood alone, have entitled him to a decree in the Revenue Court. Per *Mookerjee, J* :—The present suit is substantially one for abatement of rent and the prayer for refund is ancillary to the prayer for abatement, because as soon as the amount of abatement is determined, the amount of refund is deducible by simple arithmetical calculation. The civil court has no jurisdiction to allow a claim for abatement, and is not competent to embark upon precisely the same inquiry for the purpose of allowing a refund. Per *Mookerjee J* :—The following rules are deducible from a review of the authorities on the question :—(1) A suit for abatement of rent properly so called is maintainable only in the Revenue Court. I. W. R. 299 ref. to. (2) A suit for adjustment of the receipt on the ground that the rent payable under a lease is less than the sum nominally inserted in it, is not a suit for abatement of rent, properly so-called and is accordingly maintainable in the civil court B. L. R. F. B. 95 referred to. If the tenant is entitled to sue for abatement in the Revenue Court under Rule (1), the suit for refund lies in the same Court, but if the tenant is entitled to sue for adjustment in the Civil Court under Rule (2), the suit for refund lies in the same Court. The cases which support the view that a suit for refund lies in the Civil Court assume a prior determination of the amount of abatement by a Court of competent jurisdiction. W. R. Gap. No. (Act X) 46 ; 11 W. R. 412 relied upon; 17 W. R. 73 dissented from. **Ashutosh Roy v Harinarain Singh Deo.** 3 C L J 143

30—Construction of Kabuliat—Agreement between zemindar and putnidar to divide compensation in respect of land taken for public purposes.

A putni lease contained a clause by which it was stipulated that if any portion of the demised lands should be taken up by Government for public purposes, the zemindar and the putnidar should divide the compensation allowed equally.

Abatement of Rent
(Grounds of Abatement-*Contd.*

A portion of the land having been so taken and the compensation divided as agreed upon, it was held in a suit for arrears of rent that the putnidar was notwithstanding the fact of his having received his moiety of the compensation, equitably entitled to abatement on the ground that he had been deprived of a portion of the land covered by his putni.

Uma Sunker Sirkar v Tarini Churn Singh 11 C L R 366=9 Cal 571.

31—Ijara settlement—Deduction from rent—a kabuliat of an Ijardar who took on lease certain land, contained the following clause:—"In regard to the aforesaid rent we take upon ourselves the risk of flood and drought, of death and flight of alluvion and diluvion, of profit and loss. In no case shall we be able to claim a reduction in the rent, nor will it be open to you to demand more on account of alluvion etc.' During the lease part of these lands were taken up by Government for a railway, and the lessor was paid compensation therfore. The Ijardar claimed a deduction of rent for the lands taken away. Held, that such a claim did not come under the meaning of the word "abatement" as used in the the rent law, nor was it intended by the parties to be within the clause of the lease, but the land having been taken from the whole area demised, not by natural causes, but by vis major, the Ijardar was entitled to a deduction of rent, on his showing that there were tenants of his on the land who, before the land was taken by government, paid rent to him which they had not ceased to pay.

Watson & Co V Nistarini Gupta 10 Calc 544

32—In a suit for arrears of rent, a claim for abatement may be made by way of set-off in respect of land taken up by Government for the purposes of a road. **Deen Dyal Lall v Thukroo Koonwar 6 W R Act X 24.**

33—Proceedings under Land Acquisition Act, 1870—Purchase at sale for arrears of rent—Beng. Reg. VIII of 1819.—

Portion of certain land held under a patni having been taken up by the Government for public purposes under the Land Acquisition Act, the zemindar declared his intention of granting no abatement of rent, and acting upon this declaration the patnidar was allowed to appropriate the whole of the compensation. The patni was subsequently sold under Reg VIII of 1819, with notice of the amount of the original rent, and the purchaser now sued for abatement of that rent. He did not allege that he had no notice of the proceedings under the Land Acquisition Act. *Held*, that the plaintiff must be presumed to have had notice of these proceedings, and that it was therefore incumbent upon him to have made inquiry regarding the position of the patni, and that under the circumstances he was not entitled to the abatement sought for. **Peari Mohun Mukerjee v Audhiraj Aftab Chand. 10 C L R 526.**

Abatement of Rent
(Grounds of Abatement-*Concld.*)

(2) EFFECT OF FORMER SUIT FOR ABATEMENT.

34—Previous suit for abatement, effect of—Onus probandi.—

There is no provision in the Rent Law prescribing that suits for enhancement or abatement shall not be brought within a certain period after the determination of a similar suit on the same grounds. And there is no provision throwing upon a plaintiff in a suit for abatement of rent the burden of proof that there has been some change in circumstances since a decision in a previous similar suit was passed. **Cheda v Nunhoo Beg. 2 N W 348.**

(3) CLAIM TO ABATEMENT.

35—Claim to abatement—"Otherwise vary" the rent—

The words "otherwise vary" in s. 153, Act X of 1859, are meant to include abatement claimable by the ryot, and this reservation is made in respect of questions of right to vary the rent, whether raised by the landlord or by the tenant. **Anund Chunder Deghee v Nubocoomar Chatterjee. 8 W R 192.**

(4) WHO CAN SUE
(a) PATNIDAR.

36—Right to use—Patnidar—A patnidar can sue for abatement of rent under the Rent Act, 1859. **Prosunomoyee Dossee v Soondur Coomaree Debia 2 W R Act X 30.**

Man Gurobinee Dassea v Khettur Chunder Ghose. 2 W R Act X 47.

Notes—Ref; 3 C L J 143.

36 A—Patnidar—Act X of 1859, s. 23 A patnidar, or any other leaseholder, may bring a suit against the Zemindar for abatement of rent

Abatement of Rent (Who can sue)—*Concld.*

under this section. **Ramnarayan Banerjee v Jayakrishna Mookerjee. 1 W R F B 299: B L R Sup Vol F B 70.**

(b) HOWALDAR.

37—Howaldar—A howaldar has a right to sue for abatement of rent. **Komlakant Doss v Pogose 2 W R Act X 65.**

(c) TENANT NOT ENTITLED TO OCCUPANCY.

37 A—Tenant without right of occupancy—Act X of 1859, S 18—A tenant not having a right of occupancy is not entitled to an abatement of rent under Act X of 1859, s. 18.

Nobodeep Chunder Sircar v Lalla Seeb Lal Marsh 325.

(d) UNDER-TENANT.

38—Under-tenants—Act X of 1859, s. 23 cl 2—Illegal exaction of rent—

Cl 2 s 23 Act X of 1859 relating to the illegal exaction of rent, was not limited to suits at the instance of the raiyat, but applied to any under-tenant. **Gopal Paul Chowdry v Grish Chunder Pandey. 14 W R 269.**

(5) FORM OF SUIT.

39—Jurisdiction of Civil Court—Act X of 1859, s 23. A obtained from B a putni lease whereby it was agreed that A. should prepare a hastabud (rent roll); that, if it should appear that there was any deficiency in the jumma stated in the potta, the correct jumma should be ascertained as therein provided; and that the rent should be made up to A. by B; and B should return a proportionate amount of the consideration-money. A sued B for an abatement of rent, for a refund of rent paid in excess, and for a proportionate refund of the consideration money. *Held*, the suit was not a suit for abatement of rent within the meaning of this section, and the Civil Court has jurisdiction to try the different questions together in the same suit.

Raja Nilmani Singh v Annada Prasad Mookerjee 1 B L R F B 93=10 W R F B 41.

40—Rent, ennancement of-Transfer of Property Act. The right of enhancement is not an incident of every contract of tenancy In a proceeding for apportionment under the Land Acquisition Act, no abatement of rent can be made without the consent of the parties. The compensation is to be apportioned between the

Abatement of Rent (Form of suit)—*Contd.*

parties according to the value of interest which each of them parts with. The Zemindar has a right to the fixed rent and the loss he sustained is of so much of his rent. Any other possible injury such as the chance of the putnidar throwing up the land and its being diminished in value by what has been taken by Government, and still remaining as it did, liable to pay the same revenue is not appreciable and cannot be taken into account. If there is no abatement of the rent and the patnidar continues liable to pay to the zamindar the same rent as he had to pay before, there would be nothing for which the Zemindar is to receive compensation. The same rule applies to the case of lease in perpetuity with fixity of rent. The burden of proof is on the Zamindar to make out his claim and show as to the value of a particular contingency to him. **Satis Chunder Chattopadhya v Rai Johindra Nath Chowdhury 7 C L J 284.**

41—Apportionment of rent—Suit—Bengal act VIII of 1869, s 19—Certain batwara proceedings terminated, in 1877, and the portion of the estate, held by the plaintiff and allotted to the defendant was ascertained. The rent was Rs 4 per bigha. In 1881, a suit was brought by the defendants to recover rent of a larger amount than what the plaintiff admitted to be due and a decree obtained on the 31 st. May 1881. On the 20th September 1881, the plaintiff instituted a suit nominally under the provisions of s 19 of Bengal Act VIII of 1869, for abatement of rent, upon the ground that the defendants were seeking to charge him rent upon a larger amount of land than he actually held. The court found that the area of land held by the plaintiff was the same as stated by him in the plaint, and not that alleged by the defendants. *Held*, that the suit was rather one for the apportionment of rent after the Butwara proceedings, and not one for abatement of rent.

Durga Pershad v Ghosita Goria 11 cale 284.

Notes—Dist: 15 Mad 492.

(6) RATE OF REDUCTION.

42—Rate of reduction—Jurisdiction of Revenue Court—A granted a patni to B, to which a certain mehal appertained. The Government to which the mehal belonged, in reversion upon an ijara held by *A*, sold it to *C*. *Held* that *B*

Abatement of Rent (Rate of Reduction)–*Concld.*

was entitled to abatement of rent from A, and that a suit for abatement, under the circumstances, was cognizable by the Revenue Court. *Semble*,—Where there is no specification in the original contract of the amount of rent payable for the portion of land for which abatement is claimed, such a sum ought to be deducted from the whole rent as would bear to that whole rent the same proportion as the annual value of the portion of the land which has disappeared bears to the annual value of the land originally leased.

Brijanath Pal Chowdry v Hiralal Pal 1 B L R A C 87=10 W R 120.

43—Contract–Acceptance by landlord and his heirs of rent at a lower rate—effect of–Agreement to take lower rent not proved.

The mere acceptance of reduced rent, though it may amount to a full acquittance, cannot operate as a binding contract without proof of the agreement forming the basis of the reduction granted, and such an acceptance does not amount to such an agreement or release of a portion of the rent as to have a binding effect.

Radha Raman Chowdhury v Bhowani Prosad Bhowmik. 6 C W N 60

Notes—Dist 2 C L J 338 Ref, 10 C L J 570.

(7) PROCEDURE.

44–45–Procedure—Suit for arrears of rent.

A claim by defendant for abatement of rent under remission granted to plaintiff by Government may be tried in a suit for arrears.

Boikunto Paraki v Surendronath Roy 1 W R 84

46—Plea of Abatement in suit for arrears of rent.

In a suit to recover arrears of rent it is competent to a Court to adjudicate upon a plea of abatement.

Gour Kishore Chunder v Bonomalee Chowdhry. 22 W R 117=15 B L R 35

Notes–Fol· 4 Cal 411; 11 Cal 343; 15 Cal 750.

47.—Lease deed—Possession of lands leased—Proportionate reduction for lands not given possession of—Payment of whole rent—Voluntary payment—Damages. Plaintiff brought the suit for rent upon a registered muchilika executed by defendant for a term of 5 years. Defendants contended that they executed the suit muchilika in the full belief that the entire extent will be put

Abatement of Rent (Procedure) –*Concld.*

in their possession but that a certain tract containing 600 acres was trespassed upon by the neighbouring Talukdar who prevented defendant's occupation and that the defendant paid under protest at the end of fasli 1307 the full amount for Faslis 1305, 1306 and 1307.

Held, that the payments are not voluntary payments and the tenant is entitled to recover them. **Ghanta Ramanna v G Narayanasami Naidu 7 M L T 52=5 Ind Cas 712.**

(8) CIVIL COURT'S DECREE EFFECT OF, ON REVENUE COURT'S DECREE.

48.—Effect of decision of Civil Court on decree of Revenue Court—Suit for excess payments of rent after decree for abatement. A patnidar sued his zemindar and obtained a decree for abatment of the patni rent, on the ground that the assets of the patni fell short of the amount stated in the lease. While this suit was pending in the Civil Court, the zemindar brought a suit for the rent of the two years upon the full jumma; and though the patnidar objected that his suit for abatement was pending, the Collector decreed the rent suit in full. In execution the zemindar recovered the full rent, and the patnidar then sued for a refund of excess payments and of the interest realized by the zemindar thereon. *Held*, that the decree of the Revenue Court wes superseded and modified by the decree of the Civil Court. which was subsequently affirmed in appeal. *Held*, that the plaintiff's cause of action accrued on the date on which the zemindar recovered from him rent in excess of what he was justly liable for and also interest on such excess. *Held* (on reference to the decree) that the abatement was to take effect from the commencement of the patni lease.

Nilmoney Singh Deo v Sharoda Pershad Mookerjee 18 W R 434.

Notes:—Dist 20 W R 106.

49-Act No XII 1881(North-Western Provinces Rent Act), Chapter II Section 93 (a).—Landholder and tenant suit for rent-Plea of custom allowing deductions on account of land rendered unculturable by action of river.—Such deduction not an "abatement of Rent" within the meaning of the act.

An abatement of rent in the sense of chapter II of the North-Western Provinces Rent Act No. III of 1881, implies the reduction of the rent

Abatement of Rent (Civil Courts decree effect of)-*Concld.*

payable for the holding, if not permanently, at all events for an indeterminate period, the rent as abated being substituted for the original rent and continuing to be the rent of the holding until altered by agreement or by further order. A tenant cannot apply under Chapter II on any ground for a reduction or revision of rent for a particular year only and having no effect beyond that year on the rent payable for the holding.

In a suit for arrears of rent under section 93 (a) of the North-Western Provinces Rent Act 1881, the defendant proved a local custom, whereby a tenant was entitled to proportionate deduction from the rent for any year for such lands as were in that year, owing to fluvial action, unculturable by being submerged by water or covered by sand. No application for abatement for rent had been made under Chapter II of the act.

Held, that inasmuch as the defendant did not by his plea seek for an abatement of rent in the sense of Chapter VI namely a reduction permanently or for an indeterminate period of the rent payable for his holding, but only a remission or deduction from such rent for a particular year and in respect of such portions of the holding as were unculturable in that year, and inasmuch as remission could have been obtained in proceedings under Chapter II, the custom did not override any of the provisions of the Act, and must be given effect by the court trying the suit.

Bani Prasad Kuari v Dakkhi Rai
23 All 270=A W N 1901 69.

Abatement of execution-proceedings.

See Execution of decree.

Abatement of Nuisance.

See.

(1) Jurisdiction of Civil Court—Public ways-obstruction of.

(2) Nuisance

Abatement of part of claim.

See Relinquishment or omission to sue for portion Of claim

Abatement of Part of Rent.

See Abatement of Rent.

Abatement order of.

See appeal (Decrees).

Abatement

(1) ABATEMENT OF SUIT. (1-88)

(1) Lands washed away (1).
(2) Death of sole plaintiff (2-16).
(3) Insolvency of plaintiff (17-18).
(4) Survival of cause of action (19-88).

(2) ABATEMENT OF APPEAL (89-165)

(5) Death of appellant (89-96).
(6) Death of appellant—during pendency of appeal (97-112).
(7) Death of one of two joint decree-holders (113-114).
(8) Death of principal, pending appeal (115—116).
(9) Death of Respondent (117—165).

See cases under Right of.
Suit-Survival of Right

See also cases under:—

(1) Appeal—Orders
(2) Insolvency Act S 36.
(3) Right of suit—Survival of right.

Abatement of suits. Representatives of one of the respondents not brought on record—Abatement of appeal—See **5 Ind Cas 325.**

Abatement of suits. Pre-emption—Sale of a pre-emptional decree—No cause of action for a fresh suit—Parties—Vendor not a necessary party—Abatement of appeal—See **134 P L R 1902=94 P R 1902.**

Abatement of Suits. By husband for dissolution of marriage—Death of wife pending suit—Suit against correspondent, abatement of—See **60 P R 1906=69 P L R 1907.**

Abatement of suit. Partition decree—Execution—Death of plaintiff—Abatement of suit—Application to set aside—Limitation—See **13 Bom L R 517.**

(1) LANDS WASHED AWAY.

1.—Lands washed away—Suit for possession and mesne profits.

Abatement of suit (Lands washed away)-*Concld.*

A suit for possession with mesne prosfits does not abate by reason of the lands having since been washed away. **Unna Poorna Debia v Ram Lochan Ghose 5 W R 227.**

2. DEATH OF SOLE PLAINTIFF.

2.—Abatement of suit on death of sole plaintiff—Revivor Civil Procedure Code. Sections 363, 365,366,371-Limitation Act (XV of 1877) schedule II, Arts 171 and 178.

Upon the death of sole plaintiff, unless an application be made within 60 days from the plaintiff's death by the legal representative to have his name substituted upon the record.the suits abate under section 366 of the Code of Civil Procedure. But under section 371 of the Code, and Art 178 of Limitation Act (XV of 1877), the court may revive the suit on the application of the legal representative within three years from the time when the right to apply accrued, if can be proved that he was prevented by any sufficient cause from continuing the suit. **Bhoyrub Dass Johurry v Doman Thokoor I L R 5 Cal 139=4 C L R 374.**

Notes.—Ap: 9 Bom 275 Dist: 5 C L R 108

3.—Death of sole plaintiff after conclusion of cause, but before delivery of judgment—Decree drawn up in favour of deceased plaintiff-Material irregularity—Civil Procedure Code, 1882, sections 365. 366.

In a certain case after evidence had been taken and arguments heard on the 28th and 29th September 1897, the District Judge on the 2nd November 1897 gave the (sole) plaintiff a decree for the property claimed, and at the foot of his judgment recorded the following note:

"It having been brought to my knowledge "that plaintiff has died in the *interim*, I deliver "judgment notwithstanding, being guided by "I L R XXI Bom 314 and the authorities quo-"ted therein, defendant's counsel agreeing." Defendant applied to Chief Court on the Revision Side to set aside the said decree.

Held, that under the circumstances of the present case there had been a disregard of the provisions of the Civil Procedure which had materially prejudiced the defendant inasmuch as she could not appeal against a dead person and had no right of appeal against his heirs who were not

Abatement of suit (Death of sole plaintiff)-*Contd.*

on the record and was moreover, deprived of the possibility of the suit being allowed to abate in consequence of no application under Section 365 civil Procedure code being made within the time allowed by law.

Held, therefore, that the decree of the District Court must be set aside and the case remanded for dispossal in accordance with law with reference to Section 365 and 366 of the code.

Roe, C J.—A decree passed in favour of or against a dead person is not *ipso facto* a nullity. and all that can be said in such a case is that there has been a disregard of the provisions of the civil Procedure Code. Each case must be decided on its merits, and the decree should be set aside or maintained, as if the death occurred after decree, according as the disregard of procedure has or has not materially prejudiced the parties.

I L R XXI Bom 314, I L R VI Mad 180; I L R XV Mad 399; I L R XVII All 478 No; 31 P R 1886; No 7 P R 1889; and No 78 P R 1891 referred to. **Bates v Prestage 20 P R 1898.**

4.—C P C. O 22 r 3 (1) (1882 s. 365)-Appeal-Death of appellant—Representative not brought upon record—Decree. Where an appellant dies before the hearing of the appeal and his representative is not placed on the record, the decree passed by the appellate Court is a nullity: and if his legal representative applies within the prescribed period to have his name entered on the record the Court is bound, under S 365 of the Civil Procedure Code to enter his name **Janardhan v Ramchandra 4 Bom L R 23=26 Bom 317.**

5.—Power of Court.

If a sole appellant dies while his appeal is pending, the appellate Court cannot proceed to judgment in the appeal without the representatives of the deceased appellant being made a party to the record.

Lalji Sahai and another v Sukhi Lal and others 16 W N 91

6.—O. 22 r. 3 (1); O. 41 r. 25 (1882 Ss. 365, 566.)-Held, that a Court to which a case has been remanded under s. 566, Civil Procedure Code, has jurisdiction to act under s. 365 of the Code, and to do any act which may be necessary to carry out

Abatement of suit (Death of sole plaintiff)-*Contd.*

the order of remand. **Salabat Singh v Ram Kishan.** **7 O C 17.**

7—Civil Procedure Code (1859), s. 102 (1877) s, 371—Institution of fresh suit,—

Where a suit was declared abated in 1868 under s, 102 of Act VIII of 1859 for non-prosecution by the representative of deceased plaintiff,—*Held* that the Civil Procedure Code, s. 371, was no bar to a fresh suit instituted in 1880 on the same cause of action. **Pallikunath Ramen Menon v. Mullankaji Sri Kumaran Nambudri. 3 Mad 31.**

8-C P C. O 22, r. 9 (1), (2), (1882 S. 371)—Decree passed in a prior suit in favour of plaintiff after his death—Subsequent suit by plaintiff's legal representatives on the same cause of action—Whether maintainable. One R brought a suit against A and a decree was passed in plaintiff's favour, R's legal representatives brought the present suit on the same cause of action against A's representatives on the ground that R having died on the morning of the day on which judgment was pronounced the decree was a nullity.

Held, that the suit was not maintainable and that the decree passed in the former suit was only voidable at the plaintiff's instance and not void. (4 H and N 488; 19 Bom 807; 21 Bom 314 Ref to. 17 All 478: 26 Bom 317 Dist). **Gada Coopooramaier v M, Soondararmall 6 M L T 271= 33 Mad 167.**

9-C P C.O. 22 rr. 3 (1) 3 (2):9 (1) (2) (1882 Ss 365 366, 371)—Limitation Act (XV of 1877) Art 175—Applications for abatement and revival heard together—Form of order of revival. An application for abatement and an application for revival of a suit were set down for hearing together. The latter was made after six months of the Plaintiff's death.

Held-That on the court's being satisfied that the legal representative of the deceased plaintiff was prevented by sufficient cause from continuing the suit, the proper order to pass was to declare the suit to have abated and then at once pass an order under sec. 371 of the C P C setting aside the abatement and reviving the suit. **Ram Protab Chowdhry v. Lal Chand. 9 C W N 369.**

10—Civil Procedure Code (1882), ss. 365, 366, 371—Revival of suit.—The plaintiff died on the 28th August 1883 and in December 1884, letters of

Abatement of suit (Death of sole plaintiff)-*Contd.*

administration to his estate were granted to the Administrator General. The defendant died in June 1884, leaving a widow and one son him surviving. By his will he appointed two executors. On the 3rd February 1885, the Administrator General took out a summons to revive the suit. *Held*, that notwithstanding the provisions of s. 365 of the Civil Procedure Code (XIV of 1882) and of the Limitation Act (XV of 1877), it was competent for a Judge in chambers to revive the suit by making an order for abatement under s. 366 of the Code, coupled with an order under s. 371 setting aside the order for abatement. **Fulvahu v. Goculdas Vallabhdas. 9 Bom 275.**

11-C P C, O.22 rr 3 (1) 5 (1882 Ss.365 367)—Civil Procedure Code Act XIV of 1882 Ss. 365, 367, 371, 588 (18) 32-Plaintiff—Legal representative of deceased plaintiff—Objection to the legal representative—Nearest heir to the deceased—Appeal—Practice—Procedure. When a plaintiff dies the suit cannot proceed because there is none suing. The Legislature provides that his legal representative can come in his place; when he is allowed to come the defect is made up; there is a suit to proceed. The suit is then a suit on the merits. A Court has no jurisdiction after that stage has been reached to go back and enquire into the right of the legal representative to proceed with the suit side by side with an enquiry into the merits.

Where a person has once been admitted to the record as legal representative of a deceased plaintiff that person is a party and any dispute raised inter parties as to that substituted plaintiff's right of representation [not inheritance] so as to have such substituted plaintiff struck out comes properly under S. 32 and not under S. 367 of the Civ Pro Code

If S. 367 be read with S. 588 [18] of the Civ Pro Code, it becomes clear that the dispute contemplated in S. 367 is not an issue on the merits framed and recorded between a plaintiff and defendant. **Balaba v. Ganesh 4 Bom L R 980 =27 Bom 162.**

Notes.—Ref; 1 C W N 584.

12-C P C,O 22 r 3 (1) (1882 S.365)-Limitation-An application for the assessment of mesne profits is not a proceeding in execution of the decree, but merely a continuation of the original suit. **19 Cal 132 (F B) Fol. Debendra Nath v. Khirode Chandra 5 Ind Cas 279**

Abatement of suit (Death of sole plaintiff)—*Contd.*

13—C P C, O 22 r. 3 (1)-O. 33 r. 2 5. 8, 75 (1881 ss. 365 403, 407 410, 413) pauper, right to be declared whether personal—Death of the applicant —Substitution right of the heir—Civil Procedure Code [Act XIV of 1882] Secs, 365, 403, 407, 410 and413 The right to obtain permission to sue as a pauper is only a personal right. So on the death of an applicant praying for such permission his legal representative cannot come in as such and ask to be substituted in his place There is a marked distinction between a right to sue and a right to make an application for permission to sue as a pauper, and this distinction is clearly indicated in section 413. of the Code of Civil Procedure. The right to make such an application is Obviously a personal right and cannot survive in the legal representative who may or may not be a pauper himself.

Lalit Mohan Mandal v Satish Chandra Das 4 C L J 234=33 Cal 1163

14—C P C, O 22 r. 5 (1882 S.367)—Abatement of suit—Appeal—Revision. *Held*, that where after the death of a plaintiff the Court on the application of his widow to be brought on the record in place of her deceased husband held that the right to sue not having survived to the applicant, she could not be brought on the record as the legal representative of the deceased and ordered the suit to be dismissed as having abated. The proper remedy for the widow was to appeal against that order and not to apply for the revision of the same. 18 Mad 496; 27 Bom 162 and 10 Bom 220 referred to. **Mussammat Patraj Kuar v Bhaiya Janki Parshad. 9 O C 354**

15—C P C, O. 22 r. 5 (1882 S.367)—Dispute as to who is the legal representative of a deceased plaintiff—Order admitting a person to be legal representative for the purpose of prosecuting the suit—Effect of such order.

S. 367 empowers the Court in a case where a dispute arises as to who is the legal representative of a deceased plaintiff, to appoint a legal representative for the purpose of prosecuting the suit, but the appointment of such legal representative is not a determination of any issue which is properly raised in the suit, and particularly (as for example, in a suit for partition of family property) such a vital issue as whether the deceased plaintiff was joint with or separate from the rest of his family. **Parsotam Rao v Janki Bai A W N (1905) 206=28 All 109.**

C C 3

Abatement of suit (Death of sole plaintiff)—*Concld.*

16.—Execution of Decree—Death of decree-holder—Abatement of execution proceedings—Admission of application to set aside abatement after time—Sufficient cause—Civil Procedure Code, 1882, Sections 365, 371, 372 A—Limitation Act, 1877, Section 5.

In an execution proceeding the decree-holder having died in September 1898, the judgment-debtor, on the 18th October 1899, obtained an order from the executing Court for the removal of the attachment on the ground that no application in accordance with the provisions of Section 365, Civil Procedure Code, had been made by the representatives of the deceased decree-holder within the prescribed period of limitation. The circumstances were that the decree-holder who was a Sikh Jat had died and left a will probate of which having been keenly contested by his heirs was not granted to the executors until April 1900. In May 1900 two out of the three executors filed an application, but the judgment-debtor contended that by sec. 365 of the Civil Procedure Code the application was timebarred.

Held, that the word "suit" includes all proceedings in a suit including the proceedings in execution, and that the executors were bound to make and capable of making the application at the time of the death of the testator, but that, under the peculiar circumstances of the case, there was sufficient cause preventing them from continuing the execution proceedings originated by the testator within the meaning of s. 371, Civ. Pro. Code and that therefore under the provisions of s. 372A Civil Procedure Code, and of s. 5 of the Limitation Act they were entitled to an extension of the time for making the application to set aside the abatement order.

(7 Bom 341) (9 P R 1901) (6 All 269) (63 P R 1900) referred to. **Price v Golak Nath 39 P R 1903**

(3) INSOLVENCY OF PLAINTIFF

17—Insolvency of plaintiff—Civil Procedure Code (1859), s. 106 (1882) s. 370—Order for security for costs by Official Assignee when made a party. S. 106 of the Civil Procedure Code means that a suit abates by the insolvency of the plaintiff, but that the defendant shall not plead the abatement without giving Official

Abatement of suit (Insolvency of plaintiff)-*Concld.*

Assignee an opportunity of prosecuting the suit Where, therefore, the plaintiff after the institution of a suit, became insolvent and the defendant thereupon obtained an order that the Official Assignee should give security for the costs of the defendant within fourteen days, and should be made a party to the suit within one month, and that, in default of such security, the suit should be set down for dismissal within eight days after the expiration of the time so limited. *Held* that such order was irregular. *Held*, also, that the Official Assignee, having notice of the order was not entitled to the further notice of the setting down of the suit for dismissals he not having given the security required, and that the giving of such security was a condition precedent to his being made a party to the suit. **Ibrahim Bin Mahasin v Abdur Rahiman Bin Alli. Gamble v Abdur Rahim Bin Alli.** **12 B H C 257.**

18—If an assignee, who has been substituted for the plaintiff under s. 106, Act VIII of 1859, declines to furnish security for costs within such reasonable time as the Court may order, the defendant may, within eight days after such neglect and refusal, plead the bankruptcy or insolvency of the plaintiff as a reason for abating the suit. **Heera Lall Seal v Carapiet.** **13 W R 431.**

Notes:—Ref 9 B H C R 205.

(4) SURVIVAL OF CAUSE OF ACTION

19—Survival of cause of action During the pendency of a suit by a Hindu widow to recover possession of her husband's estate, the widow died.

Held, the cause of action was one which, from its very nature, survived on the death of the plaintiff, and therefore the suit did not abate.

Parbutty v Higgin. **17 W R 475**
Parbutty v Brikun. **8 B L R Ap 98.**

Notes—Ref 34 Cal 294; 11 C W N 501; 6 C L J 547; 12 C W N 590; Fol 35 Cal 756 F B =7 C L J 666=12 C W N 682.

20—C P C, S. 361—Suit for declaration of right as member of caste—Death of plaintiff.

Plaintiff who sued for a declaration of his right as a member of a caste to worship an idol, died and his son was entered by the Lower Court on the record as his heir.

Abatement of suit (Survival of cause of Action)-*Contd.*

Held, that as the claim was not based on any hereditary right, but on a right arising from membership in the caste, which by its nature vested in the son before the death of the father, no right survived to the son as he had enjoyed it independently of the father, and the suit abated. **Chimanaji v Parshotam.** **90 P J 219.**

21—C P C, O 22 rr 1, 5 (1882 Ss. 361 & 97) -Party to suit—Death—Right to sue—Abatement.

By the terms of a consent decree it was provided that any right, title and interest which the plaintiff's grandmother, father and uncle had in certain family properties should be released and conveyed to defendant 1, their mortgagee; and a conveyance accordingly was passed in terms of the decree. The plaintiff, who was a minor then, was not made a party to the consent decree or the conveyance. He subsequently brought a suit to have his rights declared against defendant 1. While this suit was pending the plaintiff died leaving a widow and daughter. Defendant 1 contented that the suit abated by reason of plaintiff's death as plaintiff's right had passed to him. Held that the right to sue survived as it was an interest in property, **Dharamsi v Narotam** **5 Bom L R 1041.**

22—C P C, O rr 3 (2), 5. s.104, O, 43, r. 1 (1882 Ss. 366, 367 588 cl. 18.)

The order of abatement of suit under the first paragraph of s. 366 might be treated as an order under s. 367, which is appelable under s. 588 cl. (18). Karta in a joint Hindu family must be with the consent of the adult members. If, other members of the family do not join with the descendants of a karta in carrying on the suit, the latter are entitled to carry on a suit brought by him for recovery of a property against the trespasser for the benefit of the whole family. 10 Bom 220; 27 Bom 152; 19 Mad 496; 2 N L R 7; 17 All 172; 17 Mad 209. 27 Mad 112. Ref 9 O C 354 followed. **Pandit Ikbal Narain v Pandit Ratan Lal.** **10 O C 121.**

23A—C P C. O XXII, r 3 (1)—Suit by Hindu widow—Death of plaintiff—Begal representative—Reversioner.

Where a Hindu widow died after the institution of a suit to recover property belonging to her deceased husband, the reversionary heirs of her husband, being her legal representatives, sho-

Abatement of suit (Survival of cause of Action)-*Contd.*

uld be brought upon the record. 9 M I A 543; 2 W R (P C) 31; 23 Cal 636; 20 All 341, Fol.

Rikhai Rai Sheopujan Singh. 7 Ind Cas 97=7 A L J 960.

24—C P C, O. 22 r 5; s 104; O 43 r 1 (1882 Ss.367, 588, (18) C P C order abating a suit s. 367, Cri. Pro. Code.)

Order deciding that the right to sue does not survive, is appealable. An order directing that a suit shall abate is not a decree nor appealable as such. Where a person applies to have his name entered on the record in place of the deceased plaintiff, and the Court decides that the right to sue does not survive the decision is to be regarded as come to under s. 367 C P C so that an appeal lies under s. 588 (18). 10 Bom 220, 17 All 172, 27 Mad 112; 18 Mad 496, 27 All 162; 11 Cal 6 ref. to. **Tejnath Dube v Loknath Dube 2 N L R 7.**

25-C P C, O 22 r 3 (1); The Second Schedule (1882 ss. 365, 523)—Arbitration, contract to refer to—Rule of Court—Death of one party, effect of—Revocation of contract only for just and sufficient cause—Leave of Court-Abatement of Arbitration.:—

Under the English common law the authority of an arbitrator may at any time before the award is made, be revoked at the pleasure of any party to the submission, whether such submission be by agreement in writing, bond deed or Judge's order at *nisiprius*. Such authority is, therefore, revoked in England by the death of any one of the parties to the submission 15 R R 580; 7 Taunt 57; referred to. This rule of English common law has not been followed in India so that contracts to submit to the decision of an arbitrator are not revocable at the mere will or pleasure of the parties. 8 M H C R 46 followed. A submission which has not been made a rule of court is not revocable without just and sufficient cause, and a submission which has been made a rule of court can be revoked only with the leave of court for good cause shown. 12 M I A 112, referred to. Where an uncle and his nephew who were members of a joint family entered into an agreement in writing to submit their disputes relating to the partition of their joint property to the decision of some arbitrators, and the uncle applied under s. 523 to have the agreement filed and the application was registered and numbered as a suit, but pending the

Abatement of suit (Survival of cause of Action)-*Contd.*

proceedings before the arbitrators the uncle died and his daughter's son, alleging to be the adopted son of the deceased, applied to continue the suit:—*Held* (1) that the suit did not abate; (2) that the contract of submission not being personal to the deceased, was not revoked by the death of one of the parties; and (3) that the procedure prescribed in s.367, C P C, was the one that should have been adopted. **Venkata Satyanarayana v Venkata Rangayya. 13 M L J 311= 27 Mad 112.**

Notes:—Ref. (1908) W N 228=30 All 505= 5 A L J 658.

26—Suit by son to set aside father's alienation of ancestral property—Death of son—Hindu mother.

Where a Hindu minor, governed by the law of the Mitakshara, on whose behalf a suit to set aside his father's alienation of ancestral property had been instituted, died,—*Held* that no right to sue survived in favour of his mother, but the suit abated. **Padarath Singh v Reja Ram 1882 W N 29=4 All 235**

Notes—Ref 19 Mad 345; 9 All 121 F B 26 Bom 597, 24 All 211, 217, 12 C W N 815.

27—C P C, O 22 r 1 (1882-S.361)-Abatement-Redemption suit by an unmarried daughter—Plaintiff suing as sole heir—Death of plaintiff—Right of married sister to continue the suit.

One Mussammat Prabhawati, sister of the respondent Mussammat Durga sued the appellant for redemption of a mortgage, executed by the Mussammat's father in favour of the appellant on the ground that she as an unmarried daughter, had obtained the sole right to the property of her father to the exclusion of her married sister to whom along with herself, when a minor, the mortgaged property had, in a previous litigation between the parties interested in the mortgage, been surrendered by the order of the court, which had held the mortgage debt to have been satisfied. In the present suit, Mussammat Durga was made a *Pro forma* defendant. Mussammat Prabhawati having died during the pendency of the suit, Mussammat Durga applied to have her name removed from the array of defendants and substituted as plaintiff.

Held, that the right claimed by Mussammat Prabhawati being a personal right and adverse to

Abatement of suit (Survival of cause of Action)-*Contd.*

that of her sister. Mussammat Durga, the suit abated after Mussammat Prabhawati's death and Mussammat Durga could not get her name substituted as plaintiff and continue the suit.

Balak Puri v **Mussammat Durga.** **4 A L J 783=30 All 49=1908 W N 6= 3 M L T 181.**

28—Mother, share of—Reversion—Right to sue, survival.

The right of the mother to a share of the father's properties, on a partition among the sons, is in lieu of maintenance, and such share on her death, reverts to the sons. Where the mother brought a suit against the sons for her share of certain Government Promissory Notes, which had been partitioned amongst themselves by them.

Held, on her death, the right to sue did not survive in her executor. 13 Cal 336, *Fol* 31 Cal 497 Ref. **Tripura Sundari Debi v Dakhina Mohan Roy.** **5 C L J 310= 11 C W N 698**

29—Suit by son contesting alienation by father of ancestral land—Death of son pending suit—Suit does not abate-Right of reversioner to continue suit—Civil Procedure Code ss. 351 and 367—Jats of Amritsar District—Migration from Rajputana-Customary Law of Punjab & not the Hindu Law governs the parties,

Held, also that the restraint on the alienation by a father of ancestral land applied equally to alienation by him to ancestral houses, gardens and shops. 27 Bom 162,(168-169) Fol 10; I A 150 97 P R 1893, 18 P R 1895; (F B), 55 P R 1903 (F B)=117 P L R 1903, 27 Mad 588: 15 I A 156 22 All 33 F B and 382 and 24 Mad 405 Refd. to. **Ram Rakha v Balwant Singh 59 P L R1905 =58 P R 1905.**

30—Personal cause of action,

Held, that under the circumstances the suit which had arisen on account of some illegal act of the widow, had abated on her death pending the suit and the question as to the plaintiff's reversionary right which was raised by an intervenor, must be decided in a separate suit. **Ramjun v Lachee.** **1 Agra 49.**

31-Abatement of declaratory suit brought by reversioner on his death—Reversioner, death of—Hindu Law—Declaratory suit.

A suit was brought by a reversioner for a declaration that certain alienation made by a Hindu widow had been made without necessity and were ineffectual beyond her life-time. The reversioner died during the pendency of the suit and the name of the son of the reversioner was entered on the record in place of his father. *Held*, that there being no privity of estate between one reversioner and another, each must claim in his own right from the last male-holder of the estate. *Held* also, that the right of a contingent reversioner to maintain a declaratory suit does not survive to the person who on the plaintiff's death becomes the next reversioner and that such a suit abates on the death of the original plaintiff. **Bhola v Mussammat Moona.** **8 O C 124.**

32.—*B*—Hindu Law—Reversioner's suit-suit for declaration of invalidity of alienation decree in favour of reversioner—Death of plaintiff Reversioner pending appeal—Abatement.—A reversioner brought a suit for possession of properties and in the alternative for a declaration that certain alienations by the widow will not bind the reversion. The lower courts declared the alienations invalid and gave a decree, for possession. The plaintiff reversioner died pending appeal by defendant. *Held*, that the suit for the declaration did not abate, the suit being on behalf of all the reversioners.

Muthuswami Mudli v Masilamani. **20 M L J 49.**

33—C P C O XXII. r. 1—'Right to sue'-Meaning of—Application for probate by executor—Death of executor—Right of leagal representative of executor to continue proceedings and obtain letters of administration—Abatement of suit. S, the sole executor as well as the residuary legatee under the will of A, deceased, applied for probate of the said will. On a *caveat* entered by N, the cause was set down as contentious and pending the hearing, S died, and P, his sole widow and heiress, applied that her name, as his sole widow and heiress, might be substituted for his name, and that the petition for probate might be amended by substituting a prayer for letters of administration with copy of the will annexed instead of a prayer for probate.

Held, that the right to sue did not survive to the widow of the executor and that the suit abated.

Abatement of suit (Survival of cause of Action)- *Contd.*

The right to sue, in O XXII, means the right to bring a suit, asserting a right to the same relief which the deceased plaintiff asserted at the time of his death, and that a right to obtain probate of a will is a right different in its nature from a right to be appointed by the Court to administer the deceased's estate.

Sarat Chandra Banerjee v Nani Mohan Banarjee. 36 Cal 799.

34.—C P C S. 367. K, a Mahant, brought a suit against his disciple N to have deed of gift executed by him in favour of N declared null and void. Before the defendant filed his reply, K died and B applied to be substituted for the deceased. The lower Court held that the cause of action had not survived and struck off the case. *Held*, that the cause of action did survive to B if he proved himself to be the legal representative of K and the Court must proceed under section 367 of the Code of Civil Procedure.

Ballabh Das v Narain Das 1885 A W N 7.

35.—Act VIII of 1859, section 100, (1882) Sec 362.—A and B, as joint owners of certain land, brought an action for damages on account of trespass. B died after action was brought. *Held*, that the cause of action survived to A. *Semble.*—The words " cause of action " in sec. 100 of Act VIII of 1859 mean right to bring an action **Chundermohun Dutt v Bishwambhur Laha: 1 B L R, O. C. 42.**

36.—Abatement of suit.—Joint vendees—Suit by both—Death of one of the vendees pending suit—Representative—C P C 363—Where certain property was purchased by two vendees, each taking a half share, and a suit was brought by them jointly for possession of the property, but during the pending of the suit one of the vendees died and his personal representatives were not made parties to the record. *Held* (per Banerji, J) that the surviving plaintiff was not entitled to obtain a decree for possession of the portion of the property to which he had no right. (Per Richards,) That he was entitled to carry on the litigation and to obtain a decree for the whole, the rights of the heirs of the deceased plaintiff being ascertained by an agreement or a suit between those heirs and the surviving plaintiff. **Kanjumal v Gauri Shanker. 3 A L J 30.**

Abatement of suit (Survival of cause of Action)—*Contd.*

37-C P C, O 22, rr.3 (1), 3 (2), 5 (1882 Secs. 365 366, 367)—An objection that a person is not the legal representative must be taken at the earliest opportunity and before he is entered on the record as the legal person's name representative. When once the name of a person is entered on the record under S. 365, C. P. C. in the place of the deceased plaintiff as the latter's representative, the court is bound to proceed with the suit. No order for abatement can be passed after the legal representative's name is entered on the record. **Meenatchi Achi v Ananthanarayana. Aiyar. 12 M L J 380= 26 Mad 224.**

38—C P C, O. 22, r. 1 (1882 Sec.361) -Abatement of suit—Principal and Agent—Suit by Agent on behalf of undisclosed principal—Death of Agent —Agent's representatives not brought on record —No right to Principal to continue the suit :— Where an agent, suing on behalf of an undisclosed principal, dies pending the suit, the suit should, after the death of the agent, be continued, if it can be continued at all, by the agent's representatives and not by the principal. Cause title does not suffice to make the suit one on behalf of the principal (22 Bom 672 Dist.).

Periannan Chettiar v Rangachi Reddy. 17 M L J 116.

39.—Advances by partners—Rights regarding the advances made by him to the partnership—Account—Plaintiff's death—Defendant becoming plaintiff—Practice and Procedure.—A firm, owned by a joint Hindu family consisting of father and son, plaintiff and defendant 2, made advances to a partnership of which defendant 2 was one of the partners. Plaintiff brought a suit to recover the advances made from all the partners and the surety including defendant 2 The lower Court passed a decree against the defendants. One of the partners and the surety preferred an appeal to the High Court : and while the appeal was pending plaintiff died. At this, defendant 2, who thereby became the sole owner of the firm, was substituted in plaintiff's place :

Held, (1) that the fact that defendant 2 was partly interested both as creditor and debtor rendered the suit unmaintainable so far as his share was concerned, but it could not stand in the way of the Court's adjusting the rights of the parties in accordance with the rule of justice, equity and good conscience.

Abatement of suit (Survival of cause of Action)-*Contd.*

(2) that as defendant 2 became the sole creditor and plaintiff owing to plaintiffs death pending the appeal, he was entitled only to such relief as would have been possible and he occupied that position at the institution of the suit; that therefore, defendant 2 was only entitled to credit in the partnership account his share as well as the share which descended to him at plaintiff's death but not entitled to any decree in the present suit either against the partners or the surety. **Rustomjee v Purshotamdas. (3 Bom L R 227.)**

40.—C P C. O XXII, r. 6—Death of plaintiff—Case adjourned for arguments—Arguments heard without plaintiff's heirs as parties—Decree passed therein is a nullity. After evidence on both sides in a case was adduced. the case was adjourned for hearing arguments. Between those two dates, the plaintiff died. The arguments in the case, however, were heard without making the heirs of the plaintiff parties to the suit, and the suit proceeded to judgment and decree. The defendant appealed against the decree but the appeal was subsequently withdrawn. When the decree was sought to be executed against him the defendant contended that the decree was a nullity and therefore incapable of execution. *Held*, (1) that the decree was passed without jurisdiction, and therefore, a nullity; (2) that the withdrawal of appeal by defendant did not in any way validate the decree. **Vishvanath Dnyanoba v Lallu Kabla. 11 Bom L R 1070**

41.—In a suit to recover possession of timber, the first defendant had ceased to have any interest, and after the settlement of the issues he died. *Held*, that the cause of action against the other defendants survived, and that the first defendant having no interest in the subject of suit, it was not necessary that the suit should be revived against his representatives.

Moung Khine v Burn. 6 W R, Civ Ref. 2

42.—Lunatic Defendant—Abatement of suit until appointment of Manager—Act XXXV of 1858. The defendant was sane when he contracted the debt sued upon, but became insane before the suit was instituted. *Held*, that his wife could not be summoned as his legal representative to appear and defend until she had been appointed manager of her husband's estate under Section 9 of Act XXXV of 1858, and that

Abatement of suit (Survival of cause of Action)-*Contd.*

until the appointment of a manager, the suit must abate. **Ghassee Khan v Eldred. P R 89 of 1869.**

43.—C. P. C. O. 22 rr. 3 (1) 10, (1)—Ss. 365, 372) —Legal representatives—"Pending suit" —Consent decree for sale:—In a suit a consent decree was made which provided that a certain sum of money should be paid by a defendant to the plaintiff within a specified time, that the same should form a charge on certain property mentioned, and that in case of default, the property should be sold for the realization of the money. The defendant, the promisor, having died the plaintiff applied to have the names of his representative substituted in the place of the deceased defendants. *Held*: (1) that the decree was similar to a mortgage decree, viz, directing property to be sold on non-payment of the amount due within a specified time. (2) that such a decree was not a final one, (3) that plaintiff had to apply in the same suit for a sale order, (4) that therefore, the suit was pending one, and (5) the application for substitution can be made and sucessfully entertained in the same suit. Where an order is not final, liberty to apply to the Court is implied without its being expressly reserved in the order. **Kissory Lal Chowdhury v Raja Sewbux Bogla. 13 C W N 787.**

44.—C P C, O. 22, r. 4; O 1 rr. 8 (2), 10, (2) (3) (5), 11 (1882 Ss. 368, 32)—Application for substitution to deceased defendant—Substitution of heirs under S. 368—Subsequent knowledge of probate of will—Substitution of executors in place of heirs—Bona-fides—Limitation. Where an applicant obtained substitute of names of the heirs of a deceased defendant under Sec 368 C P C, through want of sufficient information that probate of the will of the deceased had been granted, and subsequently applied, more than 6 months after death, to have the names of the said heirs struck out and that of executors substituted:—*Held*, that the application was one under S. 32, C. P. C. and that even under S. 368, C. P. C., it was not barred as the applicant has throughout had a *bona-fide* desire to effect substitution of the proper legal representatives and had shown sufficient cause for delay.

Syed Hossein Ali v Abdur Rahim 7 C W N 529

Abatement of suit (Survival of cause of Action)-*Contd.*

45—Act X of 1859, s. 20 (Beng Act VIII of 1869, s. 21).—

A cause of action accruing against an agent for money received and accounts kept, falling within the class mentioned in s. 20, Act X of 1859, survives the death of the agent. **Hills v Shokhee Monee Dossee, 10 W R 59.**

46—C P C, O. 21 r. 16; O. 22 r. 4 (1882 Ss. 232 and 368)—Application by transferee of decree to bring in defendant's representative on record—Limitation Act, Art. 179, cl. 4—Step-in—aid of execution.

There is nothing in S. 232 of the Code to prohibit the transferee of a decree, from applying for and obtaining an order, under s. 368 of the Code, to bring in the representatives of defendant on record. Such an application is a step-in-aid of execution. **Mahalinga Moopanar v. Kuppanchariar, 17 M L J 485=3 M L T 21.**

47—Suit by original mortgagor against mortgagee and sub-mortgagee—Death of mortgagee pending suit — Civil Procedure Code (1882), S. 368.—

Plaintiff sued to redeem a mortgage passed by his deceased father to defendant No. 1, and joined defendant No. 2 as being the sub-mortgagee of defendant No. 1 and in possession of the property. After suit, defendant No. 1 died, and no steps were taken by the plaintiff within time to make his legal representatives parties. The suit was, however, allowed to be continued against defendant No. 2, and a redemption decree was passed in plaintiff's favour:—*Held*, on second appeal, that defendant No. 2 being the sub-mortgagee, and not the assignee of defendant No. 1, on the death of the latter, no cause of action survived to the plaintiff against defendant No. 2, and the suit abated under s. 368 of the Civil Procedure Code.

Padgaya v. Baji Babaji Moholkar. 20 Bom 549.

Notes:—Con: 20 Mad 35. Ref: 10 C L J 470.

48—C. P. C. O. 22 rr. 3, 5—Representation of deceased defendant—Executor not substituted—Decree passed against heirs if binding on the estate:—

B, one of the defendants in a money suit brought by P, died during pendency of the suit leaving a will in favour of the plaintiff in the present suit. On P's application the heirs of B were substituted as defendants in her place and the plaintiff's application for substitution of his own name was rejected as he had not obtained probate of B's will. A decree was passed *ex parte* and the property sold in execution thereof:—*Held*, that the estate of B was not properly represented in the suit and so far as the estate covered by the will was concerned it was not affected by the decree or the sale. (9 Bom 86; 9 C W N 201 S C. 32 Cal 296; 32 I A 23; 22 Cal 903 Fol: 4 Cal 342; 30 Cal 1044 Dist) **Harish Chandra Biswas v. Praidas Das, 14 C W N 1041.**

Abatement of suit (Survival of cause of Action)-*Contd.*

49—C P C O. 22 r. 4 (1882 S. 368)—Legal Representative—Person brought on record—Wrong person—Effect of:—

Under S. 368 of the Civil Procedure Code, a person whom the plaintiff alleges to be the legal representative of the deceased defendant and whose name the court enters upon the record in the place of such defendant sufficiently represents the estate of the deceased for the purposes of the suit and a decree passed in such suit will in the absence of fraud or collusion bind the estate though the person entered on the record is not the true representative or is only one of several representatives. A person prosecuting or defending a suit of a deceased party will be accountable to others who like himself are also the legal representatives or to the true legal representative.

Kadir Mohideen Marakkayur v. Muthukrishna Aiyar. 12 M L J 368=26 Mad 230.

Notes:—Fol: 28 Mad 420. Ref: 19 M L J 671.

50—C P C, O. 22 r. 4; S. 104; O. 43 r. 1 (1882 Ss. 368, 588 cl. 18.)—Penultimate clause—Order of abatement—Appeal—Death of one of several defendants—Election to proceed against survivors.

Though the penultimate clause in S. 368 does not in words require an order of abatement by Court, an order is necessary declaring that the suit has abated: and an appeal lies from such order under cl. 18 of S. 588. A mortgagee is entitled to waive his right to proceed against a surety and restrict himself to his right against the mortgagor and consequently when the surety dies after being impleaded in the suit along with the mortgagor, the mortgagee need not bring in the legal representatives of the deceased surety on record, but may proceed against the rest.

Mehdi Hussain v. Sughra Begam, 1903 A W N 15=25 All 206.

Abatement of suit (Survival of cause of Action)-*Contd.*

Notes:—The new code does not allow an appeal against an order of abatement.

51—C P C. O. 22 r. 4 (1882 S. 368)—Death of defendant—Time for joining his representatives—Dismissal of suit—Whether appeal lies.

Where in the course of an action the defendant died and the Munsiff dismissed the suit without giving sufficient time to join as defendants the representatives of the deceased defendant.

Held, that the course taken by the Munsiff was not an order under sec. 368 or any other section of the Civil Procedure Code, and that the proceedings of the Munsiff amounted to a decree and an appeal lay to the District Judge. 18 Mad 496 Fol: **Muthu Alagappa Chetti v. Selia Pillai, 3 M L T 327.**

52-C P C Ss.362, 368—Redemption suit-Parties.

In a redemption suit, defendant No. 1 the mortgagee, assigned all his rights under the mortgage to defendant No. 2, and died. *Held*, that his representatives were not necessary parties to the suit, and s 362 and not s 368 applied.

Nagesh v. Waman....., 88 P J 191.

53—C P C O 22 r. 4 (1882 Sec. 368)—Dispute as to who is legal representative—Procedure in execution applicating—Validity of sale.

Where there are two or more claimants to the estate of a deceased judgment-debtor, held that the decree-holder may apply for execution against any one of them whom he honestly and reasonably believes to be the same legal representative and if his interests in respect of the proceedings are identical with that of his rivals and if he acts without fraud or collusion he represents the estate even though it is decided subsequently that he has not the proper representative. (14 Mad 454; 20 Mad 230; 30 Cal 1044 Ref. to; 32 Cal 296 Expl 17 Mad 186 Dist 15 Mad 399 at 400, Not Appl)

Ramaswami Chetiar v. Oppilamani Chetti. 6 M L T 269=33 Mad 6=19 M L J 671= 4 Ind Cas 1059.

54—C P C. O 22 r.4; S 50 (1882 Ss 368, 108, 234)—*Ex parte* decree against a defendant—Application by representatives of the defendant to be brought on record, maintainability of. An *exparte* decree was passed against a defendant in a suit. An application was made, after the death of such defendant, by his representatives, praying to set aside the decree under S. 108 of the Code and to add them (the representatives) as the legal representatives of the original defendant. *Held*, where a defendant dies before a decree, S. 368 of the Code provides for an application by the representatives of the deceased defendant to be brought on record. In this case, the defendant died after decree. The section applicable after decree is 234 of the Code, which does not authorise any application to be made by the representatives of the deceased judgment-debtor to bring them on the record but only authorises the plaintiffs to make such an application. S. 108 of the Code only authorises applications by the defendant against whom an *ex—parte* decree has been made. Therefore, the application could not be entertained. **Sambasiva Chetti v. Veera Perumal Mudali, 28 Mad 361.**

Abatement of suit (Survival of cause of Action)-*Contd.*

55—Mother's interest on—Partition — Civil Procedure Code (Act XIV of 1882) S. 361 ill (c).—D, a Hindu Mother was allotted a one-third share of certain properties on partition. A suit was brought by her for a relief, restraining the defendant from encroachments on her share. The defendant compromised by an agreement to purchase her share of the property. The question of the value of her share was to be decided by the arbitrators. After the award of the arbitrators was filed but before a decree could be drawn thereon, D died leaving two sons. The sons obtained an *ex parte* order to revive the suit in their own names. On the defendants application to set aside the *ex parte* order as the suit abated on the death of D it was, *held*, that on account of the death of D the suit did not abate, and the right of action on the award survived to the sons. 4 C W N 280 Affirmed in appeal in.

Chooney Money Dassee v. Ram Kinkur Dutt, 28 Cal 155=5 C W N 242.

55A—C P C. O. 1, r. 10-Partition-decree-Execution—Death of plaintiff — Abatement of suit—Application to set aside abatement — Limitation Act (IX of 1908). Art. 171 — Court — Inherent Powers—All parties to be before Court in partition-suit—Addition of parties.

In a partition-suit, a decree was passed on the 5th April 1892 on a compromise One Revchand who was a defendant in the suit died on 18th October, 1893, leaving him surviving a minor

Abatement (suit)

4 SURVIVAL OF CAUSE OF ACTION-*Contd.*

son named Lukhmichand who attained majority on the 7th February 1907. He made an application on the 16th April 1910 for bringing him on the record and for issuing a commission to effect a partition according to the rights declared in the partition-decree

Held, (1) that the suit abated, as soon as the C P. C. of 1908 came into force, so far as regarded the applicant's father who was a party, and the application to set aside the abatement by adding the applicant as the legal representative, not having been made within sixty days, was barred by article 171 of the Limitation Act of 1908.

(2) that, in a partition suit, all the parties should be before the Court, and there was nothing in the C. P. C. (Act V of 1908) limiting or affecting the inherent power of the Court to make such orders as might be necessary for the ends of justice, and under O. 1, r. 10, the Court might, at any stage of the proceedings, order that the name of any person, whose presence might be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added.

Lakhmichand Rewachand v. Kachubhai Gulabchand, 13 Bom L R 517.

56—Plaintiff sued R for damages for wrongful arrest and prosecution. R died pending the suit. *Held*, that the suit was not one to which Act XII of 1855 could be applied, the alleged wrong having been committed more than a year before R's death, and that as the wrong did not benefit the estate of R, the remedy could not be pursued against his representative, but the suit must abate. **Haridas Ramdas Lakhasa v. Ramdas Mathuradas, P J (1889), 53= I L R 13 Bom 677.**

Notes:—Dist: 26 Bom 597. Ref: 8 M L J 180. 31 Cal 406. Fol: 28 Mad 487.

57—C. P C. O. 22. r 10 (1882 S. 372)—Civil Procedure Code (Act XIV of 1882) Sec. 372—Parties, Substitution of-Assignment of the rights of a plaintiff—Substitution of assignee—Limitation Act (XV of 1877). S. 22.

When the name of the plaintiff is removed from the record and that of his assignee substituted in its place, the provisions of section 22 of the Limitation Act are applicable and the suit must be dismissed if it is barred at the date when such substitution takes place. (25 Cal 409 Appr: 5 Cal 720 Disapproved and Distd.

Abdul Rahaman v. Amir Ali, 5 C L J 486= 11 C W N 521 (F B)=34 Cal 612= 2 M L T 312.

58—C. P. C. O. 22 r. 10 (S. 50) (Ss. 372, 234) —"Assignment, creation or devolution of any interest"—Transferree of interest—Pending suit—Execution against assignee of personal decree against assignor:—

A & Co were sued by B and pending the suit the business of A & Co were sold to C, but A & Co continued to manage the business of C as C's agent. A personal decree was obtained against A & Co. and execution was sought to be had against C as A & Co's representative. *Held*, that neither S. 234 nor S. 372 applied, there having been no assignment, creation or devolution of any interest, within the meaning of the section, the liability not being a proper subject of an assignment. (30 Cal 261 Fol).

Arbuthnot Industrials Ltd. v. Muthu Chettiar, 31 Mad 464.

59—C.P.C. S. 368—Suit for damages for malicious prosecution-Cause of action accruing in Foreign State, but suit instituted in British India—Discharge of plaintiff in former proceedings-Death of defendant pending appeal — Abatement of appeal — Civil Procedure Code, 1882, Sections 368, 582, and Act XII of 1855, Section 1—"Reasonable and probable cause".—

Upon a charge of theft, brought by defendant in the Courts of the Kalsia State, plaintiff was arrested and kept in custody for about six weeks, but was subsequently discharged after full enquiry had been made into the truth of defendant's allegations. Thereafter plaintiff instituted a suit in the District Court, Umballa, within the jurisdiction of which defendant was resident, for Rs. 3400 as damage for malicious prosecution. Defendant traversed the allegations in the plaint, and further pleaded that plaintiff could not sue in a British Court on a cause of action which had arisen in Kalsia State. The Court overruled this objection and awarded plaintiff Rs. 610 as damages, whereupon both parties appealed to the Chief Court. Pending the appeal, defendant died, and his son was brought on the record as his representative, and at the hearing it was contend-

Abatement (suit)
4 SURVIVAL OF CAUSE OF ACTION-*Contd.*

ed on his behalf, (*i*) that plaintiff's appeal had abated on defendant's death; (*ii*) that plaintiff had not proved that the alleged malicious prosecution amounted to a tortious act *lege loci delicti commissi* (*i. e.*, of the Kalsia State) as well as *lege fori* (*i. e.*, of British India); (*iii*) that the former proceedings had not resulted in the *acquittal*, but merely in the *discharge*, of the plaintiff; and (*iv*) that, in any event, defendant had not acted without "reasonable and probable cause" in charging plaintiff with theft.

Held, as to (*i*), that plaintiff's appeal did not abate on the death of defendant as aforesaid, as to (*ii*), that the plea not having been raised in the Lower Court in this form, could not be raised in the Chief Court on appeal; and as to (*iii*), that a discharge after full inquiry is better proof of the innocence of an accused person than an acquittal.

But *held*, upon the facts of the case, that plaintiff's suit for damages must be dismissed, inasmuch as defendant had not acted without reasonable and probable cause in charging plaintiff with theft.— **Bhagwan Singh v. Pandit Joti, 4 P R 1897**

60—C.P.C.O. 22 r. 10. 3 (1) (1882 Ss.372 and 365)—Meaning of 'other cases' in S.372-Mortgage decree—Order absolute for sale—Death of decree-holder pending suit—Application for substitution by legal representatives of a decree-holder if under S. 372, C. P. C. The words 'other cases' in S. 372, C. P. C., mean cases other than those specifically mentioned in the previous sections in Chapter XXI. If, therefore, the preceding sections, though they may have dealt with the event of death, have dealt so with particular cases only, other cases will fall under S. 372. S. 395, C. P. C., refers to death only as occurring before decree. A mortgage suit, even after a decree has been made and an order absoltute for sale has been passed, is a pending suit until the sale actually takes place, and an application made before sale by the legal representatives of the deceased decree-holder for substitution would fall within S. 372, C. P. C. 23 All 331, 334 ref. to.

Bhugwan Das Khettry v. Nilkanta Ganguli, 9 C W N 171

Notes:—Fol. 2 C L J 288; 13 C W N 787.

61—Where the Court appoints a receiver of the property of an insolvent judgment-debtor, it cannot discharge the insolvent until the receiver has made his report.

Chanmalapa v. Hari, 1887 P J 79.

62—C.P.C. O. 22 r. 10 (1882 S. 372) — Decree in mortgage suit assigned before passing order absolute for sale—Assignee of mortgage decree.

An assignee of a mortgage decree order absolute can be made a party under S. 372, C. P. C., to an appeal against his assignor; but he cannot raise any defence of the plea of limitation to the appeal which could not be raised by the assignors.

Chunni Lal v. Abdul Ali Khan, 23 All 331.

63—C. P. C. O. 22 r. 10 (1882 S 372) — C. P. C. —Pendency of mortgage suit—Objections under S. 372 not appealable.

No appeal lies against an order allowing objections under Section 372 C. P. C. A mortgage suit is to be considered pending within the meaning of S. 372, C. P. C, until the conditional decree is made absolute. 9 C W N 171 and 23 All 331 Ref. to. **Fana v. Tetka, 2 N L R 178.**

64.-C.P.C.O 22 r 10 (1882 S.372)-"Assignment creation &c., of interest"— "Interest".The assignment by a judgment-debtor company of its liabilities to another company, the transaction is no assignment, creation or devolution of interest within the meaning of S 372. The interest referred to in the section is interest in the property which is the subject matter of the suit.

Harsih Chandra Tewary v Chandpore Company Limited 30 Cal 961.

NOtes:—Fol: 31 Mad 464=4 M L T 190.

65.—Reversioners—Contingent reversionary heir. Where a cause of action accrues to a contingent reversionary heir and is barred as against him, it is barred as against all the successive reversionary heirs. **Jamnabai v Dharsey 4 Bom L R 893.**

Notes:—Dist: 13 M L J 360.

66—*Res judicata*.—The abatement of suit under S 371 of the Civil Procedure Code has no other effect than that of preventing the plaintiff or those claiming under him from suing again on the same cause of action. The section does not say that the title of the plaintiff or those claiming under him is extinguished by such abatement and that in any suit, brought not by but against

Abatement (suit)
4 SURVIVAL OF CAUSE OF ACTION *Contd.*

him, the plaintiff cannot defend his possession or rights by relying upon his true title. The abatement of a suit under S 371 has not the same effect as *res judicata* under S 13 of the Civil Procedure Code. **Jayasing v Gopal 6 Bom L R 638**

67.—C P C O 22—Substitution application for —Privy Council Appeal—Death of parties after final admission and before transmission of record After the final order for admission of an appeal to His Majesty in Council has been made by the High Court, and before the transcript of the record has been transmitted to England, the High Court has power to entertain an application for substitution of the legal representatives of parties who have died meanwhile. Order 22 of the Civil Procedure Code, 1908, has no application to this matter. No question of limitation can consequently arise. Any order for substitution made by the High Court, however is subject to the rules of the Judicial Committee and such directions as may be given by their Lordships at the hearing of the appeal.

The history of the practice in this matter reviewed. **Jadunandan Koer v Ramjiban Lal 10 C L J 331**

68.—C P C O 22 r 10 (S 372)—S 372 not applicable to execution proceedings. **Mumotha Nath Mitter v Rakhal Chandra Tewari 11 C W N 752.**

69.—C P C O 22 r 10 (1882 S. 372)—'Devolution of interest'—Interpretation. The phrase "devolution of interest" in S 372 of the Civil Procedure Code is not confined in its meaning to devolution by death. The legislature intended by this section to provide for all cases not falling within the foregoing sections as to devolution by assignment marriage or death. **Macleod v Kisson 6 Bom L R 995.**

70.—(Act XIV of 1882),—S. 366—Legal representatives—Wrong representative brought on record—Civil Procedure Code (Act V of 1908). Order 22, rule 3, cl. [1]—Abatement. A *bona fide* application to bring the legal representatives (though the wrong persons) of a deceased defendant on record is an application made to the Court within the meaning of section 366 of the old Code, Order 22 rule 3, sub-rule [1] of the new Code, as not to cause the suit to abate. 22

Abatement (suit)
4 SURVIVAL OF CAUSE OF ACTION-*Contd.*

Mad 125 Appl. 26 Mad 230; 27 Bom 162 Ref. **Mallaprajadu v Veeraragava Row 7 M L T 43=5 Ind Cas 514.**

71.—C P C O 22, r 4 (1882 S 368) Ejectment suit against several trespassers—Death of one of the defendants-Abatement of suit-Withdrawal of suit with consent of surviving defendants. In a suit for ejectment against several trespassers, the death of one of the defendants, does not cause the suit to abate against the surviving defendants. The right to sue survives against them so far as their interests are concerned.

Where, after the death of one of the defendants, the suit was withdrawn with the consent of the remaining defendants and the Court granted leave to plaintiff to bring a fresh suit: *Held*, that the leave was not *non est* by reason of the second defendant's representatives not having consented to the withdrawal, but was operative till set aside on review or revision. 33 Cal 580; 34 Cal 1020, 11 C W N 1100, 6 C L J 715; Fol. 31 Cal 487; 8 C W N 442; 31 I A 71 Dist. **Perumal v Pichan 8 Ind Cas 268.**

72.—Abatement of suit— C P C O 22 r. 10 (S 372) Insolvency pending suit on mortgage—Official Assignee not made a party not bound—Devolution of interest of judgment-debtor or Official Assignee.

Sec 372, Civil Procedure, applies to the devolution of interest by operation of law or in *invitum* and an Official Assignee in whom the rights of the insolvent are vested during the pendency of a suit can be properly made a party under Ss 32 and 372, Civil Procedure Code (18 Cal 43 Dist).

Where a person is adjudicated an insolvent pending a suit brought against him, which is a purely an action *in personam* the Official Assignee is not a proper party. S. 372, Civil Procedure Code, has no relation to such a case as the section only relates to the case of an assignment pending suit of an interest in the subject matter of the suit. (18 Cal 43; 22 Cal 259) Appr. **Punithavela Mudaliar v Bhashyam Aiyangar 12 M L J 282=25 Mad 46.**

Notes—Dist; 26 Mad 230; Ref 9 C W N 14; Dist: 12 M L J 368.

73. C P C O 22 r 4 (1882-S 368)-Death of defendant—Power to adjourn. A Court has no power

Abatement (suit)
4 SURVIVAL OF CAUSE OF ACTION-*Contd.*

to adjourn a suit for trial when it is shown that one of the defendants died leaving legal representatives and cause of action did not survive solely to the surviving defendants. The Court cannot proceed further with the suit until the course prescribed in S 368, C P C, which is applicable to such a case, is taken (or until the time fixed by law for taking such a course has elapsed).

Purushottama Patnaik v Chaitana Naiko 12 M L J 188.

74.-C P C O 22, r 4 (1882 S 368)—Decree passed by mistake against a deceased defendant-Decree declared incapable of execution-Remedy open to plaintiff. When a decree is allowed by a plaintiff to be passed *exparte* against a sole defendant who is not alive at the time of the passing of such decree, but of whose death the plaintiff had at the time no knowledge, it is competent to the plaintiff, on the decree so obtained being declared incapable of execution to apply under S 368 C P C., to have the case reopened after bringing upon the record the legal representatives of the deceased defendant. **Qutub Ali v Dwarka Das 1904 A W N 44**

75.—C.P.C. O 22 r 10 (1882 S 372)-Devolution meaning of. 'Devolution of interest' referred to by C P C, S 372 is not confined to devolution by death, but to all cases of transfer from one to another. **Rajah Sowundra Mohan v Rani Shiromoni 5 C W N 307=28 Cal 171**

Notes;—Ref; 30 Bom 250; 6 Bom L R 995 Dist: 7 O C 78.

76-Abatement of suit against joint tort-feasors-Compromise between plaintiff and one defendant —Such compromise no bar to a decree against the other defendants.

The plaintiff sued several defendants jointly to recover damages in respect of an alleged assault committed on him by the defendants, but entered into a compromise with one of the defendants. *Held*, that this compromise did not preclude the plaintiff from recovering damages against the other defendants. (7 S and L. 547, Dist.)

Ram Kunwar v. Sheikh Ali Husain,(1908) A W N 190.

77.—Leave of Court. The original plaintiffs in this case were H L, J A and M A, the two latter claiming as the assignees of a moiety of H L's share. Subsequently L A and U A were subsituted for J A and M A on the ground that the latter had transferred their interest in the peoperty sued for the former. *Held*, that in order to maintain the suit J A and M A should have proved

Abatement (suit)
4 SURVIVAL OF CAUSE OF ACTION-*Contd.*

the purchase and the payment of the consideration. That no proceedings having been taken under s 372 of the Code of Civil Procedure, in respect of the substitution of L A and M A, there was no assignment within the meaning of the statute which could enable them to go on with the action. **Ramji Mal v Hazari Lal. 5 W N 242.**

78—C. P. C. O. 22 R 1 (S. 361)—Act XII of 1855 (The Legal Representatives suits) S. 1 cl 2-Suit for damages for malicious prosecution against prosecutor himself—Death of prosecutor pending suit—Right of plaintiff to bring in his legal representatives.

This Suit for damages for malicious prosecution was instituted against the prosecutor, when he was alive, and, on his death, before the final hearing, plaintiff sought to bring his legal representative on the record. Held, that the suit abated on the death of the defendant and that plaintiff was not entitled to proceed against the legal representatives of the deceased defendant under cl 2 of S. 1 of Act XII of 1855 since that clause had no application to an action commenced against the wrong-doer in his life-time. but could govern only actions, commenced against the executors, administrators or other representatives of a deceased wrong-doer. 13 Bom 677 Fol . 31 Cal 405 Appro. **Ramchode Doss v Rukmany Bai. 28 Mad 487 also 8 C W N 329 also 26 Mad 499.**

79.—C.P.C.O. 22 r 10 (1882 S 372)-Appeal. An appeal lies against an order directing substitution of parties under section 372 C. P. C; such an order amounts to an order disallowing objections to substitution. **Sourindra Mohan Tagore v Rani Shiromoni. 5 C W N 307= 28 Cal 171.**

Notes.—Ref. 30 Bom 250=6 Bom L R 995. Dist: 7 O C 78.

80—C P C O 22 rr 10, 4 (1882 Ss. 372, 368)-Limitation Act, S. 178-Decree directing accounts pending suit—Limitation;

Where a decree was made declaring that a party was entitled to a share in a certain property and directed the taking of accounts of that property, and the said party applied to have the death of certain defendant who had died after the decree to be recorded and the name of his heirs substituted before the final decree:—*Held*.—That S. 372 C P C applied and that the right of the petitioner to apply for such substitution accrued from day to day and was not barred under Sec. 178 of the Limitation Act. The *ratio* in such cases is not

Abatement (Suit)

4 SURVIVAL OF CAUSE OF ACTION-*Contd*

whether the decree directs a partition or a taking of accounts, but whether there is a pending suit. 5 Cal 731:8 Cal 420; 3 C W N 757 followed.

Surendro Keshub Roy v Khetter Kristo Mitter. 7 C W N 517=30 Cal 609.

81A-C P C O 22 r 4 (1882 S. 368)-Suit, institution of, in a Civil ourt-Death of defendant before presentation of plaint-Court's power to substitute his representatives—Jurisdiction.

Held, that when a plaint is presented by plaintiff for the purpose of instituting a suit against a defendant in accordance with the provision of the Civil Procedure Code, 1882, and it afterwards turns out that the defendant had died before the presentation of the plaint, the Court has no jurisdiction to substitute the representatives of the deceased as defendants and allow the suit to proceed as against them. (16 Mad 319, Ref: and 12 W R 45 approved & followed.)

Not only is there nothing in the Civil Procedure Code to authorize the institution of a suit against a dead man as distinct from a suit against his legal representative but the death of the defendant puts an end to the suit within a preseribed period unless steps are taken within that period for bringing in the legal representatives.

Veerappan Chetty v Tindal Ponnan. 3 M L T 12=17 M L J 551=31 Mad 86.

82-C P C O 22 r 4 (1882 S 368).—Application.

Held, that the provisions of sec. 368 can only be applied, where the applicant is the legal represenative, and not when he is merely a person alleging himself to be such representative. (8 Mad 306, Cons). **Vemulapati Polamrazu v Uggumadi Subbarama Reddy. 4 M L T 227=19 M L J 33=2 Ind Cas 479.**

83—C P C 0 22 r 10 (S 372)—Receiver—Suit in ejectment by receiver—Discharge of receiver pending suit—Devolution of interest—See:— **30 Bom 250.**

84—Code of Civil Procedure (Act XIV of 1882) Secs 13 and 43—First suit for revocation of agency-Second suit for dismissal for mis-conduct -no bar-Meaning of 'Irrevocable Agency'-Abatement.

The plaintiff brought a suit to revoke the authority given to the first defendant as agent for a time of 18 years under a power of Attorney, which was dismissed on the ground that the agency was irrevocable. The present suit was instituted by the plaintiff for the dismissal of the first defendant on the ground of mis-conduct. The defendant pleaded that the suit was barred by *res judicata*.

Held, that it was not barred. In every contract of service there is an implied condition that if the service be not faithfully rendered the employer is entitled to put an end to the contract. **Mayil Kolta v Kumdur Kultala. 7 M L J 87=33 Mad 162=5 Ind Cas 758.**

85—C P C Act XIV of 1882, S 503—Receiver—Appointment of new Receiver in place of Receiver

Civil proceedings instituted by original receiver and pending at date of appointment of new Receiver. Necessity for making new Receiver party.

Where a Receiver appointed under section 503 of the Code of Civil Procedure, institutes Civil proceedings and is then replaced by another Receiver it is necessary that the new Receiver should be made a party to those proceedings. Observations on the mode and circumstances in which a new Receiver will be made a party. S. 372 of C P C is only and enabling section.

Akula Paradesi v Dhelli Jugannadha Row. 28 Mad 157.

86—C P C, 1882, ss. 366, 367—Application by alleged adopted sons of deceased plaintiff to be brought on record—Appeal from order rejecting application and order declaring suit abated.

On the death of the plaintiff in a partition suit, an application was made on behalf of a boy alleged to be the adopted son of the deceased to be brought on the record in his place. The Court of first instance dismissed the application and declared the suit abated. Appeals were preferred against both the orders. *Held*, that the adopted son was the legal representative of the person to whom he was adopted and under s. 366 it was not competent to the Court to order that the suit should abate. Appeals lay against both the orders.

Subbayya v Saminadayyar. 18 Mad 496=5 M L J 63

Notes.—[F., 10 O C 121; 3 M L T 327, 30 All 348=5 A L J 363=A W N 1908, 139; R., 27 Bom 162, 5 Bom L R 1041, 2 N L R. 7, 9 O C 351, 12I P R 1907, 587=51 P W R 1907; D., 26 Mad 224=22 M L J 380].

87—Suit for dissolution—Necessary parties - Party, death of—Substitution of heirs, not made in time—Abatement of suit:

A suit for dissolution and winding up of a partnership involves the determination of the plain-

Abatement (suit)

4 SURVIVAL OF CAUSE OF ACTION-*Contd*

tiff's share and the taking of accounts, and the plaintiff's share could not be determined definitely without making all the parties interested in the partnership parties to the suit, and the accounts could not be properly taken in the absence of any of them If on the death of one of the defendants his heirs are not made parties to the suit by substitution in time, the whole suit is to be dismissed even where no relief against the deceased defendant or his heirs was asked for specifically. 14 Cal 791 ref to and foll. **Srinath Pal v Hari Charun 7 C L J 266.**

88—Death of defendant pending suit—Cause of action, when survives against his legal representative—No assets

Where the manager of a temple sued the pedda jiyyangar of the temple to recover compensation for loss of income and for expenses caused to the temple by his alleged refusal to give up the keys of the temple and have worship duly performed therein and, on the defendant dying pending the suit, his successor in office was brought in as his legal representative, *held* that, whether the misconduct on the part of the deceased defendant was regarded as a tort or as a breach of contract of personal service, in neither case the cause of action survived against his legal representative, for the reason that the misconduct was one purely personal to the deceased and did not in any way benefit his estate. **Satagopa Ramanuja v Mahabir Dossji 8 M L J 180.**

Notes:-13 Bom 677 Ref

88 1—Abatement—Suit to declare invalidity of relinquishment deed as against one's reversionary rights—Death of plaintiff—Cause of action—Whether survives in favour of legal representatives.

A suit to declare a deed of relinquishment invalid as against one's reversionary rights abates on the death of the plaintiff, and the cause of action does not survive to his legal representatives. 27 Mad 588, Fol.; 33 Mad 342, expl.: 29 Mad 390; 11 M L J 70 & 33 I A 156, Ref.

Kommeneni Chinna Veerayya v. Kommeneni Lakshminarasamma, 11 M L T 184.

88*B*—Pre-emption—Wajib-ul-arz—Interpretation of document—Custom or contract—Abatement of suit—Share of each vendee specified in sale-deed—Death of one such vendee.

In a suit for a pre-emption based upon the *wajib-ul-arz*, the plaintiff relied upon an entry in the *wajib-ul-arz* of 1870, which gave a right of pre-emption to (1) a real brother, (2) a near brother and (3) other co-sharers in the village. The defendants, on the other hand, produced the *wajib-ul-arz* of 1860, in which the right was given in these terms. "If any co-sharer wishes to transfer his proprietary rights by sale or mortgage, first let him transfer it to a real brother or a near brother or to other co-sharers, and in case these refuse or decline to pay the proper price, the owner may transfer to whomsoever he pleases". *Held*, that this being the whole of the evidence in the case, the existence of the custom was not disproved and that the later *wajib-ul-arz* explained the ambiguity in the earlier one.

Held, also that, where the sale was made to three sets of vendees, the share of each of whom was specified, and one of them died and his heirs were not brought on the record till after six months, the suit did not abate in respect of the shares of the other two sets. **Hukam Singh v. Thakur Das. 8 A L J 1135.**

2 ABATEMENT OF APPEAL.

(5) Death of Appellant.

89—(5) Death of appellant.—Death of appellant.—The death of an appellant was held to be no reason for the abatement or postponement of a case which was being conducted by an agent of the deceased defendant, and was not in any way prejudiced. **Jugomohun Singh v Dabee Pershad. W R 1864 Act X 47.**

89A—S. 99 O XXII, rr 3, 4—Sole appellant dying pending appeal—No application made to bring representatives on record-Vakalatnama filed on behalf of the representatives-Abatement-Irregularity not affecting merits.

An appellant died after filing his appeal and no application was made to bring his representatives on the record, but a *Vakalatnama* was filed by a Pleader on behalf of the representatives and the appeal was heard and the suit decreed in the name of deceased appellant:

Held, that this was not a mere irregularity which could be cured by S. 99 of Code of 1908 and that the appeal had abated. **Badal Khan v Murtaza 9 Ind Cas 977.**

90—Death of *pro forma* defendant.

The death of a *pro forma* defendant, who had appealed along with the other defendants who could have maintained their appeal independently of the said *pro forma* defendant, does not serve to abate the appeal of other defendants.

Ashiq Husain v Asghari Begam. 4 A L J 809 =30 All 90=1908 W N 21.

Abatement (Appeal)

5 DEATH OF APPELLANT-*Contd.*

91—Code of Civil Procedure (Act XIV of 1882), Section 588 cl. 18—Order rejecting an application for substitution—Appeal.

Held, that an order rejecting an application made by persons claiming to be the legal representatives of a deceased appellant is an order within the meaning of section 588, clause 18 of the Code of Civil Procedure, and it is not necessary that the dispute referred to in section 367 of the Civil Procedure Code, must be one between rival claimants as legal representatives.

Hanwant Singh v Ramgopal Singh.
5 A L J 363=30 All 348=1908 A W N 139

92—Suit for malicious prosecution—Second appeal by defendant in a suit for malicious prosecution—Death of defendant-appellant—No abatement—

Where pending an appeal against a decree passed against a defendant in a suit for damages for malicious prosecution, the appellant dies, the appeal does not abate and can be prosecuted by his legal representative—26 Bom 597, opinion of the majority followed.— **Paramen Chetty v Sundararaja Naick. 26 Mad 499.**

93—C P C O 22 r 1 (1882 S 361)—Abatement of appeal—Right of next reversioner to prosecute appeal:—An appeal by a plaintiff reversioner against a decree passed against him dismissing his suit abates on that reversioner-appellant's death, and his son, though the next reversioner, cannot prosecute the appeal. **Sakhyahari Ingle Rao Sahib v Bhavani Boyi Sahib 27 Mad 588.**

Notes—Disap. 29 Mad 390 F B=16 M L J 307=1 M L T 183.

94—An appellant having died and no application having been made before the lapse of two months to enter appearance on behalf of the representatives, the appeal was held to have abated **Khettronath Dey v Gossain Dass Dev. 11 W R 543.**
Bhagian v Palmer 20 W R 267.

95—On the 15th April, 1886, at the adjourned hearing of this appeal, the counsel for the appellant stated that he had been informed that his client was dead, and had been dead since the beginning of 1885. *Held*, that under these circumstances the first paragraph of s 366 Code, of Civil Procedure applies, and as no application has been made by any one claiming to be the appellant's legal representative, to be brought upon the record under s 365, the appeal abates. **Gregor Grant v The Oudh and Rohilkhand Railway Company. 6 W N 90.**

96—Civil Procedure Code ss. 102 (1882, ss 365 366) and 348 (1882, s 561) and Act XXIII of 1861, s 37 (Act X of 1872, s 582)—Issue based on objections by respondent—Where the special appellant died after the High Court had referred for trial to the Court below an issue based upon objections taken by the respondent under s 348 of Act VIII of 1859—*Held* that the appeal must abate in accordance with s 102 of Act VIII of 1859 and s 37 of Act XXIII of 1861: and that the respondent does not require that it should proceed, in order that he might have an opportunity of taking objection to the decree of the Court below. If the respondent desires to secure the right of asking for decision on his objection, he must file a separate appeal. **Jaita Bin Kalu v Balu Bin Raghu 3 B H C 81.**

Notes—Ref: 10 B H C R 397; 23 Bom 692.

(6) DEATH OF APPELLANT DURING PENDENCY OF APPEAL.

97—S.366 C P C—Application for substitution—By one only of several representatives.

When a sole appellant died during the pendency of his appeal leaving three legal representatives, and only one of such legal representatives was brought upon the record in the place of the deceased appellant within the prescribed period of limitation. *Held* that the appeal must abate. Either all the legal representatives of the deceased appellant should have been brought upon the record as appellants, or, if any had refused to be joined as appellants, they should have been brought on as respondents. **Ghamandi Lal v Amir Begam. 16 All 211, 14 W N 92.**

Notes:—Con: 23 Mad 125, 25 All 27. Ref: 22 All 222; 26 Mad 230; 235. Dist: 12 M L J 368; 25 All 27. Fol. 30 All 117=(1908) W N 41=5 A L J 62.

98—Sections 365—556 558—Legal representative of a deceased appellant—

When the legal representative of a deceased Plaintiff or Appellant applies under section 365 Civil Procedure Code within the period allowed by Law, the Court shall place him in exactly the same position (supposing of course that the right to sue or appeal survives) as the Plaintiff or Appellant held at the time of his death, in respect of the suit under litigation.

Bhopat Singh v Gayaram. 4 C P L R 183.

99—Death of sole appellant-Nullity of decree—Remedy—

F., the sole appellant before the Divisional Court, died while the appeal was still pending, but after the death of F, the sons of F applied to have their names placed on the record in the

Abatement (Appeal)

6 DEATH OF APPELLANT-DURING PENDENCY OF APPEAL-*Contd.*

room of their deceased father This application was rejected by the Divisional Court for default When the appeal was heard on the merits no objection was raised by either party and the appeal was decreed in the deceased appellant's favour

Held on the revision side, no appeal being competent that the proper order to pass was one setting aside the decree of the Divisional Judge as a nullity leaving either party to make any application which he might be advised to make to that Court with a view to re opening the case

Chaunni Lal v Farida 78 P R 1891

100—C P C O 22 r 2 (1882 Sec 362)—Parties —Death of sole appellant-All representatives not brought upon the record—Abatement of appeal —The sole appellant a Muhammadan, died pending the appeal leaving him surviving a widow two sons and two daughters The two sons applied to have themselves brought on the record as appellants but did not ask that their mother and sisters should be made parties to the appeal An application to that effect made by the respondents was not acted upon by Lower Appellate Court. *Held* that it was the duty of the sons to have brought upon the record, either as appellants or respondents the other representatives of their father and, as they had not done so the appeal abated

Haidar Husain v Abdul Ahad 3 M L T 207=5 A L J 62=30 All 117 =1908 W N 41

101—Civil Procedure Code (Act XIV of 1882) Sections 366, 372—Death of appellant during pendency of appeal—Suit against sovereign as Ruler of State—Public Functionary-Evidence Act (I of 1872) Section 57 (8)—During the pendency in the Chief Court of an appeal from a decree given against the Maharaja of Kashmir during the lifetime of the late Maharaja the Maharaja died and as no application was made within 60 days to put a representative of the deceased appellant upon the record it was contended for the respondent that the appeal abated under Section 366 Civil Procedure Code It appeared that the suit was not to enforce any liability contracted by the defendant personally but that the decree must be taken to have been passed against the Maharaja as Ruler of Kashmir, and that he must be regarded as having appealed against it in that capacity

Held, that as the Court was bound, under Section 57 clause 8 of the Evidence Act, to take judicial notice of the facts that the State of Kashmir existed, and that the Maharaja was its Sovereign recognized as such by the British Crown, and as the decree was against the Maharaja in his capacity as Ruler of the State, and was appealed from by him in that capacity the appellant must be regarded as a public functionary who was sued under, and appealed by his official designation and the appeal did not therefore abate under Section 366 of the Code as the true appellant was not dead the decree not being against the Maharaja in his private capacity, and the State which he represented for the purposes of the suit still existing

Maharaja of Kashmir v Mohanlal (51 P R of 1886 Civil)

102—One of the appellants dying pending the appeal—Representative of the deceased not brought on record—All persons interested not before Court—Abatement of appeal

One of the appellants against a joint decree died during the pendency of the appeal in the High Court His representatives were not brought on the record *Held* that the appeal must abate as the Court had not before it all those persons whose interest might be affected by the decree (22 All 233 Pol) **Ram Lal v Debi Singh 4 Ind Cas 385**

See also cases under C P C (1908) O 22

103—Appeal—Civil Procedure Code 1882 366—Application by legal representative to carry on appeal—The appellants father having died during the pendency of an appeal lodged by him a notice was served upon the appellants two adult brothers but they having failed to apply within sixty days the appellant who was a minor applied several months afterwards to be put on the record in his deceased father's place as his legal representative which was done The assistant Judge who heard the appeal was of opinion that in consequence of the omission on the part of the brothers of the appellant to apply the appeal abated and he passed an order accordingly *Held* that the application having been made by the minor son within the time limited by law the order of abatement made by the Judge was wrong Although the complete legal representation vested in the minor son and his two brothers, s 366 of the Civil Procedure Code only required an application to be made by a person claiming to be the legal representative, in order to prevent an order of abatement being made If neither of the brothers was willing to have

Abatement (Appeal)
6 DEATH OF APPELLANT-DURING PENDENCY OF APPEAL - *Contd.*

his name placed on the record, the respondent was entitled to have them made defendants, so that they might be bound by the decree. The minor son could then proceed alone with the appeal. **Bhikaji Ramchandra v. Purshotam 10 Bom., 220.**

Notes:—Diss: 17 All 172. Con: 23 Mad 125; 12 M L J 368. Ref 18 Mad 496; 16 Bom 23; 27 Bom 164.

104-C. P. C. O. 22 r.1 (1882 S 361)-Right to sue-Appeal—Death of appellant—Auction for libel—Legal representative. The words 'right to sue' in S. 361 of the Civil Procedure Code must be interpreted in their ordinary meaning, namely, the right to obtain relief by means of legal procedure. It does not follow that the right to appeal against a decree partakes of the nature of the original decree. Plaintiff sued to recover damages on account of a libel, and obtained a decree for damages against defendant. Defendant paid the amount of the decree and filed an appeal in the High Court after which he died; his son was then brought on the record as his heir and legal representative. To this it was objected that at defendant's death the appeal abated and his son had no right to continue the same:-*Held*, by Fulton and Crowe. J. J., (Candy, J., dissentient) that the appeal did not abate. Where the claim has been perfected by judgment, the nature of the relief claimed on appeal stands on a different footing and there can be no abatement. **Gopal v Ramchandra 4 Bom L R 325=26 Bom 597.**

105—Abatement of suit—Sections 365, 366—Death of sole appellant—Abatement of appeal—Legal representative--Right to sue.

Held, that the words "legal representative" in Section 365 of the Civil Procedure Code must be read in connection with the "right to sue" which is involved in the case before the Court and that unless the person applying to be considered the "legal representative" can show that he is the person to whom the "right to sue" involved in the case descends or survives by law, he is not *qua* that right the "legal representative' within the meaning of Section 365, Civil Procedure Code. **Harnam Singh v Bachatar Singh 23 P R 1889.**

106—Abatement of suit—S. 365-Civil Procedure Code, Sections 365, 366, 367 and 382—Suit by widow with life-interest to recover from

Abatement (Appeal)
6 DEATH OF APPELLANT-DURING PENDENCY OF APPEAL—*Contd.*

collaterals property of her deceased husband—Legal representative of such widow for the purpose of continuing the suit or appeal on widow's behalf—Dat Brahmins of Kanjrur, tahsil Shakargarh, Gurdaspur District.

The plaintiff, who was the widow of one H. R., sued to recover from the defendants, collaterals, of H. R., a portion of her husband's estate, of which it was alleged they had taken wrongful possession. During the pendency of her appeal in the Chief Court, the plaintiff died, and applications by the widows of other collaterals of H. R. who claimed to be brought upon the record and to continue the appeal as representatives of the deceased appellant, were resisted by the defendants on the ground that, as the deceased had only a life interest in the property and practically left no heir—the succession going to the heirs of her deceased husband—the right to appeal did not survive, and that the appeal ought therefore to abate.

The deceased H. R. was a Dat Brahmin of Kanjrur, tahsil Shakargarh, Gurdaspur District.

Held, that the right to appeal survived to the heirs, whoever they might be of the late H. R.

Held, also, that as all the parties interested in the result of the present application were parties to a new suit brought in order to determine the question of the right to succeed to the property of L. R the proper order to pass at the present stage was to direct under Section 367, Civil procedure Code that the appeal should be stayed until the fact as to who was the legal representative of Mussammat L had been tried and determined in such suit. **Mussammat Lachmi v Amin Chand 97 P R 1898.**

107-C. P. C. Ss. 365 and 366:-Death of appellant—Two out of four representatives substituted for appellant—The other two made respondents after time—Abatement—Limitation Act, Art, 175-A

All the legal representatives of a deceased appellant should, if possible, join in the application to the court to be made parties in place of the deceased. But if, by reason of the ignorance of the existence of other representatives or of the unwillingness of some of them to join in the application or of the *bona fide* belief on the part of some, of exclusive title, or for any other like cause they are not able to join, those

Abatement (Appeal)
6 DEATH OF APPELLANT-DURING PENDENCY OE APPEAL—*Contd.*

who agree may apply. within the period limited by Art 175 A of the Limitation Act, to be made parties so as to save the proceedings from abatement under S. 366 C P C 10 B 220 and 16 All 211 considered. **Musa'areddi v Ramayya 23 Mad 125=9 M L J 313**

Notes—Ref 26 Mad 235; 8 C W N 843. Dist 26 Mad 230; 12 M L J 368.

108—C. P, C. s. 368—Cross appeals—Substitution of names.] Where in a suit decreed in part in the first Court and pending cross appeals, the plaintiff died, and a party was substituted as his legal representative in the plaintiff's appeal, but no application was made by the defendants for substitution in their appeal, and both appeals were subsequently decided in the plaintiff's favor, *Held* that the title of the person added as legal representative in the plaintiff's appeal to execute both decrees as such legal representative was *res judicata* and was not affected by the defendant's omission to bring such person on the record in their appeal under s 368 of the Code of Civil procedure. **Saonli Bibi v. Kapur Chand. 8 W N 83.**

109—C.P C. O 22 rr 1,2,3 O 41 r 4 S 107 *(2)*,O 22 r 11 1882 Ss 361 362, 363, 544, 582—Appeal -Parties-Death of one of several appellants—Survival of right of appeal—Abatement of appeal.

Where several plaintiffs or defendants jointly appeal against a decree to which s 544 of the Code of Civil Procedure applies, the death of one of such appellants, if no legal representative of the deceased appellant is brought upon the record within limitation, can only have the effect of causing the appeal to abate so far as the deceased appellant was concerned: it cannot have the effect of causing the appeal as a whole to abate 22 Bom 718 ref. to: 16 All 211 dist: 22 All 222 overruled. **Ram Sewak v Lambar Pande 1902 A W N 171=25 All 27.**

Notes—Ref 5 C L J 393.

110—Guardian and Wards Act VIII of 1820 ss 7 (3). 8 (a) 13—Mother and grand-mother contesting guardianship of a minor, grand-mother leaving her claim on a will—Death of grand-mother pending the proceedings—Brother of grand-mother applying to continue the proceedings—Proceedings abated on her death.

The guardianship of a minor was contested by the mother and by the grandmother of the minor basing her claim upon a will. The Court of first instance decided in favour of the mother. The, grandmother preferred an appeal, and while this appeal was pending she died. Her brother applied to have his name entered on the record as her representative and to be allowed to continue this appeal.

Held, that the brother had no right to continue the appeal, as the objection raised by the grandmother to the appointment of the mother to the guardianship was purely a personal one it was based upon her own appointment by the will of the minor's father and it ceased on her death. **Gangabai v Kashibai 1 Bom L R 363 =23 Bom 719**

111—Gift of land—Suit for cancellation—Death of one of the appellants—Effect—Want of landlord's consent to gift—S. 34 Punjab Tenancy Act.

After the filing of an appeal against the decree of the Lower Court setting aside the gift by one defendant in favour of another, one of the appellants, the donor—defendant died. Held, that the appeal did not abate even though no legal representatives of the deceased were brought on record as the donee could alone have instituted the appeal independently of the donor. *Held* also, that where the landlord is no party to the suit and does not choose to contest the tenant's action s. 34, Punjab Tenancy Act will not empower strangers to question the tenant's alienation on the ground of want of landlord's consent. **Karim Din v Ismail 109 P R 1881**

112—C P C O. XXI, rr.10, 21, s.48 (=s.230,Civ. Pro. Code, 1882)—Abatement of appeal—Calculation of time.

An appellant died while his appeal was pending in the High Court. The High Court made an order to the effect that the appeal had abated and that the respondent was entitled to his costs. *Held*, that the order was in effect an order confirming the decree of the lower Court, and the decree-holder was entitled to the benefit of twelve years, limitation calculated from the decree of the appellate Court. **Muhammad Razi v. Karba-Lai Bibi, 7 A L J 58=32 All 136=5 Ind. Cas 473.**

Notes—23 All 124 Dist; 34 Cal 874 Fol.

Abatement (Appeal)

(7) DEATH OF ONE OF TWO JOINT DECREE-HOLDERS.—*Concld.*

113—If one of the appellants dies and his representatives are not brought on the record within the prescribed period, the appeal abates. 14 W.N.23 referred to.

Kamalpat v. Baldeo **22 All. 222= 20 W N 24.**

Notes—Dist: 23 All 22. Over. 25 All 27. Ref: 5 C L J 393.

113A-C P C S. 544—Joint decree—Joint appeal-One of the appellants dying during pendency of appeal—Representative of deceased not brought on record—Abatement.

Where several defendants jointly appeal against a joint decree, to which S. 544 of the Code of Civil Procedure, 1882, applies, the death of one of such appellants, if no legal representative of the deceased appellant is brought on the record within limitation, can only have the effect of causing the appeal to abate so far as the deceased appellant is concerned. It cannot have the effect of causing the appeal as a whole to abate 25 All. 27, F. 22 All. 222 overruled. **Ram Lal v. Debi Singh 10 Ind Cas 27**

114-C P C O.22 r.4 S.107 (2); O. 22 r. 11 (1882Ss 368, 582)-Out of six decree-holders, four filed a suit under s. 283 Code of Civil procedure, and, having lost in the first two courts, appealed to the High Court. Pending this appeal the other two decree-holders, who were made defendants in the suit, died, but their representatives were not brought on the record. *Held*, the appeal did not abate. *Chander Singh v. Khimadhat* 22 Bom 718 ref. to. *Kamlapat v. Baldeo*, 20 W. N 24 distinguished. **Alla Baksh v. Madho Ram 23 All 22= 20 W N 163.**

Notes.—Ref: 28 Bom 153.

(8) DEATH OF PRINCIPAL PENDING APPEAL.

115—Death of principal pending appeal—Principal and agent.—The plea of abatement on account of the death of the principal, pending the suit in appeal before the Lower Appellate Court, was disallowed, it being shown from the circumstances of the case that appellant, though an agent, intended himself to be the plaintiff. Had he acted as an agent, the whole authority was determined on the death of the principal, and the appeal must have abated until resumed by substituting the heir of the deceased principal as a party to the suit. **Thornhill v. Taylor I Agra, 215.**

Abatement (Appeal)

8 DEATH OF PRINCIPAL PENDING APPEAL—*Concld.*

116—Abatement of appeal.—Where one of the defendants in a mortgage suit died pending appeal and no application was made to bring on record his legal representative as a party to the appeal, the appeal did not necessarily abate. It abates only in cases in which the litigation can not proceed without the representative of the deceased party to a final and complete adjudication. **Renga Srinivasa Chari v. Gnanaprakasa Mudaliar. 2 M L T 36=30 Mad 67.**

(9) DEATH OF RESPONDENT.

117—Appeals.] One of 4 respondents died, but no application was made within 6 months to bring his representatives on the record. In their application that was eventually made the name of a wrong person was inserted. *Held*, that the right of appeal did not survive against the surviving respondents alone but against them and other representatives of the respondent who had died. Therefore the proper order was to have directed this suit to abate. *Held* further, that when the order as to abatement was embodied in the judgment and decree, objection was properly taken thereto by way of second appeal against the decree. 18 All 19. 20 W N 109, 19 W N 136; 14 All 221, 22 Bom 718. referred to. **Hem Kunwar v. Amba Prasada. 22 All. 430. 20 W N 136.**

Notes.—Dist: 33 Cal 580. Ref: 5 C L J 393.

118—C P C. O. 22 r. 4 S. 107 (2); O. 22, r. 11 (1882 Ss 368, 582)-Revenue Sale Law (Act XI of 1859).—Sale of joint residuary estate, suit to set aside—Plaintiffs, respondents, death of one of several — Substitution not made within time—Abatement of appeal. Where a decree which had been obtained by several plaintiffs, proprietors of a joint residuary estate, set aside the sale of the said estate held under Act XI of 1859, and two of the plaintiffs, respondents died during the pendency of the appeal by the defendants against that decree to the High Court, and their representatives were not brought on the record within the time allowed by law.

Held, that the decree could not be reversed in appeal without the representatives of the deceased proprietors being placed on the record, and that as the decree set aside the sale of the entire joint estate, under no circumstances should that decree be affirmed as to the unascertained shares of some joint share-holders and reversed as to the unascertained shares of other joint share-holders.

Abatement (Appeal)
9 DEATH OF RESPONDENT—*Contd.*

Held further, that as sufficient cause was not shown by the appellant as to why application was not made within the time allowed by law to bring in the heirs of the deceased respondents and as the right of the appeal did not survive against the surviving respondents alone, the appeal had abated under the provision of section 368 read with section 582 of the Code of Civil Procedure. **Chandreswar Persad Narain Singh v. Dharamjit Narain, 5 C L J 393= 11 C W N 504.**

119-C. P. C.—S. 368—Death of respondent during pendency of appeal—Legal representative—

During the pendency of an appeal in the Chief Court in a pre emption suit brought by the pre-emptor as appellant against the vendor and the vendee as respondents, the vendor-respondent (who was a childless widow) died; whereupon an application was duly made by the appellant under Section 368, Civil Procedure Code, to substitute as the legal representatives of the deceased respondent, certain persons who were the reversionary heirs of the husband of the said deceased. It was objected at the hearing on their behalf that they were not the legal representatives of the deceased respondent, as there was a sister and a sister's son of the deceased in existence.

Held, that the term "legal representative", as used in Section 368 of the Code, clearly does not necessarily mean "legal heirs"; that it is not the intention of the section that an elaborate inquiry and decision should be given, in case of nice questions arising as to exactly who, under particular rules of law, is the legal representative, and that looking in the present case to the obvious practical interest which the reversioners had in the property, and the great probability (to say the least) that they were as much the next heirs and representatives as a sister or a sister's son, the objection taken by the respondents must be disallowed.— **Charanjit Mal v. Mussammat Mitho, 29 P R 1888.**

120-C. P. C. O. 22, r. 4 (1882 S. 368)—Deceased defendant's representatives not brought on record—Decree against defendant who was dead and others—Decree indivisible—Abatement of entire suit.

During the pendency in the High Court of an appeal in a pre emption suit, one of the respondents died, and his representatives were not brought on the record within limitation. Judgment was passed against the respondents in ignorance of his death. Execution was applied for by the successful appellant and was allowed as against the surviving respondents.

Held, that the decree being one for pre-emption, in which possession of the entire property might have been taken in execution, and the representatives of one respondent not having been brought on the record, the cause of action did not survive as against the remaining respondents. 3 Cal 487 (P C) relied upon; 17 All 478 dist. **Imam Uddin v. Sadarat Rai, 7 A L J 228= 5 Ind Cas 797.**

Notes:—See also 31 Cal 487=1 A L J 145 =8 C W N 442. But see the new section

121-C. P. C. O. 22 r. 4 (1882 S. 368)—Appeal. Joint and several liability of the respondents—Non-substitution of the representatives of a deceased respondent, effect of.

On the preliminary objection, taken on behalf of the respondents in this appeal, that it should abate on account of appellant's failure to get the legal representatives of a deceased respondent substituted on the record under S. 368 of the Code, it was *held*, that since the liability of the respondents in the present case was joint and several, the death of one of them without his legal representatives being substituted in his place could not exonerate the others from liability and the appeal would abate only so far as the deceased respondent was concerned. (32 All 130. Distd.)

Joy Gobind Laha v. Monmatha Nath Banerjee. 33 Cal 580.

Notes:—Dist: 5 C L J 393. Ref: 11 C W N 504.

122—C. P. C. O. 22 rr. 2, 3, 4; S. 107 (2); O. 22, r. 11 (1882 Ss. 362, 363, 368 and 582)—Suit, right of— Substitution, application for.

A, B and C, members of a joint Hindu Mitakshar family, applied for registration of their names under the Land Registration Act. The application was opposed and refused in 1883. In 1894, they sued for declaration of title and obtained a decree. During the pendency of the appeal against such decree, A died, and more than six months after the appellant applied to have B and C noted as legal representatives, who had taken the estate by survivorship.

Held, that the application for substitution was governed by S. 362, C. P. C., and not S. 368, S. 362 is not limited in its application to cases in which the right of suit survives against the

Abatement (Appeal)

9 DEATH OF RESPONDENT—*Contd.*

surviving defendants, by reason of some circumstance antecedent to the suit. **Shyamanand Das v. Raj Narain Das,** **4 C L J 568 = 11 C W N 186.**

123-Civil Procedure Code (Act XIV of 1882), Ss. 368, 371—Abatement of appeal owing to death of respondent—Application to set aside order of abatement.—

Section 371 of the Code of Civil Procedure, 1882, does not allow an application by an appellant to set aside an order of abatement, where the appeal has abated by reason of the death of the respondent in the case; nor is there any provision in the law for setting aside such an order, though, under the last clause of Section 368 of the Code of 1882, explanation of delay in applying to substitute on the record the representative of a deceased respondent may be offered at the hearing of the appeal. **Sham Singh v Sant Singh.** **22 P R 1885.**

Ghasita Mal v. Mul Singh, **22 P R 1885.**

124—Defendant— A respondent is not included in the word "defendant" used in art 171 of the Limitation Act, 1877. **Udit Narain Singh v. Hargouri Prosad,** **12 Calc 590.**

Notes:—Fol: 10 Bom 663. Dist: 10 All 223 F B. Ref: 29 Mad 529 F B = 16 M L J 475 = 1 M L T 348.

125—C.P.C.O. 22, r. 4; S. 107 (2): O 22. r. 11 (1883 S. 368)—Suit for possession—Death of two of the respondents—Interest of one vesting in the surviving respondents—Another respondent not a necessary party—Survival of cause of action.

One B died bequeathing by his will certain portions of his property to plaintiff, and defendants 4, 5, 6, respectively. Plaintiff sued on the will for the recovery of the possession of her share from defendants 1, 2 and 3, who were alleged to be in possession of the property in suit improperly. Defendants 4, 5, 6, refused to join plaintiff, so they were made defendants, but they did not appear either at the hearing in the Court of first instance or an appeal.

Defendants 1, 2, 3, joint brothers, and related to B as cousins, opposed.

The suit was dismissed An appeal against it was admitted and adjourned *sine die*; at the hearing after nearly two years, it was found that defendants-respondents Nos. 2 and 5, had died in the interval, and no steps had been taken to bring their legal representatives on the record. It was alleged that defendants-respondents Nos. 1, 2, 3 were joint and the interest of respondent No. 2, merged into those of 1 and 3, and that respondent No. 5 was not a necessary party. The appeal was still ordered to abate.

Held, that it could abate only as regards defendants-respondents Nos. 2 and 5, and should proceed against the rest, on the merits.

Bai Full v. Adesang, **3 Bom L R 736 = 26 Bom 203.**

Notes:—Ref: 5 C L J 393; 6 C L J 715.

Abatement of suit—This is also the view taken by the Allahabad High Court. See **23 All 22.**

126—On the 12th December 1881 the Court passed an order declaring the appeal had abated as no application had been made within sixty days from the death of the deceased to bring his representative. On the 30th January 1882, the application was presented under S. 371 Civil Pro. *Held*, that the application must be disposed of under the law as it stood when the application was presented and so it was not competent to the petitioner to prefer it; and that S. 371 does not apply to a case in which a defendant or respondent died but to the case only in which the plaintiff or defendant dies. **Suri Bhatta v. Sittarama Bhatta,** **7 Mad 195.**

127—Sufficient cause-*Sine die* postponement. An appeal was filed in April 1891. In June 1891 it was adjourned *sine die* pending the decision of a certain case by the High Court. The case being decided, the appeal was set down for hearing in 1896 when the appellant informed the Court that the respondent had died three years ago and asked the Court to substitute his heir in his place. *Held* that the Court was wrong in ordering the appeal to abate, that the appeal being adjourned *sine die* there was nothing to draw the appellant's attention to it, and his ignorance of the death of the respondent in the interval was sufficient cause within the meaning of section 368 of the Civil Procedure Code. **The Collector of Broach v. Balvantrai,** **96 P J 674.**

128— C P C—O. 22, r. 4: S. 107 (2); O. 22 r. 11 (1882—Ss. 368,582,)—Limitation Act. Art 175 C.—Death of respondent—Legal representative necessary for prosecution of appeal—Application

Abatement (Appeal)

9 DEATH OF RESPONDENT—*Contd.*

for substitution of legal representative made within six months of obtaining probate of deceased respondent's will, but more than six months after his death—Abatement of appeal—Sufficient cause. In a suit which was in substance one for taking the accounts and winding up the affairs of a partnership which had subsisted between the plaintiff and several defendants to that suit, a final decree was made binding the plaintiff and some of the defendants to contribute in certain proportion a sum of money of which a portion was directed to be paid to another defendant A. Pending an appeal before the High Court preferred by some of the former, A (respondent) died leaving a will. About four months after A's death, A's son obtained probate of the will. The appellants applied for substituting the name of A's son for A within six months of his obtaining the probate, but more than six months after A's death. *Held*, that the appeal could not have proceeded in the absence of a representative of A, and no sufficient cause having been shown for not applying for substitution within six months of A's death the appeal had abated under Ss. 368 and 582 C P C and Art 175 C of Sch II of the Limitation Act. 14 M L J 147.

Raj Chunder Sen v. Gangadar Seal 1 A L J 145=31 Cal 487=8 C W N 442=31 I A 71 P C.

Notes —Ref: 11 C W N 698; 5 C L J 310.

129—Civil Procedure Code, ss. 365, 582—Substitution of second applicant as respondent—A respondent having died, a conditional order was, on the application of the appellant, made substituting the name of his alleged representative on the record. That order was cancelled upon the application of another person who satisfied the Court that he and not the person whose name had been conditionally substituted was the real representative and who asked to have his name put on the record—*Held*, that the Court had no power to substitute the name of the second applicant upon the record and no further application having been made by the appellant to complete the record the appeal was ordered to abate. **Sadhu Sarun Singh v. Dwarka Singh 12 C L R 45**

130—Practice — Procedure Parties-Death of respondent pending appeal—Application by appellant to have certain person brought on record as deceased's legal representative—similar application by third party who alleges himself to be deceased's legal representative—Duty of Court—

Abatement (Appeal)

9 DEATH OF RESPONDENT—*Contd.*

Civil Procedure Code 1882, Sections 367, 368—One of two respondents having died pending an appeal, the appellant applied to have one Mussammat T.D brought on the record as the deceased's legal representative. Thereupon one H N applied under Section 368 of the Civil Procedure Code 1882, to be accepted as the legal representative of the deceased instead of Mussammat T, D. The Divisional Judge, without inquiring into the truth of the allegations held that he was bound to accept as the deceased's legal representative, the person indicated in the application of the appellant H N having appealed to the Chief Court.

Held, that although Section 368 of the Code does not make any express provision for the case of a dispute in such matters, it follows *ex necessitate rei*, that when a dispute does arise, the court should have the power of deciding it by an interlocutary order for the purposes of proceeding with the case or appeal. I L R IX Bom., 151, and I L R X All., 223, cited; 5 P R 1890, distinguished —

Har Narain v. Tulsi Ram 66 P R 1894.

131—C P C 582—No application for substitution of deceased's representative—Act XV of 1877 (Limitation Act), sch II, art 171 B—

Held by the Full Bench (Mahmood, J. dissenting) that s 582 of the Civil Procedure Code does not make the provisions of chapter XXI, relating to the death of a defendant in a suit, applicable to the death of a plaintiff-respondent in an appeal so as to render it obligatory on the defendant-appellant to make an application to the Court praying that the legal representatives of the deceased be made parties to the appeal; and that, where there has been no such application, the appeal does not abate. *Per* Petheram, C J —The words "so far as may be," in the second clause of the first paragraph of s 582, must be construed as meaning "so far as may be necessray to carry into effect the remedies contemplated by chapter XXI." *Per* Mahmood, J., *contra*, that the object of s. 582 of the Civil Procedure Code is to obviate the necessity of repeating the provisions of chapter XXI, so as to make them applicable to appeals, and the words "appellant' and " repondent" as used in the section include both plaintiffs and defendants in an appeal; that the whole Code maintains the analogy between the position of a respondent and that of a defendant for the purposes of being impleaded and brought before the Court; that chapter XXI applies to cases where a plaintiff-respondent has died; and

Abatement (Appeal)

9 DEATH OF RESPONDENT—*Contd.*

that, in such a case, and where no application has been made, within the period prescribed therefor, praying that the legal representatives of the deceased be made parties in his place, the appeal abates. Also *per* Mahmood, *J*—The word "defendant," as used in art. 171 B of the Limitation (XV of 1877), must be taken to include a respondent, whether plaintiff or defendant in the suit *I L R., 4 Bom 654 I L R 8 Calc 440* and *I L R 9 Bom 56*. referred to. **Naraindas v Lajja Ram. I L R 7 All 693=5 W N 169**

Notes—Fol 10 All 264 F B 12 Cal 590 F B: 10 All 260 F B Dist: 7 All 734; 10 All 223 F B.

131A—Art 175 C – For substitution of names – Death of plaintiff-respondent. *Held* that art 171 B of Act XV of 1177 does not apply to an application by a defendant appellant to have the representative of a deceased plantiff-respondent made a respondent (*I L R 4 Bom 654*) (*I L R 8 Cal 440*) (*I L R 9 Bom 56*) referred to. **Narain Das and others v Lajja Ram. 7 All 693=5 W N 169.**

132.-C.P.C.**S.368**-Abatement of application under s 368 as one under s 372.

Held, that an application made under s 368 of the Code of Civil Procedure to bring upon the record the legal representatives of a deceased defendant, which was made after the expiration of the sixty days allowed by art. 171 B of the Limitation Act (prior to its amendment by Act VII of 1888) could not be treated as an application under s 372. (*I L R 8 Calc. 837*) dissented from on this point. Nor could it be regarded as an application under s32 Athiappa v Ayanna, (I L R 8 Mad 300) dissented from.

Ojagar Mal and Another v Niamat Bibi. 10 C W N 21.

133.—Civil Procedure Code (Act XIV of 1882) S 368—Death of respondent--Ommission to apply within 60 days to place representative of deceased on record—"Sufficient cause" for not applying within such period.

Where, pending an appeal, one of the respondents died and it appeared that the right to sue did not survive against the other respondents alone and no application was presented within the period allowed by law to substitute the legal representative of the deceased on record in his stead, *held*, that the excuse that the heir was not put on the record because the plaintiff-appeallants did not know the requirements of the Code and the Limitation Law, could not be accepted as "sufficient cause" in the terms of Section 368 of the Civil Procedure Code for the appellant's omission. **Allanditta v Ziadat 39 P R of 1885**

Compare Mussammat Bhain v Uttam Chand P R 39 of 1885

134.—Appplication to implead the legal representative of a deceased respondent—"Sufficient cause" for not applying within the prescribed period—Ignorance of law.

In a suit in which there were numerous defendants, it appeared that after the plaintiff had filed his appeal in the Court of the Divisional Judge, one of the respondents died leaving minor sons, and (it was allegeed) a widow, and also a brother who was also a respondent. At the hearing of the appeal it was objected that plaintiff had not applied within 60 days of the death of the deceased respondent to have his sons made legal representatives, whereupon the plaintiff explained that he considered it unnecessary, as the deceased's brother was alive and a party to the suit. The Divisional Judge held that this was merely pleading ignornance of law and the excuse was not sufficient.

Held, that the explanation was sufficient, the plaintiff being an uneducated zamindar, who, it might easily be believed, would consider the adult surviving brother to be the proper representative of the deceased in preference either to his widow or his minor sons in a suit regarding immoveable property.

It is not necessarily a ground for rejecting cause shown for omitting to apply for legal representatives to be brought on the record in place of a deceased party, that the cause shown involves a mistake of law (See No 81 P R 1886 F B,

Amir Bakhsh v Dula 43 P R 1889.

Ghulam Shah v Malak Muzaffar Khan 43 P R 1889.

135 —Civil Procedure Code (Act XIV of 1882, Section 362, 368—Death of respondent during pendency of appeal—Omission to apply within time to substitute legal representatives of deceased—Right to sue surviving against surviving respondents alone—Suit for partition of undivided estate of joint family--Necessity for placing divided brothr or widow of deceased co-parcener on the record.

During the pendency of an appeal by plaintiff

Abatement (Appeal)

9 DEATH OF RESPONDENT—*Contd.*

in Chief Court, arising out of a suit for partition of what he (plaintiff) alleged to be the undivided estate of a Hindu joint family, one of the defendant-respondents died, and no application having been made within the 60 days prescribed by Article 171 B, Schedule II, Act XV or 1877, to put his heirs on the record, it was contended on behalf of the remaining respondents that the appeal abated. It appeared that after the period of limitation for such an application had expired the appellant did put in on application, praying that, in addition to one B D., brother of the deceased already on the record, one R C. another brother, and also the widow of the deceased should be placed on the record as respondents, but in a subsequent application it was pointed out that neither R C who had separated from the family, nor the widow were entitled to be regarded as the lengal representatives of the deceased and the appellant therefore prayed that the suit be proceeded with, under Section 362, Civil Procedure Code without adding any parties to those already on the record.

As regards R C., *held*, that the suit having hitherto proceeded on the footing that he would have no claim to a share in the property on division, the Court would not be justified in assuming in a case where no custom modifying the Hindu law had been pleaded or proved, that a custom allowing separated brothers to share with associated brothers in the property of a deceased brother was applicable to the parties, and that R C was not therefore a necessary party to the appeal. (No 44 of 1884. Civil) referred to.

As regards the widow *held*, that in a suit for partition brought by one member of an undivided family against another, the widows of deceased brothers and cousins are not necessary parties though in many cases it might be convenient that they should be made parties, in order to ascertain what provision should be made for their claims against the estate.

The right to sue was therefere *held* to survive against the surviving respondents, against whom the appeal was directed to proceed under Section 362, Civil Procedure Code. **Budha Mal v Bhagwan Das P R 86 of 1886 Civil.**

136.—O 22 r 2 (1882 S 362)—Limitation—Application to bring the surviving respondents entered as legal representatives of the deceased respondent—Limitation Act Art 178;—S 362, C P C is not limited in its application to cases where the right to sue (or appeal) survives against the surviving defendants (or respondents) not as the legal representatives of the deceased, but by reason of a right vested in them antecedent to the suit. **Chowdhury Shamanund Das v Rajnarain Das 11 C W N 186.**

Abatement (Appeal)

9 DEATH OF RESPONDENT—*Contd.*

137.—Civil Procedure Code (Act XIV of 1882 Section 368—Application to make the representative of a deceased respondent a respondent—"Sufficient cause" for not applying within the prescribed period—Ignorance of law.

The question referred for the decision of the Full Bench was whether, for the purpose of ascertaining what is "sufficient cause" within the meaning of Section 368, Civil Procedure Code and other similar provisions of the Code it is necessary to exclude altogether from consideration mistakes arising from ignorance of law

Held, by Burney Tremlett and Smyth, JJ that it cannot be laid down as a general proposition that ignorance of law can never be considered : but that the principle laid down in (No 39 of 1885, Civil), (viz that the excuse that the heir of a deceased respondent was not put on the record within the prescribed period, because the appellant did not know the requirements of the Code and the Limitation Law, could not be accepted as "sufficient cause" in the terms of Section 368 of the Code for the appellant's omission) should only be departed from under special circumstances.

Held, per Barkely, J., (while otherwise concurring in the reply to the reference made) that it is inexpendient to lay down any general rule to control the discretion of the Court in dealing with each case with reference to its particular facts. **Ghulam Shah v Mallik Muzaffar Khan 81 P R of 1886 Civ.**

See also **Lakmi Dass v. Mahant Gobind Bakhsh P R 81 of 1886 Civil.**

138.—Civil Procedure Code (Act X of 1877), SS 368 372 Death during pendency of appeal of defendant-respondent—Appellant omitting to apply within the 60 days to place deceased's legal representative upon the record—Suit for immoveable property—Abatement of appeal—Limitation Act (XV of 1877), Schedule II Arts 171 B,, 178.

During the pendency of an appeal by the plaintiffs in a suit for cancellation of a mortgage

Abatement (Appeal)
9 DEATH OF RESPONDENT—*Contd.*

of immoveable property, one of the defendant-respondents died and no application was made till after the lapse of 60 days from the date of the respondent's death by the appellants to place the names of the legal representatives of the deceased on the record in his stead, nor was the case one in which the cause of action could be held to have survived against the surviving respondent alone.

Held, by the Full Bench that S 368 of the Civil Procedure Code of 1877 and not S 372 was applicable to the above case, as the expression "cause of action" in Chapter XXI of the Code means any cause of action whether the suit be for damages, or for personal property or for immoveable property, or for some peculiar relief, and the expression "a cause of action which survives" means a cause of action which is not extinguished by the death of the plaintiff or of the defendant as the case may be. (10 Calc L R 449) not followed.

Held therefore, by the Division Bench (Plowden and Smyth JJ) that Art 171 B and not Art. 178 of the 2nd Schedule of the Limitation Act applied to the above case, and accordingly under S 368 of the Code the appeal abated.

Jafar v Jawaya **P R 76 of 1884.**

139—C. P. C. Section 582—Appeal—Local representative of respondent.

In the case of the death of a respondent, the Court has no authority to inquire as to who is the legal representative of the deceased or to refuse to accept the person designated as such by the appellant. Section 368 leaves it to the appellant to apply that a certain person whom he alleges to be the legal representative be brought on the record. If he wilfully omits to bring the right person on the record he will bear the consequence, as the proceedings will not bind the true heir. **Kutba v Mussammat Umri.**

5 P R 1890.

140—Civil Procedure Code, 1882, Sections 361, 368—Death of one of several defendants pending appeal—No application by plaintiff within prescribed period to put legal representative of deceased on the record—Abatement of appeal—Amendment of appeal—Cross-objections, abatement of—Contract—Act, 1872, Sections 42, 43.

Plaintiff sued for recovery of Rs. 48, 400, principal and interest due on a mortgage-bond

Abatement (Appeal)
9 DEATH OF RESPONDENT—*Contd.*

executed by a Muhamadan lady, widow of one R A., on the 2nd June 1881. The said lady having died in 1883, the persons sued were the brother and nephews of R A., they having succeeded to R. A's property on the death of the widow and the claim was based on the grounds that the defendants were the heirs and representatives of the widow, and that in any event, as the debt was incurred for necessary purposes, it was recoverable from the estate of her husband in their hands. Defendants pleaded that the deed was fictitious and without consideration, and that it was not executed for necessary purposes, and did not therefore bind the estate of R A.

The District Judge found necessity proved to the extent of Rs. 3,000 only, and, gave plaintiff a decree for that amount with interest at one per cent. up to date of suit or Rs 7,260 in all, with proportionate costs, against the property sought to be charged, and dismissed the rest of the suit with costs.

Plaintiff thereupon appealed to the Chief Court for the portion of his claim disallowed by the Lower Court and defendants filed cross-objections under Section 561, Civil Procedure Code, in regard to the amount decreed against them.

When the appeal came on for hearing, respondents' counsel pointed out that one of the respondents had died more than six months previously, and that no application had been made to put his representatives on the record, and contended that the appeal had therefore abated under Sections 368 and 582, Civil Procedure Code. On behalf of appellant, it was admitted that the facts were as stated, but it was urged that appellant had nevertheless a right to proceed against the remaining respondents.

Held, that the appeal abated as against the remaining respondents, inasmuch as under Section 42 of the Contract Act, the obligation to perform the promise of the widow devolved on her death, on all her representatives jointly, and as on the death of one of her said representatives, the heirs of the latter were not discharged, but took their place with reference to the liability, Section 368 was applicable to the suit though founded on contract, and no act on the part of plaintiff could take the case out of the operation of the said section.

Abatement (Appeal)
9 DEATH OF RESPONDENT—*Contd.*

S. 43 of the Contract Act which gives a creditor a right to proceed against any one of his joint debtors, deals with substantive law, and the right so given must be exercised before the creditor institutes his suit. After the suit is filed the creditor is in the hands of the Court, and his option under s. 43 of the Contract Act is subject to the provisions of the Code of, Civil Procedure. He cannot therefore, defeat the provisions of s. 368 of the Code by resorting to his right under s. 43 of the Contract Act after the Limitation prescribed for putting the representative of his deceased debtor on the record has expired, and he has no explanation to offer for the delay.

Held, also, that even if appellant's prayer to proceed against the remaining respondents could be regarded as tantamount to one to amend his appeal, the appeal having at the time abated, it was too late to ask for such amendment in the form proposed, whatever might have been the decision on such application, if it had been made within six months of the death of the deceased respondent

Held, further, that as there can be no hearing on the merits after abatement, the cross objections had also abated. **Rao Ghulam Muhammad Khan v Nahar Ali. 53 P R 1896.**

141—Insolvency proceedings.

The decree holder respondent, in an appeal from an order refusing an application by the judgment debtor for declaration of insolvency under S. 344 Code of Civil Procedure, died. No step was taken to implead his representative. Held that the appeal abated.

Rameshur Singh v 'Bisheshar Singh 7 All 734, 5 W N 217,

Notes—Over 10 All 264 F B

142—Judgment before death.

A suit was brought for recovery of a share of ancestral family property, which had been sold in execution of a money-decree for a debt contracted by the plaintiff's grandfather. The plaintiff obtained a decree in the lower appellate Court, from which the defendant appealed to the High Court. During the pendency of the appeal, the plaintiff died, and on her own application, his widow was brought on the record. At the hearing it was contended that upon the plaintiff's death, the right to sue did not survive, and that the suit should be dismissed. Held by the Full Bench that, judgment having been obtained before the plaintiff's death, the benefit of the judgment or the right to sue, would survive to his legal representative. **Muhammad Husain v Khushalo. 9 All 131.**

Notes—Ref 19 Mad 345. Fol 26 Bom 597.

143—C. P. C. O 22 r 4 (1882 S. 368).

Held, that in case of the death of one of the defendant-respondents an appeal abates altogether, if the plaintiff (appellant) fails to substitute legal representatives within time in case of joint possession. 22 All 430 Ref. **Shive Bin v Ma Thein. 3 L B R 168.**

144—C.P.C. O 22 r 4 (1882-s. 368)-Death of one of two respondents alleged by appellants to be members of a joint Hindu family—Application by widow of deceased respondent to declare the appeal to have abated, and by appellants to bring the widow on to the record—Widow added by the Court.

The plaintiffs sued two defendants alleging them to be members of a joint Hindu family. Their suit having been unsuccessful, the plaintiffs appealed and during the pendency of the appeal one of the respondents died. After the lapse of more than six months the widow of the deceased respondent applied to the Court to have it declared that the appeal had abated. The appellants contested this application, but at the same time themselves asked that the widow might be brought on to the record if the Court thought it necessary that she should be a party. The Court accordingly ordered that the widow should be made a respondent. *Held*, that, under the peculiar circumstances of the case, the plaintiff's appellants having pleaded that the respondents were joint, whilst the Court of first instance had held that they were separate, the plaintiffs were excusable in not having applied to have the widow made a party to the appeal and the appellare Court had used a proper discretion in joining her **Sher Singh v Hari Singh 1902 A W N 152.**

145—The plaintiff-responent in an appeal, pending before the High Court, died on the 17th of September, 1885, subsequently D applied to the High Court, to be brought on the the record as legal representative

Abatement (Appeal)
9 DEATH OF RESPONDENT—*Contd.*

of the deceased. On the 15th of April. 1886, he was referred to a regular suit to establish his title as such representative, and on the 25th of February 1887 such suit was dismissed. On the 8th of February. 1886, the defendant-appellants applied to the High Court for judgment, but the application was dismissed under the decision of a full Bench in 10 All 260.On 24th July,1888,they applied to bring certain persons on the record as the legal representative of the deceased plaintiff-respondent. *Held* that the appeal abated.

Chajjmal Das v Jagdamba Prasad, 11 All 408=8 W N 111

146- C. P. C. O 41 r 4 (1332) S 544)—Death of defendant—Right to appeal—Appeal—Practice.

Where a decree is passed against defendants. and one of them dies, it is open to the rest of the defendants to appeal against the whole decree, if the ground of appeal is common to all the defendants, **Chintaman v Gangabai. 5 Bom L R 90=27 Bom 284.**

147—S. 371 C. P. C.—Sufficient cause.

An order having been made under s. 366 of the Code of Civil Procedure for the abatement of a suit an application was made to set aside the abatement and to substitute, the applicant in the place of the deceased plaintiff. The application was made several months after the period of sixty days allowed by art 171 of sch (ii) of the Limitation Act ; and the only cause alleged by the applicant for not continuing the suit related to a period of thirteen days only. The Court set aside the abatement, brought the applicant on the record and decreed the claim. The defendants appealed and in their memorandum of appeal objected to the order setting aside the abatement as illegal. *Held*, that the Court of first instance had committed an error in law in making the order setting aside the abatement, inasmuch as that order was time-barred and without sufficient cause being shown within the meaning of s *371* of the Code : that the error was one which affected the decision of the case within the meaning of s 591 ; and the defendants were therefore entitled to set it forth in their memorandum of appeal in the lower appellate Court. **Dudhraj v Parbati, 9 W N 70, Chajjandas v. Jagdamba Prasad. 11 All 408=8 W N 111.**

148—C.P.C. O,22,r 9 (1)(2);S.107 (2);O,22 r.11 (1882 Ss 371 and 582)—Death of one defendant

Abatement (Appeal)
9 DEATH OF RESPONDENT—*Contd.*

—Withdrawl of suit against surviving defendant, pending appeal by him—Restoration of appeal upon application by heirs of deceased defendant. Where two defendants, who were jointly interested in a suit, preferred an appeal to the district Judge and the appeal being dismissed, one preferred a second appeal. the other having died, and on remand by the High Court, the plaintiff withdrew the suit as against the surviving appellant by arrangement with him and the appeal was dismissed.

Held. that an application by the heirs of the deceased defendant for restoration of the appeal ought to be allowed, inasmuch as it was not necessary for them to prosecute the appeal so long as the other defendant was prosecuting it. **Chandra Kumar Majhi v. Sandhyamoni, 13 C W N 338=36 Cal 418= 2 Ind Cas 412.**

149—Abatement of suits—Suit for redemption—Decree for—Appeal—By first mortgagee—Death of mortgagor-Legal representatives—Not brought on the record-Abatement.

In a suit for redemption by the mortgagor and second mortgagee a decree was passed. The first mortgagee appealed and claimed a larger sum than was allowed. The mortgagor died pending the appeal and his legal representatives were not brought on the record. *Held*, the appeal has abated. **Seshu Patter's son v yakanath Easwaran Unni Valia Kaimal 9 M L T 356**

150—Art. 175C—Death of a respondent, a co-sharer landlord. on appeal by tenant in rent—Suit—Abatement of suit. When a respondent in a second appeal dies during the pendency of the appeal, and application by the appellants to substitute his heirs on the record is governed by Art. 175, cl. (c) of Sch II of the Limitation Act Sec. 587 of the Code of Civil Procedure must be read in conjunction with Sec. 582 of the Code and Art. 175, cl (c) of Sch II of the Limitation Act. I.L R 29 Mad 529 Mad (1906).dissented from. **Upendra Kumar Chakravartti v. Sham Lal Mondol 11 C W N 1100=6 C LJ 715.**

See also:—

Limitation Act

Art 175 C.

151—C.P.C. S. 3 8 (6)-Application to place legal representative of deceased defendant respondent

Abatement (Appeal)
9 DEATH OF RESPONDENT—*Contd.*

on the record-Sufficient cause for not applying within prescribed period-Civil Procedure Code (Act XIV of 1882) Section 368.

Held, that the period for applying in the case of a deceased defendant-respondent to place his legal representative upon the record is 60 days under Art. *171* B. of the Second Schedule of the Limitation Act. (No. *133* P. R. (No. 1884) *133* P. R. *1886*) followed.

Held, further, that ignorance by an appellant of the fact of a respondent's death may be a sufficient excuse for not applying within 60 days, within the meaning of the last clause of Section *368* of the Civil Procedure Code. **Gaman v. Baksha 42 P R 1887.**

152—S. 363 C. P. C.——*Onus.—H and G* plaintiffs in the suit, preferred this second appeal. After the appeal had been filed, H died, and an application was made no behalf of his sons to have their names substituted for their ewased father, in which ita,edei stated that he pp'son or about the 15th June last." Held, that it was for the petitioners to prove that the application was made within the period of limitation provided in art. *171*; that they having failed to do so the application must be refused and the appeal as regards H must abate. **Harnandan v. Durga. 7 W N 60.**

153—C.P.C O. *22* r. 4 S. *107* (2) r. *11* (*1882* Ss. *368* and *582*)-Decision before expiry of six months. The sole respondent died leaving a son and two grandsons. On the application of the son his name was brought on the record without any objection. The appellant did not apply to have any one's name substituted in the place of the deceased father. The court decreed the appeal. The respondent appealed on the ground that the appeal in the Court below ought to have been held to have abated. *Held*, that inasmuch as the appeal in the Court below was decided before the expiry of six months from the death of the sole respondent's death, it could not be held to have abated and the appeal was remanded to the lower appellate Court. **Inayat Ullah v. Gopal Narain Lal 1901 W N 187.**

154—C.P.C O. *22* r. 1 S *107* (*2*); O. *22*, r. *11* (*1882* Ss *361*, *582*)—Act XIV of *1882*) ss *361* and *582*-Suit for injunction-Dismissal—Appeal—Death of defendant, pending appeal-Abatement A.

Abatement (Appeal)
9 DEATH OF RESPONDENT—*Contd.*

personal action would not survive. The parties sued or suing and a party mulcted in costs in such an action dismissed and incompetent to prosecute his appeal for the damages is not entitled to maintain an appeal for the setting aside of a decree for costs, which was consequent on the dismissal of the action. If an action fails what is incidental to it must fail also. *26* Bom. 597; 24 ch. D. *439*; 9 All. *131*: 9 Q B D 170; 31 Cal 409 Ref **Josiam Thiruvengada Charlar v. Sami Iyengar 7 M L T 195= 5 Ind Cas 937=20 M L J 760**

155—C P C O 22 rr. *3*, 4 (Ss *365*,*368*)—"The legal representative may apply"—*Court's duty:*—The provisions in Ss *365* and *368*, C P C (Act XIV of *1882*) that "the legal representative may apply" do not mean that the Court is to accept as legal representative of the deceased party any person who choses to apply, The provisions of S *368* can be applied only when the application is made by the real legal representative **Mamraza v. Subbarama Reddi 19 M L J 33**

156—C.P.C. S. 372-Transfer of interest pending suit or appeal-Registration-Notice-Verbal mortgage for over Rs. *100*—Plaintiff sued for possession under a registered sale-deed, Defendant pleaded a verbal mortgage for over Rs. *100* with possession and of which plaintiff had notice. The first Court decided in favour of the defendant's mortgage, but the Devisional Judge passed an unconditional decree in favour of plaintiff. Defendant appealed to the Chief Court. While the appeal was pending, the defendant sued the plaintiff, for pre-emption of the same land and got a decree At the hearing of the appeal the plaintiff objected *in limine* to the appeal being heard, on the ground, that he had no longer any interest in it; that all his rights had passed to the defendant under the pre-emption decree, and that consequently nothing was left to decide. Held, that this contention was not correct. It was material to the defendant to get a decision on the question whether or not he held a lien on the land as mortgagee, as this would effect the amount of money he may have to pay as pre-emptor.

A registered purchaser with notice of an oral mortgage takes subject to the latter. **Najmuddin v Akbar Din 143 P R 1889.**

Abatement (Appeal)
9 DEATH OF RESPONDENT—*Contd.*

157—C P C S. 368 & 582—Section 168—Death of a respondent—Limitation for application under section 168 Civil Procedure Code.—

When an appellant predeceases a respondent the period of limitation prescribed for making an application under sections 168 and 582 Civil Procedure Code is computed from the time when the names of the legal representatives of the deceased appellant are entered on the record.

Nil Kanth Talatuley v Govind Rao Desh-Mukh. 16 C P L R 78.

158-159-C.P.C. O 22,r 4 (1882-S.368)-Penultimate clause-Abatement-Absolute—Limitation-Act S. 7—Per Daries J:

The abatement provided for in the penultimate clause of S. 368 is absolute and cannot subsequently be set aside. A minor cannot seek to set aside the order of abatement after the appeal has been ordered once to abate through the negligence of the former guardian, to apply to bring the legal representative of the deceased respondent on record. S. 7 Limitation Act, will not help him, there being no appeal pending at the time.

Paru v Variangatil Raman Menon. 28 Mad 359.

160—Abatement—Appeal, incompetency of-Privy Council appeal—After final admission and before transmission of record—High Court duty of.

After an appeal to His Majesty in Council had been admitted but before the transmission of the transcript record to England, it was objected by the respondent that he had attained the status of a Sovereign Prince, so that the suit could not be continued against him in any Municipal Court, and he prayed that the appeal may be declared to have abated.

Held, that although the High Court retained jurisdiction over the appeal for interlocutory matters; it would not make the order for abatement, but would transmit the petition with a report upon the truth or otherwise of the allegations made therein, to be dealt with by the Judicial Committee upon the hearing of the appeal.

Samarendra Chandra Deo v Birendra Kishore. 10 C L J 330.

Abatement (Appeal)
9 DEATH OF RESPONDENT—*Contd.*

161—C. P. C. O 22 r 1 (1882 S.361)—Appeal-Defect of.

When during the pendency of an appeal against a decree for rent one of the plaintiffs, respondents, died and his heirs were not brought on the record. *Held*.—That the appeal ought to be dismissed. 6 C W N 196 foll. **Tarip Dafadar v Khotejannessa Bibi. 10 C W N 981.**

162—C. P. C.O 22, r 9 Sub-r. (2)—Abatement-Sufficient cause-Negligence or forgetfulness:—

Negligence or forgetfulness on the part of the agent specially appointed by the appellant to look after the appeal and to receive notices and information from his vakil, is not a sufficient cause within the meaning of O 21, r 9, sub-rule 2. When the time for reviving proceedings in a court is once passed, a very valuable right is secured to the successful litigant and the court must therefore be fully satisfied of the justice of the grounds on which it is sought to obtain an extension of the time for attacking the decree. 30 Bom 329; 31 Bom 333 Ref. **Tarini Kumar Datta v Gopeswar Pal Chowdhury. 12 C L J 615=7 Ind Cas 391.**

163—C.P.C. O 22. r 4 (1882 s.368.) Abatement of appeal as against one of the respondents.

Appeal continuing as against the remaining respondents. Where there are more respondents than one, and one of them died pending the hearing of the appeal, and an application to substitute the name of his heir was rejected.

Held, that the appeal has abated so far as the deceased respondent was concerned, but the appellate Court will proceed against the remaining respondent. **Upendra Kumar v Sham Lal. 6 C L J 715=11 C W N 1100.**

164—Defendant.—

The word "defendant" in art. 171 3 of the Limitation Act, 1877, does not include a respondent.

Udit Narain Singh v Harogouri Prasad. 12 Calc 590.

165—Suit for redemption—Appeal—Mortgagor's death pending suit—His legal representatives not brought on record—Abatement.

Abatement (Appeal)

9 DEATH OF RESPONDENT—*Contd.*

Where, in a suit for redemption, a decree was passed, and pending an appeal preferred by the first mortgagee and others, the mortgagor (Jenmi) died and the legal representatives of the mortgagor were not brought on record, held that the appeal abated. **Seshu Pattar v Unni Yalia Kaimal. 9 M L T 356.**

166—C P.C. O. 22. r. 1 (1882 S. 361)-Partition suit——Death of co-partner pending appeal—Abatement—Widow's right to represent:—

Where a co-partner dies after decree for partition in first court, but pending appeal, his widow was allowed to be brought on record as his representative for purposes of appeal —*Quære.*— Whether she can claim her husband's share. **Narayan v. Durgaji, 28 Bom 201.**

Notes·—Ref: 19 M L J 70, 9 C L J 133= 13 C W N 309, 32 Mad 271.

167—C. P. C. O. XLIII r. 1 (k)—Order of abatement-No application made to set aside—No appeal—No revision—Punjab Courts Act, XVIII of 1884, S. 70 (1) (a).

Where no application to set aside an abatement was made, *held* that no appeal would lie under O. XLIII, r. 1 (k), Civ. Pro. Code.

Where an applicant fails to avail himself of the remedy by way of application to set aside the abatement, the Court will refuse to interfere under S. 70 (1) (a), Punjab Courts Act, 1884. **Thakur Das v. Perma Nand, 95 P R 1911.**

168—(21) O. XXII r. 4 (3)-Death of respondent--No application to bring in legal representatives on record made within 6 months—Abatement—Ignorance of death till after expiry of 6 months.

Where one of the respondents appointed under O. I, r. 8, Civ. Pro. Code, to represent a body of numerous respondents, died, and where no application to bring on record his legal representatives was made within 6 months from the date of his death.

Held, that the appeal abated.

Ignorance of death until after the expiry of the period of limitation is not such a ground that would justify a departure from the rule laid down in O. XXII, r. 4 (3), which is imperative in its terms. **Sayad Mir Nawab v. Hardeo. 60 P R 1911.**

Abatement (Appeal)

9 DEATH OF RESPONDENT—*Concld.*

Abatement of suit—General cases.

See (1) Parties—Adding parties to suits.

See also cases under C P C O XXII.

Abatement of wrong.

See Damages—Suit for damages—torts.

Abbreviation of time.

See (1) Mortgage—Redemption.

,, (2) Possession—Adverse possession.

Abdication.

See Hindu Law—Interitance—Impartible estate.

Abduction.

Abduction.—See Contract Act 1872 s.3. **82 P R 1904.**

Abduction & Seduction of daughter

See Damages—Suit for damages-Torts.

Abkari Act.

See Bombay Acts.

Abkari Laws.

1—Abkari license—Licensee taking a partner in violation of Abkari Rules-Fort St, George Gazette Notification No. 58, dated 4th February 1890 and 29th September 1896.

The taking of a partner by an Abkari licensee is not illegal, though it is in violation of rule 27 of the license forbidding a sale or transfer of the privilege, as the rule is ultra vires of the notification No. 58 Fort Saint George Gazette and the subsequent notification of the 29th September 1896 did not have a retrospective effect. **Jayanti Bhimappa v Seshanna, 6 M L T 345.**

Abkari Renter.

See Stamp Act XXXVI of 1860.

Abkari sale.

1—Madras Act (Abkari) S. 28,—Sale for arrears under—Prior encumbrance by defaulter, effect of such sale on.

Abkari Sale-(*Concld.*)

Certain lands were sold under S. 28 for arrears of Abkari revenue due by its owner. They were purchased by the seventh defendant in this suit and the question for decision was whether he took it free of incumbrances or subject to the mortgage which, prior to the sale, the defaulter had created it in favour of the plaintiff in this suit. *Held*, that the seventh defendant took the land subject to the plaintiff's mortgage, that, in cases under the old Abkari Act it has been decided that the purchaser at such a sale did not take the land free of all incumbrances, that between the words "in like manner as for the recovery of arrears of land revenue" in S, 10 of the old Act and the corresponding words "as if they were arrears of land revenue" of the present S. 28, there is no real difference in the meaning and, that to hold otherwise, would open a wide door to fraud on *bona fide* mortgages (7 Mad 434; 25 Mad 57; 26 Mad 230 Fol.) **Ibrahim Khan v Rangasami 28 Mad 420.**

Absconding debtor.

See Attachment—Attachment of person.

Absconding offender.

1—Power to try claims of third parties—Criminal Procedure Code,1882' ss. 88 89-Proceedings of magistrate—"Judicial proceedings."

There is no provision of law requiring a Magistrate, who has attached property under s. 88 of the Criminal Procedure Code, to investigate the claims of third persons to the ownership of such property. 7 W. R, Cr, 35, followed. The proceedings of a Magistrate under s. 88 of the Criminal Procedure Code are therefore not "Judicial proceedings" in the sense of s. 4 (d) of that Code. **Sheo Lihal Rai 6 All. 487**

2-C.P.C. S.88-Attachment of property as of an absconding person—Claim a property attached —Procedure. When a claim is made to property attached under section 88 of the Code of Criminal Procedure, the Magistrate should stay the sale to give the claimant time to establish his right. If the Magistrate errs, the remedy of the aggrieved party is by civil suit and not by criminal revision petition. **Kandappa Goundan, 20 Mad. 88.**

3—Attachment by magistrate—Priority of attachment—Criminal Procedure Code Act X of 1872 Secs, 171 173, 173—Disposal of Government

Absconding offender-(*Concld.*)

The proprietor having absconded certain immoveable property belonging to him was attached on the Seventh August 1878 by the Magistrate under s. 172 of the Criminal Procedure Code Act X of 1872. While this attachment was still subsisting the plaintiff attached the same property in execution of a decree and at the sale in execution became herself the purchaser on the 15th January 1879. The original proprietor not having appeared within the time specified in the proclamation issued under s. 171 of the Code, the Magistrate in April 1880 at a public sale sold the rights of the Government to the defendant.

Held, that so long as the attachment by the Magistrate subsisted no title could be conferred by any subsequent attachment, and that the plaintiff's title could not prevail against that of the defendant. Golrm **Abed v Toolseeram Bera 9 Cal 861=12 C L R 411**

4—Criminal Porcedure Code, ss. 88 and 89—Property of alleged absconding offender attached and sold under an illegal warrant—Suit for recovery of such property.

Held that where the property of an alleged absconding offender is attached and sold by a Court purporting to act under s. 88 of the Code of the Criminal Procedure, and it turns out that the proclamation of sale is irregular and illegal there is nothing to bar a suit by the owner of the property so sold to recover such property in the hands of a purchaser. **Abdul v Kazim Begam A W N 1904, 159**

5—Criminal Procedure Code, 1882 ss. 87 88, 89—Proclamation and attachment-Sale of attached property-Title of purchaser. Where property was attached and sold as property of a proclaimed offender under ss. 87 and 88 of the Code of Criminal Procedure, it was held that, although the proclamation was irregular. yet the property having vested in third parties, strangers to the proceedings in which the proclamation was made the sale could not be set aside. **Abdullah v Jitu 22 All 216=(1900) A W N 28**

Notes—Ref 9 P R 1908, 29 P W R 1908= 8 Cr L J 260.

Absence

See Resjudicata-judgments on technical points.

C. P C. O. 9 r. 9 and O 17 r. 3

Absence from British India.

See Cases under

(1) Limitation Act (IX of 1908) s 13

(2) Dismissal of Suit

1—Absence by reason of transportation

During the plaintiff's absence by reason of transportation, the defendant took possession of land which previously belonged to him as a tenant, and the landlord allowed the defendant to hold as his tenant He held possession for more than twelve years In a suit by the plaintiff on his return to turn the defendant out of possession, in which the landlord was made a defendant, —*Held* that the suit was barred there being no exception in the Limitation Act with regard to plaintiffs who are beyond the sea in consequence of transportation. **Domun v Sudunkoolah.**
1 B L R S N 25=10 W R 253

Absence of defendant at an adjourned hearing.

See C. P C. O. 9 r 13 and O 17 r. 3

Absence of defendant from British India.

See Limitation Act 1877 Ss 13, 9

Absence of entry of acceptance in drawer's books.

See Bill of exchange.

Absence of foreclosure clause in a mortgage deed.

See Mortgage Foreclosure.

Absence of intention to grant Zamindari partible.

See Grant-Construction of grants

Absence of natural father at Datt-Homom.

See Hindu Law Adoption

Absence of reasonable & probable cause.

See Malicious Prosecution.

Absence or want of notice no ground for review by another Judge.

See-Review Grounds for review Review Review by Judge other than judge in original case.

Absent Co-owner claiming property after seven years absence.

See (1) Evidence Act Ss 107 and 108.

(2) Hindu Law Presumption of death.

(3) Mahomedan Law presumption of death

Absentee Co-sharers.

See Co sharers

Absentees.

See (1) Limitation Act art 144 (Adverse Possession)

(2) Landlord and Tenant (Abandonment or Relinquishment of Tenure)

(3) Right of Occupancy

(4) Adverse Possession

Absentees

Long absence—Presumption of relinquishment—Presumption not affected by the conduct of the persons holding adversely

Long absence by an absentee, who though residing near the land takes no steps to assert his claim, raises a strong presumption that the absentee has relinquished all claim to the land recorded in his name and this presumption is not affected by the conduct of those who permit the absentee's name to be borne in the settlement papers (78 P R 1875 Fol)

Shera v Qutba **38 P R 1878.**

Notes—Cited 38 P R 1887 Fol 141 P R 1887 Ref 120 P R 1905.

Absolute estate.

1—Will—Construction of—Absolute estate—Restriction upon alienation—Validity of—A Hindu testator directed by his will "The house I give after my decease to my son Ramabhau and to the sons and grandsons that may hereafter be

Absolute estate-(*Concld.*)

born to him. As to the property mentioned above which I have given as recited above to my said son Ramabhau, his wives Manjulabai and Taibai and their lineal sons and grandsons alone shall be entitled to the said property after the death of the said Ramabhau. No one else besides these shall be entitled. *Held*, (1) that Ramabhau acquired, under the will, an absolute estate in the property bequeathed to him; (2) that the restriction put upon the estate by the latter provision was void. **Chimanrao v Bamabhau. 4 Bom L R.509.**

See also cases under—

(1) Will.
(2) Hindu Law (Will)
(3) Hindu Law (Stridhan)
(4) Hindu Law (Widow)

Absolute grant.

See (1) Will—Construction Grant-Construction of grants.
(2) Mahomedan Law—Endowment.

Absolute occupancy holding.

See Landlord and tenant—Nature of Tenancy.

Absolute occupancy Tenant.

1—Mortgage—Pre-emption.

A mortgaged his absolute occupancy holding to B without the consent of the malguzar. The holding was put up to sale in execution of a money decree subject to whatever encumbrances existed upon it and it was purchased by C. Before sale the Collector gave C an opportunity of pre-emption; but the Commissioner set aside the transaction on the ground that the right of pre-emption had not been exercised within a month. B now sued to enforce his lien against the holding. *Held*, that the proceedings taken by the Collector and by the Commissioner under section 38 Tenancy Act must be left out of consideration altogether as in no way affecting the rights of the defendant. The mortgage was void as against him, II C P L R 16 referred to. **Ramlal v. Hasan Bibi, 7 C P L R 89.**

See also Cases under:—

(1) C. P. Tenancy Act, S. 38
(2) Limitation Act Art. 10

C. C. 7

Absolute occupancy Tenant-(*Concld.*)

(3) Mortgage (usufructuary and mortgage by Conditional Sale)

2—Absolute Occupancy Tenant—Malguzar—C. P. Tenancy Act. 1883 Sec. 38 —Mortgagee—Possession—Sale Deed— Specific Relief Act. An absolute occupancy tenant mortgaged his holding by a registered deed which was void as against the malguzar under Section 38 of the C. P. Tenancy Act 1883. The mortgagee sued the tenant on the deed, obtained a decree and got possession in March 1896. In June 1896 the malguzar with the knowledge of the above facts got a sale deed executed by the tenant and forcibly ejected the mortgagee who again got possession by a suit under the Specific Relief Act.

The malguzar then sued the mortgagee on his sale deed. *Held* that at the date of his purchase the malguzar had a right to take over the holding at a price to be fixed by the Deputy Commissioner but that as he chose to purchase for a price arranged between himself and the tenant and to pay the whole of that price to the tenant his suit could not succeed. 5. C. P. L. R. 125. 6 C. P. L. *R.* 131, referred to. 7 C P L R 89; 18 All 354.

Seth Laxmichand &c. v. Thakur Raghuraj Singh. 12 C. P. L. R. 127.

Absolute privilege

See (1)—Evidence Act 1872 S. 126.
(2)—Privileged communication
(3)—Privilege

1.—C. P C. O 11 rr. 12, 13 (1882—S. 130).

Indian Evidence Act (1 of 1872, S 126—Document, production of—Privilege attaching to documents—Legal adviser—Court—Discretion.

Under the Evidence Act. in regard to certain documents—when they are absolutely privileged the court has no power whatever to order production. But under S. 130 of the C. P C. 1882. the court does possess the discretion, and the discretion is to be exercised according to the practice of the Court. And although a document may not be such as passed directly between the legal adviser and the client yet if it is of such a nature as to make it quite clear that was obtained confidentially for the purpose of being used in litigation and with a view to being submitted to legal advisers then the Court will not compel the production of such a document 7 Q B D 769 Ref to. **Vishnu v. New York Life Insurance Co. 7 Bom L R 709**

Absolute Privilege-(*Concld.*)

2-State proceedings-Communications between Ministers of State—Production in a Court of law.

All communications between Ministers of State with regard to public matters or public functions all expressions of opinion in the conduct of public duties by the officers of State, and all records and documents in which the opinions, or order of public officers are contained, are absolutely privileged, and cannot be compelled to be produced in a Court of law

If *prima facie* a document purports to be an official communication which would be privileged, no allegation of malice would be allowed and no proof of malice would take away the privilege.

Jehangir v. Secretary of Stste 5 Bom L R 30.

Abstract of Title

See Vendor and Purchaser (Warranty of title)

Abuse

See—(1) Slander.
(2) Damages-suit for damages-tort.
Jurisdiction of Civil Court—Abuse defamation and slander.

Abuse, defamation and slander.

See—Jurisdiction of Civil Court

Abuse of process of Court.

1—T. P, Act S 90—Abuse of process of court—Fraud—Purchase benami for decree-holder—Estoppel Where upon an application for sale the decree-holder obtains leave to purchase in the property upon the undertaking to pay the full decretal amount for it and the property is purchased benami for him, at a less sum, and the judgement-debtor does not object at the time *Held*, upon the decree-holder applying for a personal decree for the balance, that the judgement debtor having the remedy to get the sale set aside in due course of law cannot object to the decree-holder executing his decree for the balance, although the purchase by the decree-holder was an abuse of the process of the court. **Durga v Bhagwan Das, 1 A L J 486**

2—C P C O. 16 r. 1, (1882 S.159)—Summons to witnesses—Jurisdiction inherent in Court to prevent abuse of process.

Although on application of a party to a legal proceeding summons to a witness will ordinarily issue and a court is bound to issue a summons under S. 159, except in cases governed by s. 386, C. P. C., a Court has an inherent right to prevent an abuse of its own process,and where it is shown that the process is applied for not *bona fide* for the purpose of obtaining any material evidence, the Court will be justified in declining to issue process. **Veerabadran Chetty v. Nataraja Dasikar. 14 M L J 329=28 Mad 28=9 C W N 421=32 Cal 582 also 15 M L J 569=28 Mad 560.**

Abuse of process of Court-(*Concld.*)

Abuse, suit for Damages—

See—(1) Jurisdiction of Civil Court—Abuse, Defamation and Slander, Suits For.
(2) Slander.
(3) Defamation.

Abusive language

See—Cases under defamation-Jurisdiction of Civil Court-Abuse defamation and Slander.

Abutting or adjoining a public Road.

See—Jurisdiction of Cvil Court-Public ways, obstruction of.

Abwab.

See also Cases under.—
(1) Cess.
(2) Batta,
(3) Bengal Tenacy Act (VIII of 1885) S. 74.

1-Beng. Tenancy Act S. 74—"Abwab"—Stipulation made before Act.

"All impositions upon tenants under the denomination of abwab," etc., and "all stipulations and reservations for the payment of such," referred to in sec. 74 of the Bengal Tenancy Act, relate to both past and future stipulations ; such stipulations made before the passing of the Bengal Tenancy Act are therefore void.

Jotindra Mohan Tagore v Chandra Nath Safui, 6 C W N 860.

Abwab-(*Contd.*)

2—Abwab—Puja expenses.

Puja kharach or expenses for a puja agreed to be paid in excess of the rent is an abwab and cannot be enforced. Road cess is not abwab within the meaning of S. 74 of the Bengal Tenancy Act (4 Cal 576; 3 C L J 337 Ref. 22 Cal 214 Expl).

Narandra Kumar Ghose v Gora Chand Joddar. 3 C L J 391=33 Cal 683.

Notes.—Ref: 12 C W N 154, 8 C L J 525.

3—Abwab—Promise to supply wood-Not forming part of rent—Bengal Tenancy Act (VIII of 1885), S. 179-Reg. (VIII of 1819), S. 5.

A *patni* lease, executed before the Bengal Tenancy Act came into operation, provided that the *patnidar* should supply wood for the cooking of the *bhog* of certain idol. On his default, the *Zamindar* sued him for the price of the article.

Held, that, as the value of the wood was not incorporated with and did not form an integral component of the rent of the *patni*, it should be considered as an abwab and not recoverable.

The original patnidar having died, his representatives the present defendants, were called upon in 1903 by the Zamindar to execute a security bond, and they complied with the requisition agreeing to remain bound by the terms of the original patni lease.

Held, that the execution of the security bond did not amount to a new lease, and that, therefore, s.179, of the Bengal Tenancy Act was of no assistance to the plaintiff. 3 C L J 301: 33 Cal 683; 4 C C L J 527, 10 C W N 527, 12 C W N 175. Rel on 3 C W N 608; 26 Cal 611, Dist. **Ranjit Singh v Bahadur Singh. 9 Ind Cas 47**

4—Abwad——Mokurari lease——Zemindari selami.

In a mokurari lease, executed before the Bengal Tenancy Act came into force, there was an agreement to pay a certain sum as rent and a certain additional sum as Zamindari selami, holi &c, expenses, which latter were found to be arbitrary and extra charges imposed on the tenants on account of work done in the Zemindari sherista and for other purposes.

Held, that the additional sum was an illegal cess or *abwab* and could not be recovered from the lessee by the zamindar. 17 Cal 726. **Bepin Behary Mitter v Prokash Chandra Sarkar. 13 C L J 148.**

Abwab-(*Concld.*)

5—Abwab—Delivery of 10 seers of chilli part of consideration for which tenant was allowed to take lease—Kabulyat—Construction.

If a particular sum is specified in a lease or is agreed to be paid and is the lawful consideration for the use and occupation of the land, that is to say, if it is really part of the rent, although not described as such, the landlord is entitled to recover the same.

Where in a *patni kabulyat* executed before the Bengal Tenancy Act, it was stipulated that, besides the money rent agreed upon, the tenant would deliver 10 seers of chilli 5 days before the *Puja* to the landlord

Held, on a construction of the *kabulyat*, that the delivery of the chilli was a part of the consideration for which the tenant was allowed to take the lease, and that it was a part of the rent and not an *abwab*. 4 C L J 529, 10 C W N 529 rel. upon. **Sarada Kripa Lala v. Mostafizar Rahman, 12 Ind Cas 37.**

Acceleration of Estate

See also cases under —

(1) Hindu Law (Widow)
(2) Hindu Law Reversioners

Acceptance

See (1) Contract-Construction of contracts.
(2) Hundi
(3) Debtor and creditor
(4) Bill of exchange

Acceptance of an instalment overdue.

See Limitation Act Arts 74, 75
„ Limitation Act Art 179 Order for Payment at specified date.

See also Bond—Bond payable by instalment.

Acceptance of executorship

See (1) Probate
(2) Executor

Acceptance of gift

See Hindu Law.—Gift

Acceptance of goods by buyers

See (1) Contract Act s 108

Acceptance of goods by buyers-*Concld.*

(2) Vendor and purchaser-Completion of transfer

Acceptance of Patta not in accordance with Law

See Landlord and tenant

Acceptance of Vakalat

See pleader

Acceptance or renunciation of executionership

See (1) Probate
(2) Executor

Acceptance what amounts to

See (1) Contract—Construction of contracts
(2) Contract Act s 4
(3) Negotiable Instrument Act

Accepting lower rent than that entitled to for long time.

See.—acquiescence

Acceptor.

See (1) Hundi
(2) Bill of exchange

Accession.

See (1) Lease
(2) Landlord & tenant
(3) Accretion

Accession to Land.

1—Accession —Transfer of Property Act s 63 The meaning of the term accession in section 63.

By virtue of his mortgage the mortgagee steps into the shoes of the landlord and in such capacity acquires rights which as a stranger he cannot acquire. The holding acquired by him therefore is an accession and the mortgagor is entitled to such accession on payment to the mortgagee of the cost of acquiring it X C P L R 103. Distinguished. 10 B H C 369, 5 Cal 198, referred to

Mohan Lall v Chaodhri Jalandar Singh 14 C P L R 169

2—Accession—Building on mortgaged land

When a mortgagor builds on mortgaged land after mortgage, the mortgagee is entitled to treat the building as an accession to the mortgaged

Accession to Land *(Concld.)*

property and it is part of his security as if the building had been on the land at the date of his mortgage. **Krishna Gopal Sadhani v A B Miller 29 Cal 803**

See also cases under
(1) Building on another's Land.
(2) Landlord and Tenant
(3) Equitable relief
(4) Accretion

Accident, loss by.

See Cases under (1) Carriers
(2) Railway Company
(3) Shipping law
(4) Damages suit for

Accidents.

See
(1) Carriers
(2) Shipping Law
(3) Gas plant

Accommodation acceptor.

See
(1) Bill of Exchange
(2) Negotiable Instruments
(3) Principal & Surety
(4) Hundi

Accommodation drawer.

See Principal and Surety—Discharge of Surety.

Accord & satisfaction.

See
(1) Waiver
(2) Debtor discharge of

Account.

(a) Power of court to order account instead of referring party to separate suit (1)
(b) Suit on accounts not signed (2)
(c) Accounts taken in one suit adopted in another (3)
(d) Mode of taking account (4).
(e) Current mutual account (5-5a).
(f) Suit for balance on running account (5b)
(g) Court s order to furnish (6).
(h) Decree for contribution (7)
(i) Caste inspection of books right of (8).

Account-(*Contd.*)

(j) Form of an executor (9)

(k) Judgment-debtors paying off decree against estates account (10)

(l) Account kept in course of business (11-12)

(m) Common Law right of the member to inspect books of the corporation (13).

(n) Inventory and account (14-15).

(2) Miscellaneous Cases

(a) Payments made by agent (16)

(b) Partnership account (17-18)

(c) Custom of trade (19)

(d) Dishonest conversion by partner (20).

(e) Hard and unconscienable bargain (21)

(f) Executor's right to call for inventory and account (22).

(g) Guardian s liability to render accounts (23).

(h) Entry in Government Gazettee Account Book (24)

(i) Leave to bring suit for accounts (25)

(j) Receiver s Accounts (26).

(k) Commissioner to examine (27).

(a) During inquiry suit

(b) Acknowledgment of debt

Account—See Copyright

Account—See Cases under Decree — Construction of Decree—Account.

Account—See Decree — Form of Decree—Account.

Account—See Cases under Mortgage — Interest-Accounts.

Account—See Onus of Proof—Account

Account—See Pledgor and Pledgee

Account—See Principal and Agent — Duty of Agents to Account

Account—See Variance between Pleading and Proof—Special Cases—Account

Account—See Special and second appeal.

Account—Right to an — See Cases under

Account-(*Contd.*)

Hindu Law—Partition — Right to Account on Partition

(a) POWER OF COURT TO ORDER ACCOUNT INSTEAD OF PREFERRING PARTY TO SEPARATE

1—Power of Court to order Account instead of referring party to separate suit —

In a suit by the heirs of a deceased Mahomedan to recover from his widow landed property of which she claims to be in possession as absolute owner under a mokurari deed alleged to have been executed in lieu of her dower where she wholly fails to prove execution of the deed, it is competent to the Court, instead of referring the plaintiffs to a separate suit, to direct an account to be taken of the mesne profits received by the widow and of the amount due to her on account of dower with a view to the settlement of the claims of both parties

Asloo v Umdutoonissa, Umdutoonissa v. Asloo, 20 W R 297

Notes —Fol 21 Mad 27. Ref 15 All 29

(b) SUIT ON ACCOUNTS NOT SIGNED.

2—Suit on accounts—Account not signed—Limitation.—

An account settled must be signed by the debtor and the creditor has three years from its date for the institution of the suit

Chinnasawmi Naidu v Venkatasami Naidu 7 M L T 372=6 Ind Cas 719.

(c) ACCOUNTS TAKEN IN ONE SUIT ADOPTED IN ANOTHER

3—Accounts taken in one suit adopted in another, Practice as to —

Where the accounts actually taken and completed in one suit are adopted in another, the ordinary practice is to allow the result of those accounts and enquiries to be questioned in the suit wherein they are adopted **Advocate General of Bombay v Kuramally, 4 Bom L R 857**

(d) MODE OF TAKING ACCOUNT

4—Mode of taking Account.

In orders relating to the taking of accounts it is irregular to direct the amounts to be taken irrespective of the plea limitation **Asghar Ali v. Kurshed Ali, 3 Bom L R 576=24 All 27**

Account-(*Contd.*)

(e) CURRENT MUTUAL ACCOUNT

5—Current mutual account—Limitation.

Where the dealings between the parties are such as to create independent obligations in favour of one party against the other, the account between them is a mutual account. Article 85, Limitation Act of 1877, applies to a case of this nature giving rise to reciprocal demands, and limitation begins to run from the close of the year, in which the last item was entered in the account. 22 Bom 606 Fol. A W N (1895) 186 relied on. **Chittiar Mal v. Behari Lal, 6 A L J 921=32 All 11=4 Ind Cas 261**

See also Limitation Act, Arts. 85, 89 and 57.

5*A*—Account, mutual, open and current—Reciprocity of dealing—Settled account—Signature.

The reciprocity of dealing and the right to mutual demand form the essential ingredients of a mutual, open and current account.

Haji Abdul v. Haji Bibee. 7 Bom L R 151.

(f) SUIT FOR BALANCE ON RUNNING ACCOUNT.

5*B*—Suit for balance on running account.

When an account between a principal and his agent shows what balance is due from either party at different times, but is never finally settled, it is a running account, and the limitation begins to run from the date of its being closed under Art. 85, Limitation Act. **Prem Kaur v. Mohan Lal, 128 P L R 1909= 115 P W R 1909=4 Ind Cas 960.**

(g) COURT'S ORDER TO FURNISH.

6—Accounts, Court's order to furnish—Company transferring its business to a limited Company—New Company not bound by the order.

Where a decree directs a company to furnish accounts, and the company in the meanwhile transfers its business to a limited company, the latter company is not bound by the decree as it is a distinct legal person; and the decree does not operate beyond the date of such transfer.

Fraser & Co. v. Bombay Ice Manufacturing Co. 7 Bom L R 107=29 Bom 107.

(h) DECREE FOR CONTRIBUTION.

7—Decree for—Satisfaction—Apportionment —Contribution.—

Account-(*Contd.*)

When a decree for mesne profits was satisfied by some out of the entire body of persons liable thereunder by payments made from time to time and a question arose as to the principle which would regulate contribution amongst the parties themselves:

Held, that the correct principle was to allow interest on the sums paid from the date of payment, and then to apportion rateably the whole sum crediting interest on each amount paid in favour of the party on whose behalf it was paid, from the date of payment until the final satisfaction of the decree for mesne profits. Judgment of the Judicial Committee in 31 Cal 597 explained. **Guru Prasanna Lahiri v. Jotindra Mohun Lahiri, 7 C L J 454=35 Cal 303=35 I A 32.**

(i) CASTE INSPECTION OF BOOKS RIGHT OF.

8—Caste, not a corporation — Inspection of books—Right of members to.—

The right to inspect account books kept in connection with caste funds and properties is not in any sense a caste privilege. It is a legal right. It is preliminary to a right to assert a claim to property and is incidental to the right to recover property which may be lost to the caste by misuse or misappropriation. A suit brought by plaintiffs on behalf of themselves and others as members of Cutchi Memon Jamat to have full and free inspection of the books of account kept by the defendants in their capacity as trustees of caste funds and properties is maintainable in Civil Courts. It is the assertion of a pure legal right and it in no way affects the internal autonomy of the caste "or" its social relations. There is no analogy whatever between a corporation as known to English Law and an Indian caste. The principles governing the rights of members of caste to inspection of accounts of caste properties must be governed by considerations very different from those governing the rights of members of corporation seeking inspection of documents of such corporation.—**Haroon Haji Vahedina v. Haji Adam Haji Oosman Nurani, 11 Bom L R 1267=4 Ind Cas 569.**

(j) FORM OF AN EXECUTOR.

9—From an executor—Filing of accounts.

It is the duty of an executor to file his accounts without compelling the parties interested in the estate to take out an order to compel him

Account-(*Contd.*)

to do so. If an executor improperly and without sufficient reason fails to file the accounts, he will have to bear the costs of the order for compelling him to do so.

An executor is not justified in declining to file his accounts simply because there may be a dispute as to the period from which the accounts should begin. But a party interested in the estate will be ordered to bear his own costs of the order if his application is frivolous or vexatious or if he has been guilty of long delay or laches or if he has acquiesced in the executor not filing the accounts.

Jetha Padamsi, 7 Bom L R 451.

(K) JUDGMENT—DEBTORS PAYING OFF DECREE AGAINST ESTATES ACCOUNT

10.—Judgment-debtors paying off decree against estate—Accounts. R, the 12 annas share holder of an estate, and after his death his successor-in-interest remained in wrongful possession of the remaining 4 annas share from 1826 to 1854 when the true owners recovered possession. In 1862, they instituted a suit for mesne profits from 1826 to 1854 against "the co-sharers, zemindars of 12 annas share" and got a decree in the first Court in 1875 against persons who were co-partners in the estate at the date of the decree. On appeal, the High Court merely reduced the amount decreed (in 1882). Between 1854 and 1882 several changes had taken place in the distribution of interest amongst the different branches of R's family. On a question subsequently arising as to what amount each co-partner was liable to contribute in paying off the decretal amount, the High Court held that this was to be determined according to the share which each of them had in possession from 1826 to 1864: *Held (reversing the judgment of the Court)*—That the cause of action in the suit was the wrongful enjoyment of the 4 annas share by the 12 annas shareholder collectively as part of their family estate and the decree which followed being in effect one against the estate, was against those who were co-parteners when it was passed and they were bound to contribute according to shares they then held in the estate. The decree was satisfied by payments made from time to time on behalf of the several co-partners from 1883 to 1889 and during this period interest ran on so much only of the amount of the decree as for the time being remained unsatisfied. In a suit for contribution instituted by one of the co-partners against the others in respect of the amounts so paid: *Held*—That inasmuch as each payment, so far as it went, stopped the running of the interest of the decretal amount, the benefit, of that cessation of interest ought to go in relief only of those who made the payment and not of those who continued in default. Accordingly accounts were directed to be taken on the following principle, viz., interest was to be computed on the total principal of the judgment-debt to the date of the final extinguishment without regard to the sums from time to time paid on account, and interest at the same rate on each amount so paid from the date of payment until the final satisfaction of the decree was to be credited in favour of the party on whose behalf it was paid, decree depending on the result. One of the items paid on account consisted of a sum of money held by the Government Treasury to the credit of the co-partners in separate accounts and derived from a portion of the estate which lay in the Garo Hill District. This amount was drawn in 1883 but one of the co-partners, H, proved that before that he had by suit established his right to a larger share in the estate than was represented by the amount held by the Treasury to his credit. The High Court in passing accounts held that H was entitled to a credit out of the sum drawn from the Treasury proportionate to his share in the estate: *Held (reversing the judgment of the High Court)*—That the money not having been held on joint account, H was not entitled for the purpose of the present suit to credit for a larger sum than that which stood to his account.

Jotindra Mohun Lahiri v Guru Prosunno Laniri 8 C W N 625=31 Cal 597=31 I A 94.

(L) ACCOUNT KEPT IN COURSE OF BUSINESS.

11-12.—Account kept in course of business.

A person used to enter all his receipts and all the advances he made to his *amlahs* first in a *khata* book. The *amlahs* used to submit *furds* embodying the expenses incurred by them and these used to be regularly checked by him. He used to prepare his monthly and other accounts from the *khata* book and the *furds*. *Held*—That these accounts having been kept regularly in the course of business, were admissible under sec. 34 of the Evidence Act even though the *khata* book itself was not produced. 4 C W N

Account-(*Contd.*)

147, s. c. I L R 27 Cal 118 (1899), referred to.

Raja Peary Mohon Mookerjea v. Narendra Nath Mookerjea. 9 C W N 421.

See also.

(1) Evidence Civil cases.

(2) Accounts & account books

(m) COMMON LAW RIGHT OF THE MEMBERS TO INSPECT BOOKS OF THE CORPORATION.

13.—Register of shareholders—Member of the Corporation—Common-Law right of the member to inspect books of the Corporation—Presidency Banks Act (XI of 1876)——Bank of Bombay—Shareholder—Suit by shareholder against the Bank to enforce inspection of the register of shareholders.

On the application of a member the King's Bench Division will in general grant a rule for a *limited inspection* of the documents of the corporation, if it be shown that such inspection is requisite with reference either to an action then instituted or at least to some specific dispute or question depending in which the applicant is interested; but, even in this case, the inspection will be granted to such an extent only as may be necessary for the particular occasion. The rule was formerly sometimes laid down broadly, and the language ascribed to the Court in one or two cases might almost lead to the inference that members of a corporation have an absolute right, whenever they think fit, to inspect all papers belonging to the aggregate body. But any such doctrine is now exploded; and the privilege of inspection is now confined to cases where the member of the corporation has in view some definite right or object of his own, and to these documents which would tend to illustrate such right or object.

These principles were extended to the case where a shareholder applied to inspect list of shareholders, and registers of their addresses, of a bank incorporated under the Presidency Banks Act, 1876. **The Bank of Bombay v. Sulleman Somji. 10 Bom L R 636= 12 C W N 825=32 Bom 466. Reversing 9 Bom L R 165. Restored 9 Bom L R 169.**

Account-(*Contd.*)

(n) INVENTORY AND ACCOUNT.

14-15.—Inventory and Account.

District Judge, power of, to call for inventory or account—High Court, decision of, if binding on lower court—Construction of Act—Reference to proceedings of Legislative Council:—Under S. 98 of the Probate and Administration Act, the District Judge has no power to institute a judicial enquiry by an audit of the inventory and account at the expense of the executor or administrator, nor can such an authority be implied from the provisions of the Code of Civil Procedure as to the appointment of a commission to examine the accounts. All that the District Judge has to do under S. 98 of the Probate and Administration Act is to see that the inventory and account *prima facie* satisfy the requirements of the section, that is, that the inventory appears on inspection to be a full and true estimate of all the property, credits and debts, and that the account on inspection appears really to be a true one shewing the assets and their disposal. To ascertain this the inventory and account should be passed under some examination by the judge's staff so as to detect manifest mistakes or errors: if such were detected the papers could not satisfy the section, and for this purpose the section empowers the judge to extend the time to the executor or administrator to amend the account. Where the testator enjoined on his executor to prepare accounts annually; *held*, that that did not enlarge the Judge's power and empower him to exact an account annually although it would authorise a person interested to take action against the executor. S 98 of the Probate and Administration Act does not give a Judge power to call for a revised account, if an account has already been exhibited as required by the section and has been accepted as *prima facie* true, but if it appears that the account is materially untrue the Judge may take action under its fourth subsection. Where once an account had been filed and accepted shortly after the expiry of a year from the grant of probate —*Held*, that the judge had no power to call for further accounts of subsequent years. **Maharani Sarat Sundari Barmani v. Uma Prosad Roy Chowdry. 8 C W N 578= 31 Cal 628.**

(2) MISCELLANEOUS CASES.

(a) PAYMENT MADE BY AGENT.

16.—Payments made by agent.—

How proved—Moneys taken to pay illegal

Account-(*Contd.*)

gratification must be accounted for. When an agent's account is being taken, items of payment alleged to have been made by him cannot be passed without a voucher or a clear account of the facts. An agent is bound to prove that moneys drawn by him for payment as illegal gratifications reached their destination.

G R Fox v Beni Pershad Koer. 13 C W N 212

(b) PARTNERSHIP ACCOUNT.

17.—Art 106—Suit for partnership account and share of partnership assets.

A suit by the heir of a deceased partner against surviving partner for an account and share of the deceased in the partnership assets, including the good will and trade marks of the partnership business, comes within the class of suits dealt with under Art 106. The fact that there were unrealized assets outstanding at the death of the deceased partner which were still outstanding at the date of the suit would not alter the nature of the suit. **Mohit Lall Dutt v Raj Narain Dutt. 9 C W N 537**

18.—Accounts—Expenses incurred for partnership not allowable if unseparably mixed up with private affairs.

In taking accounts, it is not possible for a court of justice to allow expenses to the accountable party, even though honestly incurred for the partnership, where, by mixing up his private affairs with those of the partnership and by his omission to keep clear accounts of any kind, he has made it impossible even to conjecture what those expenses are. **Moung Tha Huyin v Mah Thein Myah. 5 C W N 114=28 Cal 53**

Notes—Dist; 11 M L J 353=25 Mad 149.

(c) CUSTOM.

19—Indent form—Inconsistency between printed and written provisions-Custom of trade in Bombay—Indentor—Foreign manufacturer—Liability to account.

Where in an indent form in which the usual conditions of contract are printed there exists some inconsistency between the printed and the written provisions, the Court cannot discard the print, but must as far as possible discover the real contract of the parties from the printed as well as from the written words.

Account-(*Contd.*)

According to the custom of trade in Bombay when a merchant requests or authorizes a firm to order and to buy and send goods to him from Europe at a fixed price net free godown including duty, or free Bombay Harbour, and no rate of remuneration is specifically mentioned, the firm is not bound to account for the price at which the goods were sold to the firm by the manufacturer, and it does not make any difference that the firm receives commission or trade discount from the manufacturer either with or without the knowledge of the merchant. 38 L J Q B 111. ref. to. **Beir v Chhotalal. 6 Bom L R 948=30 Bom 1.**

Notes.—Ap: 29 Bom 310=7 Bom L R 282.
Ref: 30 Bom 205=7 Bom L R 611.

(d) DISHONEST CONVERSION BY PARTNER.

20-Criminal breach of trust-Dishonest conversion by partner—Liability of partner to account for partnership money. In a partnership it is open to a partner to spend the money he receives and to account for it in dealing with the partnership, and such a partner is plainly entitled to be called upon for an account of the expenditure of the money which he has received.

In a case where it was not satisfactorily made out that this was not done, and it could not be made out in the absence of a proper demand for an account, it was held that no dishonest conversion could be found, which would justify the conviction of the partner under S 406 Penal Code

Debi Prasad Bhagat v Nagar Mull. 35 Cal 1108.

(E) HARD & UNCONSCIONABLE BARGAIN.

21.—Hard and unconscionable bargain-Relief—Exceptions—The general rule is that neither excess of interest nor exorbitance of charge will suffice for a court to relieve parties from the incidents of their contracts unless the element of unfair dealing, such as, that the debtor has been overreached, tricked or deceived, or that the money lender has taken an unfair and undue advantage of his weakness and necessities, is shown. The mere fact that a person is in urgent need of money is not sufficient in itself to raise a presumption that the person to whom he applies for the loan will take unfair advantage of his necessity. Undue influence or unfair dealing must be proved before a presumption of pressure can arise. A bargain not in itself hard and unconscionable can

Account-(*Contd.*)

not be held to have become so by reason of delay on the part of the creditor in suing though wilful. 9 All 228 dissented from. The exceptions to the general rule are female debtors standing in a fiduciary relation and expectant heirs 21 W R 352 4 Cal 137; 20 Cal 366; (1901) 2 K B 110 followed 1 B L R O C 31 (note); 7 Cal 245 26 Cal 891, 918 5 C W N 505, 12 Cal 225 (12 I A 215) dist

Umesh Chandra Khasnavis v Golab Lal Mustafi **31 Cal 233.**

Notes. —Ref: 5 C L J 542.

(F) EXECUTOR'S RIGHT TO CALL FOR INVENTORY AND ACCOUNT.

22.—Executor's interest—Executor's right to call for inventory and account from co executors. An executor to whom leave to apply for probate has been reserved has an interest, or at any rate, an appearence of interest so as to entitle him to call for an inventory and account from his co-executors who had already obtained probate.

Obiter:—Probate is made operative as the authenticated evidence and not at all as the foundation of the executor's title and an executor derives all interest from the will itself and the property of the deceased vests in him from the moment of the testator's death. 1 Phill. 239 at 241: 1 Phill 241—1909. Phill. 22 foll.— **Jehangir v Bai Kukibai** **27 Bom 281.**

(G) GUARDIAN'S LIABILITY TO RENDER ACCOUNTS.

23.—Guardian's liability to render accounts-Suit for accounts.—Where a previous guardian failed to deposit the process fee, which he was required to put in, for the purpose of notice being given to the succeeding guardian to come in and inspect the accounts, and the Court has made no order declaring the previous guardian to be discharged under S 41. cl 4 of the Act, a suit lies for the purpose of calling upon the previous guardian to render accounts. The mere fact that the succeeding guardian has neglected to inspect those accounts, although they were paying in the Court for about a year, is no legal bar to the suit being maintained.

Although a question, as to whether certain properties in respect of which accounts are claimed, really belonged to the estate of the minor or to the previous guardian personally, is a question of right, which cannot properly be gone into in such a suit, still for the purpose of taking an account, it must be seen what are the properties, which the previous guardian took possession of, as guardian of the minor under the orders of the Court; and he is bound to render an account, in respect of all the properties, of which he received charge as such guardian. **Kaniz Fatima v Sajjad Hosain** **34 Cal 211.**

(H) ENTRY IN GOVERNMENT GAZETTEE ACCOUNT BOOK.

24.—Hindu Law—Adoption—Proof of onus Entry in Government Gazettee Account Books, Non—examination of the parties—English and Indian Practice

Their Lordships also based their conclusion on the non-production of the accout books.

Having regard to the wellknown and often proved habits of the Indian people with regard to the keeping of accounts recording their most minute transactions the non-production of such books (in whose possession they are) covers that party's cause with suspicion.

Mussamat Lal Kunval v Chiranji Lal **7 M L T 57=14 C W N 285= 11 C L J 172=12 Bom L R 244= 32 All 140=20 M L J 182= 5 Ind Cas 549 P C.**

(I) LEAVE TO BRING SUIT FOR ACCOUNTS.

25—Leave to bring suit for accounts—Grant of leave—Order, if a decree — Civil Procedure Code (Act, XIV of 1882), section 2—Appeal, Act XX of 1863 (Religious Endowments Act) makes no provision for appeal and an order granting leave to bring a suit for the purpose of having the accounts of a certain religious encowment not being a "decree" within the meaning of section 2 of the Code of Civil Procedure, no appeal lies against such an order.

Mojaffer Ali v. Mirza Hedayet Hossain, **5 C L J 641=34 Cal 564.**

Notes —Ref: 10 C L J 505.

(J) RECEIVFR'S ACCOUNTS.

26.—O 40 rr 1 to 3 S.104; O 43 r 1. Ss 22; 23 (3) (1882 Ss 503 and 588 cl.) Receiver's accounts, order in passing appeal. The directions which a Court gives in passing a Receiver's accounts are not appealable under cl of S 588 of the Civil Pro Code. **Rani Keshabati Kumari v W O Mac Gregor** **12 C W N 648=35 Cal 568.**

Account-(*Contd.*)

(K) COMMISSION TO EXAMINE

27-Civil Procedure Code (Act XIV of 1882), Sec. 398 Amount, Commissioner to examine—Commissioner's duty—commissioner, when to take evidence under section 398, Civil Procedure Code—Commissioner, not a Judge or an Arbitrator—Decision of commissioner, value of.

On an application by the parties, the appellate court ordered a certain vakil to be appointed commissioner with powers under section 398, Civil Procedure Code, to examine the accounts and objections to the same, and it was further ordered that the vakil should submit to the court his report on the said accounts and objections.

Held that the object of the order was to refer to the commissioner the examination of the accounts for the purpose of enabling the court to see what the accounts were, and duty of the commissioner was to make out an account showing to the court exactly, what the accounts in the books stood and nothing else. The business of the commissioner was practically to place himself in the position of an assistant to the court, so as to give the court all the information which the accounts gave and thus to enable the court to come to a decision.

Held further, that under section 398 of the Code of Civil Procedure, the commissioner is entitled to take evidence in the matter referred to, so as to be able to report to the court for the purpose of enabling it to give a judgment on the points at issue.

The commissioner cannot deal with the case as if he is the Judge or an arbitrator appointed by the parties.

If the commissioner's report does not show what the accounts are, but merely contains a decision in favour of one party, the report is waste paper and is of no assistance to the court, whatever. **Tincowri Debi v Suttya Doyal Ranerji. 6 C L J 105**

28—Direction to take, not contained in a decree.

A decree contemplated an account being taken between the parties but it was silent on the question as to how that account was to be taken, whether by the Commissioner of the Court or by some person selected by both the parties. The Court of first instance decided that where the direction as to account ought to have been incorporated in the decree when passed it was competent to the Court at any stage of proceedings to direct necessary inquiries or accounts to be made or taken

Held, on appeal, that as some account was taken under the decree by a person appointed jointly by the parties a new agreement had come into existence superseding the decree and the Court was not competent to make the order appealed against. **Sir Jehangir Cowasji Jehangir v The Hope Mills, Ltd. 33 Bom 273 =10 Bom L R 488; reversing 33 Bom 216 =9 Bom L R 1380.**

29—Negotiable Instruments—Object of parties having dealings with each other—Presumption.

Prima facie the object of a promissory note is to show that the particular transaction represented by the note is a separate transaction, and it is intended that the remedies in respect of that transaction, should be separately pursued, even though the parties had several dealings with each other and there is a running account between them. **Issur Singh v G Bergamaun. 30 Cal 627.**

Account—During inquiry of suit plaintiff found entitled to sum in excess of court's jurisdiction not ousted thereby. See **8 C P L R 86**

Account—Duty of party impeaching settled account. See **15 C P L R 61.**

Account—Whether balancing of an account is account stated. See **7 Ind Cas 270.**

Account—Acknowledgment of debt. See Limitation Act arts 64, 115.

Account—Right to inspect account books relating to caste property. See **11 Bom L R 1267 =4 Ind Cas 569.**

3. OTHER CASES.

Account—Suit on accounts—Best evidence available to be produced. See **63 P R 1897**

Account—Suit for, against deceased guardian's representatives—Maintainability. See Guardians and Wards Act 1890 S. 41.

Account—See Limitation Act 1908 S. 22 Art 120.

Account—Suit for—against widow of a deceased Hindu—Non-joinder of parties. See **12 P R 1905=73 P L R 1905.**

Account-(*Contd.*)

Account—Suit for—jurisdiction of Court—Valuation of suit—Course of appeal—Limitation for suit for, after dissolution of partnership. See **87 P L R 1909=4 Ind Cas 929.**

Account—Plea as to the taking of—raised for the first-time in the High Court maintainability of. See **2 A L J 485=A W N 1905, 125**

Account—Admissibility of Mashkabari and rokhar books in evidence—Absence of khata books. See **9 C W N 421=32 Cal 582.**

Account—Unstamped entry in account book—Admissibility in evidence. See **A W N 1881, 115.**

Account—Order for production of, for inspection—Disobedience to order—Dismissal of suit—Wrong exercise of discretion. See **9 A W N 1905, 62.**

Account—Agreement by mortgagor not to claim accounts—Effect. See **9 Ind Cas 978**

Account—Partner spending honestly for the firm, mixing his—with partnership accounts—Effect. See **28 Cal 53 P C=27 I A 189=5 C W N 114.**

Account—Adjusted account—Settlement on basis of—Final adjustment not signed—Cross demands in partnership account—Limitation. See **15 C W N 882.**

Account—Objections to report of Commissioner for examination of—See **2 I A 34.**

Account—Direction for—Validity—Hindu Law—See Mortgage—General. **7 Ind Cas 921**

Account—Cross-suits between parties one on pro-note and the other on accounts in different Courts—All transactions dealt with in suit for account—Question of procedure becoming one of convenience rather than of right. See **30 Cal 627.**

Account—Liability of executor and administrator to accounts—Suit—Limitation—Effect of delay in suing—See **13 C W N 557=9 C L J 383=1 Ind Cas 289.**

Account—Admissibility in evidence:—See Evidence Act S. 34

Account—Accounts settlement—Re-opening:—Mc Kellar v Wallace (5 M I A 395) Ref See **10 Bom L R at 490**

Account-(*Concld.*

Account—Agreement by mortgagor not to claim accounts—Effect. See **9 Ind Cas978**

Account—Adjusted account—Settlement on basis of—Final adjustment not signed—Cross demands in partnership account—Limitation. **15 C W N 882.**

Account—Suit for, against deceased guardian's representatives—Maintainability. See **78 P L R 1911.**

Accountability.

See Account, suit for

See Mortgage—Accounts.

Account adjustment of.

See cases under:—

(1) Limitation Act (IX of 1908) art 64.

(2) Partnership suits respecting partnership.

(3) Contract Act S. 25.

(4) Limitation Act Ss. 19, 20, 64 120.

1—Contract to purchase land—Necessity to sell land for arrears.

Where an estate was sold under a contract at 10½ years' purchase of the net annual rent collections, and various sums of money were left in deposit with the vendee to meet various charges which were expected to arise, and the amount of these charges was regulated by the vendor's expectations, and formed portions of the stipulations of which the contrat was composed. but the net annual collections eventually fell short of those expectations,—*Held* that the agreement at the root of the contract *viz.*, that the property was taken at 10½ years' purchase, should govern the whole transaction, and that the accounts between the parties should be adjusted accordingly. In a suit to have an account taken of what was payable. and had been paid by either of the two parties in pursuance of the contract and to have a decree for any balance found to be due to either—the contract distinctly providing for an adjustment after the net annual collection and containing a stipulation that any injury accruing to the interests of one party by any laches in the payment of rent by the other should form a ground for compensation :—*Held* that it was not necessary that the land should be sold up for

Account Adjustment of-(*Concld.*)

arrears in default of payment before the account could be adjusted, and that even a decree, taken out by the zemindars against defendant for the rents of the land in suit, did not affect plaintiff's claim to the money owing under the contract

Opender Narain Mookerjee v Gudadhur Dey 25 W R 472 476

2—Proof of adjustment—Parol evidence

The adjustment of an account may be proved by verbal evidence, and need not necessarily be in writing signed by the party to be bound

Purnima Chowdrain v Nittanand Shah B L R Sup Vol 3 W R F B 82.

Accountant.

See Bankers

Account Books, entries in.

See Bankers' Books Evidence Act

See Cases under Evidence—Civil Cases—Accounts and Account Books

See Onus of proof

1—Inspection of account books—Right of a member of a caste to inspect documents and books of account relating to caste property—Injunction where such inspection refused

Where a member of a caste, who was also a trustee of the caste property, was refused inspection of books of accounts, documents etc, by the President of the managing committee of the caste —

Held that an injunction could be granted restraining the President from refusing such inspection.

Every member of a caste, being interested in its affairs, has a right, incidental to his membership, to every information which the books, records, and documents of the caste can give him to enable him to discharge the duties he owes to the caste It is a right similar to that of a partner in a firm to the partnership books and can be taken away from him only by an express caste rule, resolution, or usage. But a trustee or a member of a caste has such right to inspection only for the *bona fide* purpose and in the interest of the caste and not for any purpose hostile or injurious to those interests.

Though a Court will not interfere with the jurisdiction and discretion of a caste as regards its

Account Books, entries in-(*Contd.*)

internal purposes and management with reference to which it is its own master to frame rules and regulations, yet it will interfere in favour of any individual member of the caste as against any other member or members of it, where the Court is asked to give effect to any rule, resolution, or usage, of the caste if the right claimed in virtue of such rule, resolution, or usage, is a civil right congnizable by the Court In giving relief in such cases, the Court so far from interfering with the autonomy of the caste, or encroaching upon its jurisdiction as to its internal affairs, recognises them by giving effect to its rule, resolution, or usage

Chapsey v Jethabhai (9 Bom L R 569 reversed on appeal 11 Bom L R 1172)

2—Account books, Copy of an extract from stamps—Civ Pro Code, 1882, ss 141-A and 142-A—Stamp Act 1899 sch I art 24.

A copy of an extract from an entry in an account book filed under the provisions of ss 141-A and 142-A of the Civ Pro Code, 1882, does not require to be stamped under art 24 of schedule 1 of the Stamp Act 1899 **Kastur v Fakira. 4 Bom L R 293=26 Bom 522.**

Notes—Ref 27 Bom 150

3—Books of account, Presumption as to

According to the Indian Evidence Act, 1872, books of account which have been regularly kept, may be appealed to, not only for the purpose of refreshing the memory of a witness, but also as corroborative evidence of the story which he tells Books of account containing entries referring to a particular transaction are not entitled to the same credit that is given to the books that record that transaction in common with other transactions in the ordinary course of business.

Bhoy Hong v Ramnathan 4 Bom L R 378.

Account books, recovery of—(2) Suit for recovery of account books—Maintainability—Subsequent prayer for recovery of moneys due from defendant—Amendment whether allowable

10 M L T 557

Account made in course of usual dealing.

See acquiescence

Account, mutual, open and current

See Account, suit for and Limitation Act S 5

Accounts

See (1) Decree—Construction of Decree-Account.
(2) Decree—Form of Decree—Account
(3) Mortgage—Accounts. Keeping two sets of.
(4) Bombay Tolls Act, s. 7. Mutual Accounts.
(5) Limitation Act, (1908) arts 85, 89 and 57.
(6) Mortgage (Redemption).

1—Procedure.

Procedure to be observed in a Judicial enquiry into accounts laid down. **Alaiahmad alias Boolaki v Nusibun. 24 W R 70.**

Account sales.

See Evidence—Civil Cases—Account Sales.

See Principal and Agent—Commission Agents.

Account settled.

1—Reopening of.

When a plaintiff sued on a deed which recited that accounts had been settled the defendant may by pointing out existence of irregularities and mistakes in the book of the plaintiff justify reopening the account. **Girdharlal v Hiraji 91, P J 337.**

2—Accounts—Expenses incurred for partnership not allowable if unseparably mixed up with private affairs.—In taking accounts it is not possible for a Court of justice to allow expenses to the accountable party, even though honestly incurred for the partnership, where, by mixing up his private affairs with those of the partnership and by his omission to keep clear accounts of any kind, he has made it impossible even to conjecture what those expenses are. **Moung Tha Huyin v Mah Thein Myah. 5 C W N 114=28 Cal 53**

Notes—Dist: 11 M L J 353=25 Mad 149.

3—Settled account—requisites of—Acquiescence—Accounts settled to be reopened when—Proof—Leave to amend—Suit for account, procedure to be followed.

The requisites for making an account settled depend on the circumstances of each case and mode of dealing between the parties.

Account settled—(*Contd.*)

Although acquiescence in accounts furnished may not, by itself, amount to settlement, when acounts have been delivered with opportunity for inspection where they have been duly examined and no exception has been taken, and where they have been acquiesced in, they cannot be opened unless upon distinct and specific averment of errors proved or of fraud, mistake or collusion proved.

If a settled account is impeached for errors, particular errors must be stated and proved and the same rule holds even where the account is settled "errors excepted."

Where the plaintiff commenced an action on the assumption that no accounts had been rendered, and the case proceeded on the question of the liability of the defendant to render an account and the appeal was argued on the same footing, leave ought not to be granted to convert the suit into one for re-opening the accounts on the ground of errors contained therein.

Where a person seeks an account from another alleged by him to be his agent the first question to be decided is the *factum* of the agency. If that question is decided in favour of the plaintiff the next question to be tried is whether the defendant as agent is liable to be called upon to account. If he answers that accounts have been settled between him and his principal, that question ought to be tried next. If the accounts have not been settled, they have then to be taken. In suits of this description, if the liability to account is denied, that is the fundamental question to be tried first It is only after an adverse decision upon this question against the defendant, that he may be called upon to render an account.

Mohesh Chunder Bose v. Radha Kishen Bhatta Charjee. 6 C L J 580.

4—Accounts—Limitation Act Sch. II. Arts 57 and 85—Account-current-Account, open mutual.

An open account is one, which is continuous or current, uninterrupted or unclosed by settlement or otherwise, consisting of a series of transactions.

An account-current is an open or running account between two or more parties, or, an account which contains items between the parties, from which the balance-due to one of them is, or, can be ascertained.

Mutual accounts are such as consist of recip

Account settled-(*Contd.*)

rocity of dealings between the parties and do not embrace those having items on one side only though made up of debits and credits.

An account, under which one party has merely received and paid moneys on account of the other, is not a mutual account properly so-called. Each party must receive and pay on account of the other.

A shifting balance, sometimes in favour of one side, sometimes in favour of the other, is a test of mutuality but its absence is not conclusive proof against mutuality.

The mere circumstance that, on one solitary occasion there was a sum to the credit of the defendants in the books of one plaintiffs, does not make the account, between the parties, a mutual account in which there have been reciprocal demands between the parties. 6 (M H C R 142 and 17 Mad 293=4 M L J 140 Ref: 18 Beav.575 (579); 52 E R 225; 23 L J Ch 657: 18 Jur 763; 2 Phillips 7: 8; 3 Drewry 183 (192) 61 E R 873 (876) 2 Y and C. C. C 620; 9 Harg 471; 68 E R 596: 79 N Y II 35, Am Rep 490 Ref: 2 Ind Jur N S 241; 3 All 523;5 Cal 759=6 C L R 112; 6 Bom 134 Ref: 5Cal 759=6 C L R II2, Fol.) **Ram Pershad v Harbans Singh 6 C L J 158.**

Notes:—Fol: 32 All 11=6 A L J 921=4 Ind Cas 201.

5—Suit for—Procedure—Principal and Agent.

In a suit for accounts all that is necessary for the plaintiff to show, to entitle him to a decree, is that the defendant is a person bound to account. When this is established, the Court ought to fix a date for the furnishing of the accounts under S. 215 A C P Code, and order accounts to be taken. The law does not impose any duty on a plaintiff, who calls on his agent to account, first to satisfy the Court that there is, or ought to have been some surplus in the hands of the agent. A W N (1883), 218, Refd.) **Ram Das v Bhagwat Das A W N (1905), 1.**

5A—An account to be a settled account need not be signed, provided it is submitted to the party sought to be made liable on it and he has by words or conduct acquiesced in its correctness. **Haji Abdul v Haji Bibee. 7 Bom L R 151.**

6—Accounts—Accounts settled—Omission of plaintiff to party for re-opening of accounts on the basis of fraud—Plea of defendants that no accounts were rendered—Finding that plaintiff accepted payments after hearing accounts read—Whether amounts to a finding that accounts were.

A finding, in a suit for settlement of accounts, that plaintiff accepted payments after hearing accounts read, is not finding that accounts were settled between the parties.

Where the defendant, in such a suit, admits that he had not rendered any accounts to the plaintiff and was not liable to do so, the Court should presume that there was no settlement of accounts, and plaintiff's suit is not liable to dismissal on the ground that he did not pray in his plaint for re-opening of accounts on the ground of error or fraud. **Pattath Manakkal Narayanan v Manakkal Narayanan. 8 M L T 424=7 Ind Cas 853**

7—Mode of taking.

In orders relating to the taking of accounts it is irregular to direct the amounts to be taken, irrespective of the plea limitation. **Asghar Ali v Kurshed Ali. 3 Bom L R 576= 24 All 27.**

8—Account suit for—Suit for accounts against executor—Accounts on the footing of wilful default.

In an action against executor for accounts, it is not necessary, when making a reference to the Commissioner to take accounts, to give leave to the plaintiff to make an application to have accounts taken on the footing of wilful default pending the reference.

Modern practice allows of an order charging wilful default being made at any time during the continuance of the action on a proper case being shown. **Ayshabai v Ebrahim Haji Jacob. 10 Bom L R 117=32 Bom 364.**

9—Settled accounts—Error—Re-opening—Surcharge and falsification—General words of release—What passes.

B and S, partners, had the partnership accounts strictly adjusted, and Rs. 39,465-7-0 was found due to B. By a deed of assignment, B, in consideration of Rs. 34,000, assigned and released his share in the firm to S. By common mistake, Government promissory notes for Rs. 7,000 were omitted from the accounts. On discovery of the mistake, B sued for a share of the notes,

Account settled-(*Concld.*)

Held, either the whole account may be re-opened, or leave may be given to B to surcharge and falsify. The latter is the more proper course on the facts of this case.

General words of release in a deed can only operate to pass what the parties had in contemplation, and not something with which they had no intention of dealing. (5 M I A 372, 9 Beav. 503, 9 Ch D 547, Ref: 4 H L 610, 14 Ch D 829 Fol. **Baney Madhub Mullick v Subal Chunder Law.** **11 C W N 776**

10—Account settled—Suit on—Account not signed—Limitation.

An account settled must be signed by the debtor, and the creditor has three years from the date of the debtor's signature.

Chinnasawmi Naidu v Venkatasami Naidu. **7 M L T 372=6 Ind Cas 719.**

Accounts Settled.—Accounts settled—Hypothecation bond for balance due—Obligor preventing registration thereof—Suit on accounts stated—See **11 All 13=A W N 1888, 280.**

Account settled but not signed.

See Limitation Act Ss. 2, 19, 20.
„ Limitation Act Art 64.

Account Stated.

See (1) Accounts.
(2) Contract Act (IX of 1872,) S 25.
(3) Limitation Act (1908) S 19. and Sch II, 62.
(4) Pleadings.

Account stated—See Limitation Act, (1908) S. 19.

1.—Account stated—Limitation Act, sch ii art. 64.

When account shewing reciprocal demands between two parties is made up, a balance is struck, and the debtor signs an acknowledgment that the balance is due, there is an account stated within the meaning of art. 64 schedule ii of the Indian Limitation Act which evidences a new contract and upon which a suit may be brought. **Musammat Jhapkan v Ram Dayal.** **7 O C 166**

2.—Suit on account stated—Hypothecation bond for the amount due—Obligor presenting registration of bound denying execution.

The plaintiff sued (i) for registration of a hypothecation—bond executed by the defendant; (ii) in the alternative, for recovery of the amount of the bond upon an account stated. The defendant denied execution of the bond, and that she had any dealings or stated any account with the plaintiff. The Courts below disallowed the first claim as barred by limitation, and disallowed the second on the ground that the bond had effected a novation of the contract implied by the statement of accounts :—*Held*, that this decision was wrong, and that the plaintiff was entitled to sue upon the account stated. 4 All 30 Dist. **Kiam-ud-din.** **11 All, 13=8 W N 280.**

Account stated-(*Contd.*)

3.—Cause of action—Evidence of the existing debt—Fresh contract interest—Damdupat.

In June 1883, the plaintiff's father advanced a loan to the defendant at compound interest. The account of this debt with interest was adjusted and signed from time to time. In June 1893, it was adjusted and signed, the amount found due being Rs. 28-8-0. In February 1896, the plaintiff sued to recover this amount. *Held*, that the account (ruzukhata) was merely an acknowledgment of the debt and of the correctness of the calculation of interest upon it. *Held*, also, that the plaintiff was not entitled to treat the amount so found due as principal and to claim interest upon it. The debt to be sued on was the amount originally advanced, and the interest recoverable was limited by that amount according to the rule of damdupat. By English law an account stated could be sued on as implying a promise to pay. Formerly this was the rule also in Bombay (as shown by the earlier cases), where the account was signed. If, however, it was not signed, it could not be sued on as a new contract. The Indian Limitation Act required an acknowledgment or admission of a debt to be signed; and an admission not made in the manner prescribed by law (i. e. signed) for the purpose of preventing a debt from becoming barred does not imply a promise to pay it if it should become barred. According, however, to the later authorities, an account stated or adjusted (ruzukhata) cannot be sued on as a fresh contract. The suit must be brought in respect of the original transaction, and the subsequent stated or adjusted accounts are only evidence of the debt arising from them, and serve to prevent the operation of the Act of the Limitation. **Shankar v Mukta.** **22 Bom 513.**

Account stated-(*Contd.*)

Notes.—Fol: 23 All 502. Con: 26 Mad 186; 12 M L J 441 Dist: 24 Bom 394, 25 Bom 387. Ref: 32 Mad 284; 19 M L J 372.

4.—C. P. C. O. 2 r. 2 (1882 : S. 43)—Cause of action—Account stated—Mortgage transaction.

The defendant traded in Zanzibar as the agent of one Khimji, who owned five shops within the German jurisdiction. To release from attachment these shops, the defendant obtained from the plaintiff a sum of Rs. 7,000 out of which he applied Rs. 5,859 in discharge of the attachment, and returned the balance to the plaintiff. As a security for the repayment of Rs. 5,869, the defendant became personally responsible for the amount, and as part of the same transaction, he got a mortgage in his own favour from Khimji of the five shops and in turn sub-mortgaged them to the plaintiff. As a result of these transactions, the plaintiff debited Rs. 2,753 in the general account which was in the name of the defendant. The plaintiff then brought Suit No. 193 of 1899 against the defendant to recover the balance due on this general account; and a few days later he brought another Suit No. 196 of 1899 for the purpose of enforcing certain rights under the sub-mortgage. The first suit was decided in the plaintiff's favour, but the second was thrown out on the ground that it was barred under Section 43 of the Civil Procedure Code.

Held, that the second suit was not barred by Section 43 of the Civil Procedure Code, since the two claims were not in respect of the same cause of action. The cause of action in the earlier suit was an adjusted account, in respect of the transaction arising out of the mortgage; and the mortgage constituted a cause of action in itself in the second.

An account stated respecting a debt constitutes a new and distinct cause of action, the consideration being the ascertaining of the previously uncertain state of the transaction between the parties, while a promise to pay is implied by the admission of the balance.

Hansraj v Lalji. **6 Bom L R 454= 28 Bom 447.**

5—Acknowledgment—Limitation Act, s. 19 & Art. 64 of schedule II—Promise to pay—Account stated.

C. C. J.

Account stated-(*Concld.*)

A bare acknowledgment under s. 19 of the Limitation Act, does not imply a promise to pay on which a right of suit could be based.

An account so acknowledged is not an account stated within the meaning of article 65 of schedule II of the Limitation Act. 1 Bom 590 . 2 Bom 230 ; 13 Moo I A 37 ; 6 Bom 683 ; 8 Bom 405 ; 9 Bom 516 , 7 Bom 414; 15 All 1 & 10 Cal 284, referred to. **Beohar Raghubir Singh** through the Courts of Wards **v Udechand Agarwal 11 C P L R 65.**

6—Limitation Act s. 19—Acknowledgment of debt—Stamp duty.

The mere fact of a document being an acknowledgment of debt within the meaning of s. 19 would not make it liable to a stamp duty, under Sch I Art 1 of Act 1, of 1879. It should be intended to supply evidence of a debt.

Ambica Dat v Nityanund Singh. 30 Cal 687.

7—Guardians & Wards Act, VII of 1890—Minor—Guardian—Debt—Acknowledgment of liability—Limitation of time]

A guardian appointed under the Guardians and Wards Act can sign an acknowledgment of liability in respect of, or pay part of the principal of a debt so as to extend the period of limitation against his ward in accordance with ss. 19 & 20 Limitation Act, provided it be shown in each case that the Guardian's act was for the protection or benefit of the ward's property.

Annapagauda v. Sangadigyapa. 26 Bom 221; See 20 Bom 61, 17 All 198.

Account stated or adjusted (ruzu-khata).

See 1 Account Stated
2 Limitation Act S 19.
3 Mortgage—Accounts.
4 Limitation Act Art 64.

Account, suit for.

See 1 Bengal Rent Act (VIII of 1869), s. 30.
2 Costs.
3 Dekhan Agriculturists Relief Act. s. 15 D.
4 Guardian and Wards Act s 41.
5 Mortgage—Accounts.
6 Principal & Agent.

Account suit for-(*Contd.*)

6 Partnership—Suits Respecting Partnership.
7 Plaint—Form and Contents of Plaint—Frame of suits Generally.
8 Small Cause Court, Mofusil—Jurisdiction—Account, Suit for.
9 Valuation of Suit—Suits.

Account, suit for

(1) Liability to account (1)
(2) Lumberdar (2-3)
(3) Mahomedan widow in possession for dower. (4)
(4) Mother appointed administratrix of minor son (5)
(5) Right to an account—Person with title barred by lapse of time (6)
(6) Landlord and Tenant (7)
(7) Principal and Agent (8-19)
(8) Refusal to account (20-21)
(9) Right to Re open settled account (22-26)
(10) Running account for portion of which hundis are given(27)
(11) Necessity to go into accounts in suits for profits (28-84)
(12) General Cases. (85-88)

(1) LIABILITY TO ACCOUNT.

1—Liability to account—Administrator General as Executor of the surviving trustee of religious endowments.

An account was decreed against the Administrator General, who had been appointed the executor of the last surviving trustee under the will of the founder of a religious institution.

Thacoor Dass Sett v Hogg. Cor 68

(2) LUMBERDAR.

2.—Lumberdar—Account of rents uncollected.

Held, that a lumerdar is ordinarily bound to account for rents not collected if he does not exercise his power of distraint with due diligence. **Sees Ram v Chait Ram. 2 Agra 266.**

3—Account of rents uncollected.

Held, that a lumberdar is not liable for the rent which he, without any wilful default on his part, has never received, if he shows that he has done his duty in endeavouring to collect the same.

Enayet Hossein v Gholam Ally. 2 Agra 276.

Notes:—Ref: 12 All 301 F B.

Account suit for-(*Contd.*)

(3) MAHOMEDAN WIDOW IN POSSESSION FOR DOWER

4—Mahomedan widow in possession for dower—Suit not framed for an account.

In a suit by the only brother and heir-at-law of a Mahomedan of the Shiah sect, claiming the whole of the deceased's estate, and for mesne profits, the issues raised by the pleadings were, first, whether a marriage had taken place between the deceased and the party in possession, who claimed to be his widow, and secondly, the validity of a deed of dower executed by the deceased in her favour. The Courts in India found these issues in favour of the widow, and dismissed the suit. The Judicial Committee, in affirming the Court's decrees upon these points, held further that, although the estate of the husband was hypothecated for the dower, yet as the heir-at-law would be entitled to the residue after satisfying the widow's claim, he was by right entitled to an account, but as the plaint was so framed as not to admit of an account being taken, the appeal was affirmed, without prejudice to a suit being brought for administration of the deceased's estate upon the footing of the marriage and deed of dower being admitted in the suit. **Ameeroonnissa v Moradonnissa. 6 Moore's I A 211.**

(4) MOTHER APPOINTED ADMINISTRATRIX OF MINOR SON.

5—A mother appointed under Sec. 6 of Act XX of 1864 administratrix of her minor son's estate is not bound, as is a curator appointed under Sec. 9, to present accounts. After the minor's death the only way in which she can be called to account is by a suit instituted by a person interested. **Narmadabai. P J (1883) 308= I L R 8 Bom 14.**

(5)RIGHT TO AN ACCOUNT-PERSON WITH TITLE BARRED BY LAPSE OF TIME.

6—Right to an account—Person with title barred by lapse of time—Hereditary Office, administration of trusts of.

The Plaintiff brought a suit to establish his right to and for possession of the hereditary office of dharmakarta of a pagoda and to remove the defendant, but it was held that his title was extinguished by lapse of time. *Held* that plaintiff, having no longer any title to the property,

Account suit for-(*Contd*)

was not in a position to treat defendant as a trespasser and to call upon him for an account of the past administration of the trust upon that footing; and further, that the suit being substantially one to remove the defendant from the trust and establish plaintiff's title to the hereditary office, or on failure of this, to secure the appointment of a fit and proper person to fill defendant's office, the account was only prayed for on that understanding, and, therefore, the plaintiff was not entitled to call for an account of the past administration of the trust, as a person interested in the religious trust. **Manally Chenna Kesavaraya v Vaidelinga. 1 Mad 343.**

(6) LANDLORD AND TENANT.

7—Tenancy—Advanced set off against the account of rent due—Suit for rent—Limitation Act (XV of 1877) arts. 85, 89 sch. II—Form of decree.

The plaintiffs executed a lease in favour of the defendant No. for nine years. An annual rent was fixed payable by instalments. The defendant as instructed by the plaintiffs, paid on their behalf from time to time Government revenue, cesses, expenses of litigation etc. The defendant used to set off those sums against the rent due to plaintiffs under the lease. The plaintiffs instituted this suit for an account against the defendants after the lease had expired:—Held that the suit for an account was not maintainable, the lease created between the parties the relationship of landlord and tenant and the only relief which the plaintiffs could not ask is a decree for rent if any still remains due. **Bhekdhari Lal v Badhsingh Dudharia. 27 Cal 663.**

(7) PRINCIPAL AND AGENT.

8—Account—Agent—Civil Procedure Code, Act X of 1877 Sections 394 and 395.

Procedure to be observed in taking accounts discussed. **Annoda Persad Roy v Dwarka Nath Gangopadhya. 6 Cal 754= 8 C L R 321.**

9—Sch II Art. 85—Suit for balance on running account.

When an account between a principal and his agent shows what balance is due from either party at different times, but is never finally settled, it is a running account, and the limitation begins to run from the date of its being closed under Art 85, Limitation Act. **Prem Kaur v Mohan Lal. 198 P L R 1909.**

Account suit for-(*Contd.*)

10—Arts 89, 116, 132—Contract of service in writing registered-Principal and agent-Accounts, suit for.

Art 89 of Sch II of the Limitation Act expressly applies to the case of a principal suing his agent for an account, whilst Art. 116 applies to a suit 'for compensation for the breach of a contract in writing registered'. To ascertain which article of the schedule applies, it is necessary to see what is the relief which the plaintiff claims. The expression "moveable property" in Art 89 of Sch. II of the Limitation Act includes money. 27 All 27; 8 C W N 113: 1 C L J 147: 1 C L J 232. A suit not merely for an account, but also to enforce in the plaintiff's favour the charge created to secure the moneys which might be found due from the agent to his principal on his account, falls within Art. 132 of the 2nd Schedule of the Limitation Act, and the period of limitation is twelve years from the time when the money sued for becomes due. **Hafezuddin Mandal v. Jadu Nath Saha. 7 C L J 279=35 Cal 298 =12 C W N 820.**

11.—Arts 89, 120.—Suit for accounts by Zemindar against naib—Principal agent. A suit by a principal against his agent for an account and for money that may be found due upon such account being taken is governed by Art. 89 Sch II of the Limitation Act. **Jogendra Nath Roy v Deb Nath Chatterjee. 8 C W N 113.**

Notes:—Fol: 32 Cal 719=1 C L J 232; 35 Cal 298=32 C W N 820=7 C L J 279= 14 C W N 121.

12—Principal's suit for accounts — Distinction between a decree for an account and a decree made upon the hearing—Costs.—

A principal brought a suit against an agent, who was employed as a dewan for drawing and expending the money of the principal, alleging that the agent has drawn more than he had spent for him and the balance was misappropriated by the agent. He also claimed any other

Account suit for—(*Contd.*)

sum which might be found payable to him The agent denied having received any money and also his liability to an account thereunder The court found that the relation of agency subsisted between the parties The Appellate Court dismissed the suit on the ground that though an attempt has been made to prove a balance due, still from the evidence adduced at the hearing, it was impossible to decide, how much of the principal's money was unaccounted for:—*Held*, that such a suit was essentially a suit for an account and the Lower Courts should have ordered an account to be taken of the defendant's dealings with plaintiff's money. This was without any expression of opinion that, in a suit for an account, an issue may not be raised, at the outset, so clearly as to be ready for decision. But the general rule being the other way, this suit was an example of it. **Hurrinath Rai v. Krishna Kumar Bakshi.14 Calc 147=L R. 13 I A 123**

Notes:—Dist 32 Cal 719=1 C L J 232: 20 Mad 418: 13 C W N 212 Fol. 1 A L J 722 Ref: 27 All 371=(1905) W N 3: 6 C L J 580: 12 C W N 28.

13—Form of suit for account—Procedure on taking accounts—Civil Procedure Code (Act X of 1877), ss. 250, 395, and 396, sch. IV, form 157—Form of keeping accounts of joint property in mofussil—

In a suit for an account by a principal against his agent, the plaintiff should ask in his plaint that a proper account may be taken. If the defendant is found liable to render such account for a certain period, the Court should make an interlocutory decree declaring that he is so liable, and direct him to file an account in Court within a fixed period. This decree may be enforced under s. 260 of the Civil Procedure Code. After an account has been filed, the plaintiff should be allowed reasonable time to examine it. If the objections are numerous, the procedure prescribed by ss. 394 and 395 and form 157 of Sch IV of the Code should be followed. When the accounts have been taken, the court must determine the amount due, and the final decree should be for the payment of this amount and also, if necessary, for the delivery of any papers, vouchers, or other documents which have come into the hands of the agent in the course of his employment. Form of keeping accounts of joint property in the mofussil considered.

Degamber Mozumdar v. Kallynath Roy, 7 Cal 654=9 C L R 265.

Account suit for—(*Contd.*)

14-C P C O. 22, r 4, S. 107 (2), O, 22r.11 (1882 Ss. 368, 582)—Limitation Act. Art.175 C.—Death of respondent—Legal representative necessary for prosecution of appeal-Application for substitution of legal representative made within six months of obtaining probate of deceased respondent's will, but more than six months after his death—Abatement of appeal—Sufficient cause.

In a suit which was in substance one for taking the accounts and winding up the affairs of a partnership which had subsisted between the plaintiff and several defendants to that suit, a final decree was made binding the plaintiff and some of the defendants to contribute in certain proportion a sum of money of which a portion was directed to be paid to another defendant A. Pending an appeal before the High Court, preferred by some of the former, A (respondent) died leaving a will. About four months after A's death A's son obtained probate of the will. The appellants applied for substituting the name of A's son for A within six months of his obtaining the probate, but more than six months after A's death. *Held*, that the appeal could not have proceeded in the absence of a representative of A, and no sufficient cause having been shown for not applying for substitution within six months of A's death, the appeal had abated under Ss. 368 and 582, C. P. C., and Art. 175 C. of Sch. II of the Limitation Act. 14 M. L. J. 147. **Raj Chunder Sen v. Gangadar Seal 1 A L J 145=31 Cal 487=8 C W N 442=31 I A 71 P C=14 M L J 147.**

Notes.—Ref: 11 C W N 698 ; 5 C L J 310.

15—Fraud or specific error in account, Allegation of.—M sued for an account of all moneys received and paid on his behalf by T, deceased (represented by his widow), and F as his agent from 1st August 1859 to 30th April 1865. It was alleged in the plaint that M "left India in 1858, and has since resided in Scotland; that at the time he left he was, and still is, possessed of extensive property in the Province of Bengal, chiefly landed property;" that T and afterwards T and F were his agents and managers. In his written statement, M stated that "in the month of June 1861, the deceased rendered an account to the plaintiff

Account suit for-(*Contd.*)

showing that all moneys due to him by the plaintiff in respect of his salary and commissions up to the 31 st January 1861, being the whole of deceased's claim against him up to that date under their above mentioned arrangements, had been duly paid by the plaintiff. In the month of April 1865, the deceased transmitted to the plaintiff the agency accounts of himself and his firm with the plaintiff in continuation of the accounts rendered by him as mentioned in the preceding paragraph brought down to the end of February 1865; and again in May 1865, the deceased transmitted the continuation of the said account brought down to the 30th April preceding, being the date of the termination of the agency. The said accounts rendered have been examined by the plaintiff, who verily believes that the true balance now due to him thereon exceeds Rs: 1,00,000. without including interest." There was no allegation in the plaint, written statement or opening of counsel, of fraud or specific error. *Held* that M, in his plaint and written statement had not disclosed any cause of action.

Mackintosh v. **Temple 2 Ind. Jur N S 333**

16—Suit against gomasta—Duty of Court to look into accounts.

In a suit against a gomasta to obtain accounts of moneys which had come into his hands, it was held that it was not enough for the Lower Courts to make a decree ordering the defendant to render nikash papers to the plaintiff; it was the business of the Court to have these papers brought before it and examined, and to determine whether they were correct and fair accounts between the parties. **Shushee Shekhur Audhikaree v. Suleem Biswas 22 W R 191.**

17—Decree for account against agent.—

Where a decree requires an agent to render accounts, he can only discharge himself by accounting for all the moneys that have come into his hands,and it is always open to the decree-holder to show that this has not been done. **Woomanath Roy Chowdhry v. Sreenath Singh 15 W R 260.**

18—Principal and agent—Specific sums of money credited by agent to himself, suit for, if one "for account"—Cognisability by Provincial Small Cause Courts, Act IX of 1881, s. 31.—

Account suit for-(*Contd.*)

Where plaintiff sued for specific items of money due by his agent, on account of moneys, with which the agent wrongfully credited himself, and an objection was raised that it was a 'suit for an account' and as such not cognisable under art. 31 of Act IX of 1887. *Held*, that it was not a suit for "an account" and was cognisable by the Court of Small Causes, **Sankara Reddi v. Errama Reddi 19 M L J 113.**

19—Execution proceedings transferred to a Collector—Court's power under S. 324 A—Collector's duties.

A Collector acting under S. 320 of Civil Procedure Code has power to include on the debit side only such charges as can be incurred under the provisions of the chapter; and the Court is perfectly justified under S. 324 A in regarding as at its disposal, the balance which is left after such charges have been deducted; and if there be any charges which have been not so incurred, but which have been inserted in the accounts, such charges, being improper, cannotiaffect or restrict the disposing power of the Court over the balance. The power of the Court as to the application of the balance is complete although the fund itself remains in the hands of Collector as trustee.

The amount of maintenance to be determined for the judgment debtor is a matter for the Court to consider and decide and one which it cannot allow the Talukdari Settlement officer (acting as a Collector) to decide.

The Collector, like an agent, though bound under S. 324 A to render accounts, cannot be compelled to give up the account books into Court nor does the section require him to pay the balance into Court. **Rupali v. Kalyansing: Rupali v. Gambhirsingji (6 Bom L R 825).**

(8) REFUSAL TO ACCOUNT

20—Refusal to account—Destruction of account books—Where a defendant refused to render accounts, and there was evidence of spoliation of the banking books, the Court charged him with the principal sum for which he was accountable. with interest at 12 *per cent per mensem* in lieu of the profits he failed to account for.

Rampershad Tewarry v. **Sheo Churn Doss; Thookra v. Rampershad Tewarry 10 Moore's I. A., 490.**

Account suit for-(*Contd.*)

21—Limitation Act Arts 85 116—Account, suit for, limitation—Demand-Breach-Limitation Act (XV of 1877), Sch. II. Arts. 89, 115, 116.

When there is a contract to render accounts year by year, Art, 116 of the Limitation Act applies if the contract is registered, and Art. 115 if it is unregistered.

Neglect to comply with the demand to render accounts is tantamount to a refusal within the meaning of Art. 89.

Where the contract was to render accounts year by year and there had been successive demands and breaches at the end of every year, and plaintiff brought a suit for accounts within three years of the last breach.

Held, whether Art, 89 or Art. 115 applied, he was entitled to accounts for one year only. I C L J 211, Fol, 3 L R 446, Relied on. **Easin Sarkar v Baroda Kishore Acharyya Cnowdhury 11 C L J 43=5 Ind Cas 186.**

(9) RIGHT TO REOPEN SETTLED ACCOUNT

22-Right to re-open settled account-Principles of Court of Equity in re-opening accounts—Principles which regulate a Court of Equity in opening stated and settled accounts—Accounts of long standing and great complication of a mercantile firm at Calcutta one of the partners of which afterwards acted as agent in England, involving charges for agency and partnership transactions were mutually agreed to be investigated and closed. After long negotiations and discussion respecting some of the charges, an agreement was come to, the parties agreeing to strike the general balance at a given sum, reserving one item of the account amounting to a considerable sum, for future investigation This reserved item was subsequently settled by the acceptance of a bill of exchange for a lesser amount, as such reserved-item, if re-opened would have disarranged the settled general account. The bill of exchange was dishonoured and an action brought to recover the amount. A bill was then filed for an injunction for the cancelment of the bill of exchange, and praying that the accounts so settled might be opened. The Supreme Court at Calcutta held that the reserved item being left open was evidence that the account was not finally closed, and decreed the accounts to be opened, referring the cause to the Master On appeal, held by the Judicial Committee (reversing such decree, and dismissing the bill with costs) that the transaction amounted to an adjustment of the general account between the parties, subject to the reserved item which was subsequently settled, and that the accounts so settled and closed could not, in the absence of fraud be re-opened **Mc. Keller v. Wallace 5 Moore's I A 272**

Account suit for-(*Contd.*)

23—Examination of accounts, waiver of—settlement of account—No fraud or undue influence used in settlement—Promissory note for the amount found due—Re-opening of accounts, not allowed.

Where two persons have mutual dealings and accounts and one of them of his own free-will and accord and without any fraud practised or undue influence exerted by the other waives his right to an examination of the accounts for the purpose of ascertaining the balance due and agrees to treat a gross sum as due from him and executes a promissory note for the amount, the promissory note must be treated either as the result of a settled account or as a settlement by compromise, and in either case it cannot be re-opened.(5 M I A 395 Fol) **Magniram Khupchand v Laxminarayan Rampratap 10 Bom L R 281=32 Bom 353**

24—Hindu Law—Partition-Account-Account for partition nature of-Mitakshara joint family—Manager's liability to account—Settled account when to be reopened or impeached-Right to correct account-Pleadings. When accounts have to be taken with a view to a partition of joint family properties, the account which has to be taken of the entire family property in the hands of the different members is mainly an enquiry into the existing assets: the head of the family cannot, in general be called upon to defend the propriety of the past transactions of the family.

Although the Court is always reluctant to re-open account which has been settled with deliberation and with tolerable fairness, relief will be granted where fraud or mistake is established; and it does not matter whether the error in the accounting occurred by accident or design: nor is it necessary that the error or mistake should be mutual If an item has been omitted in the account by mistake it may be recovered.

Account suit for-(*Contd.*)

A settled account is only *prima facie* evidence of its correctness; it may be impeached by proof of unfairness or mistake in law or in fact ,and if it be confined to particular items of account it concludes nothing in relation to other items not stated in it. But the right to correct an account is confined to cases in which no element of estoppel has intervened or where there is no obligatory agreement between the parties as upon settlement and mutual compromises.

Ordinarily, where a party seeks to open a settled account, there must be some direct, distinct and specific averment of errors to entitle the party to open the accounts, but where no objection was taken by the defendant to the frame of the suit and even after the preliminary question of the liability of the defendant to render an account had been decided in favour of the plaintiff, and the accounts had been elaborately examined without any objection as to the course adopted being taken, the Court will not allow an objection of this character to prevail when it is not suggested that the defendant has been in any way prejudiced by the omission of the plaintiff to specify the errors in the plaint.

Bhowani Prasad Shaha v Jugger-nath Shaha 13 C W N 309= 9 C L J 133=3 Ind Cas 241.

24 A—C P C S. 2 (2) (1882 S. 2)—Decree—Settled accounts, order directing reopening of.

Plaintiff, a solicitor, advanced money to a client on a mortgage bond and three further charges. The consideration for the third further charge was not paid in cash, but was made up of (1) amounts due to the plaintiff on several promissory notes in the plaintiff's favour (2) certain promissory notes executed by the client in favor of a third party, which the plaintiff is said to have "taken up" (3) balance of amount due as interest on the mortgage and 2 further charges and (4) a certain amount stated to have been found due to the plaintiff as costs for acting for him in various suits, upon a settlement made of amounts due under various taxed and untaxed bills, a large remission having been allowed in consideration of all the bills not being taxed. In a suit by the plaintiff against the heirs of his deceased client to realize the amount due on the mortgage and the three further charges, the plaintiff obtained a decree on the 1st three bonds,

Account suit for-(*Contd.*)

but the 4th bond was ordered to be reopened and it was directed that the plaintiff "do get all his bills of costs upto the 3rd August 1903 taxed by the Taxing officer of the High Court, and then refile the bills in this Court, that then a Commissioner be appointed to take accounts in the light of the observations in this case, that after the Commissioner's Report is received and the parties are heard thereon the final decree will be drawn up under s. 89 of the Transfer of Property Act. *Held*, that this order was a decree. The fact, that the Subordinate Judge intended hereafter to adjust the equities arising out of the contract, did not in any way do away with his adjudication that the contract, as it stood, was not binding on the defendants. 9 Bom 183 dist and doubted 15 Bom 155 s c L R 18 I A 6 at p 8.

Shamuldhone Dutt v Srimutty Susila Bala Debi. 12 C W N 1102=36 Cal 493= 2 Ind Cas 553.

25—Where the Court is asked to reopen accounts on the ground of fraud, at least two or three instances of particular items must be established which the Court can take as false and fraudulent. **Boo Jeenut Boo v. Sha Nagar Wallab Kanji, P J (1886), 175=11 Bom 78.**

Notes:—Ap: 16 Mad 311. Fol: 17 Bom 755. Ref: 14 Bom 279; 16 Bom 186; 21 Bom 424 F B; 7 Bom L R 836.

26—Settled accounts — Suit for accounts—Pleading—Procedure.

The requisites for making an account a settled account depend on the circumstances of each case and the mode of dealing between the parties. 1 Ball and Beatty 420 at 428; L R 2 H L 1 (1867); 5 Moo I A 372; 8 Moo P C 378 (1858), referred to. If a settled account is impeached for errors, particular errors must be stated and proved and the same rule holds even when the accounts have been settled errors excepted. Where the plaintiff made no averment in his plaint that accounts had been settled but commenced action on the footing that no accounts had been rendered. *Held*—That the plaintiff could not after the suit had been tried out on that footing be allowed to convert the case into one for reopening of accounts on the ground of errors contained therein. Procedure in account suits indicated, and that adopted in the present case condemned. In a suit for account, if liabi-

Bengal Acts-*Concld.*

Bengal Act IX of 1879.

See Court of Wards Act (Bengal).

Bengal Act VII of 1880.

See Public Demands Recovery Act 1880.

Bengal Act IX of 1880.

See Bengal Cess Acts (IX of 1880).

Bengal Act III of 1881.

See Courts of Wards Act (Bengal).

Bengal Act IV of 1881.

See Bengal Excise Act Amendment Act.

Bengal Act II of 1882 ss. 61, 76, 80

See Embankments. 11 Cal 570

Bengal Act III of 1884.

See Bengal Municipal Act, 1884.

Bengal Act II of 1888.

See Calcutta Municipal Consolidation Act, 1888.

Bengal Act II of 1889.

See Bengal Private Fisheries Protection Act.

Bengal Act I of 1892(Village Chowkidars).

See Confessions to Police Officers.

2 C W N 637.

Bengal Act VII of 1895.

See Bhootan Duars Act (XVI of 1869).

Bengal Act III of 1899 (Calcutta Municipal Act).

See Calcutta Municipal Act.

Bengal, Agra and Assam Civil Courts Act XII of 1887.

See (1) Bengal N. W. P. and Assam Civil Courts Act.
(2) Marriage.
(3) Valuation of suit—Appeals.

1.—Civil Courts Act. S. 11—"Removal":

The word "removal" in S. 11 of U P and Assam Civil Courts Act, does not merely include a temporary absence of the Presidency Officer, but also contemplates cases of removal of the Court itself. A District Judge has power to transfer a suit

Bengal, Acts (Agra and Assam Civil Courts Act XII of 1887)-*Contd.*

transferred by him from one Subordinate Court to another again to the same Court on the removal of the Court to which he transferred it under Cl. 3 of s. 11. **Gappu Lal v Mathura Das. 1903 A W N 4=25 All 183.**

Notes.—Dist: 10 C W N 903.

2.——Civil Procedure Code Ss. 15 and 17.

Ss. 15 and 17 of the Civi Procedure Code, control s. 144 of the Bengal Tenancy Act. A suit for rent should be instituted, subject to pecuniary limitations, in the Court of the lowest grade competent to try it. **Fazlur Rahim Abu Ahmed v Dwarka Nath Chowdhury. 30 Cal 453.**

3.—U P. Land Revenue Act. ss. 113, 114—Partition suits—Appeals.

The law which regulates the jurisdiction of the Courts to hear appeals in proceedings under Ss. 113. 114 of U. P, Land Revenue Act is the ordinary law (Civil Courts Act, U. P.). which regulates appeals in ordinary civil suits, value of the subject matter, if not the value of the property under partition determines the value for the purposes of jurisdiction in the appeal.

Sheo Singh v Baldeo Singh. 1903 A W N 37 =25 All 277.
See also 24 All 381.

4—Valuation of suit—Appeal—Jurisdiction—Bengal N. W. P and Assam Civil Courts Act (XII of 1887) s. 27

Plaintiff sued for an account and valued the suit at Rs. 2000, but added that if any further sum were found due he would pay the additional court-fee. A preliminary decree was passed directing the Defendant to render accounts. On Defendant's failure to account, plaintiff filed an account claiming that Rs. 11000 was due and prayed for a decree for that amount. Plaintiff subsequently reduced the amount to Rs. 9000. Defendant thereupon objected and on an account being taken plaintiff's suit was dismissed and he preferred an appeal to the District Judge valuing his appeal at Rs. 4500 The District Judge held that the appeal did not lie to him as the value of the suit was Rs. 9000 and not Rs. 2000. Held that the appeal lay to the District Judge as the value of the suit must be considered

Bengal Acts-(Agra & Assam Civil Courts Act XII of 1887)-*Concld.*

as that stated in the plaint (Rs. 2000).

Nogendra Nath Mozumdar v Russik Chandra Rai. **6 C W N 346.**

Notes.—Ref: 31 Cal 301; 365; 34 Cal 954 F B 11 C W N 1133. Rel: 8 C W N 233. Appr. 6 C L J 255; F B.

5.—Christian marriage—Marriage with deceased wife's sister-Member of Greek Church embracing Roman Catholic faith at the time of marriage—Subsequent apostacy—Effect on marriage—Bengal, N. W, P. and Assam Civil Courts Act (XII of 1887), s. 39—Equity and good conscience, rule of—'Incestuous,' meaning of.

Per curiam—The presumption in favour of everything necessary to give validity to a marriage is one of exceptionl strength and the evidence to rebut the presumption must be strong. distinct. satisfactory and conclusive. 12 Cal. 706 (1885) followed. In India there is no legislative prohibition against persons who are not British subjects and of English domicile marrying though they be within the prohibited degrees as understood in England. The Courts in India will not disallow a Roman Catholic of Indian domicile, who has obtained the necessary dispensations, from marrying his deceased wife's sister, though by the law of her own Church she may be incapable of contracting the marriage. The husband's capacity renders the marriage valid in law. 5 P D 94 (1879), relied on. Where a person who belonged to the Greek Church subsequently embraced the Roman Catholic religion and married his deceased wife's sister (necessary dispensations having been granted to him) and thereafter speedily reverted to his original faith: *Held*—That this subsequent apostacy did not affect the validity of the marriage. It is not the province of the Court to examine the sincerity of a man's religious convictions. *Per* Mitra, J.—The rule to be applied in such a case is that of equity, justice and good conscience as stated in sec. 37 of Act XII of 1887. There being no Municipal law or well-established usage prohibiting the marriage of a domiciled British Indian of the Christian religion with reference to consanguinity or affinity, the marriage of such a Christian when it is not incestuous by the general consent of Christendom should be declared valid. **H. A. Lucas v Theodora Lucas.** **9 C W N 323.**

II C. C. 10

Bengal Acts-(Agra and Assam Laws Act).

1.—C. P. C. S. 2—Appeal Forum—Sambalpur—Proclamation No, 2033 of 1906—Act VII of 1905-Act II of 1904-Act XII of 1887-Act I of 1868—Act X of 1897-Pending proceeding-Appeal—High Court—Judicial Commissioner-Central Provinces:

A suit was decided by the Subordinate Judge of Sambalpur on the 8th September 1905. The appeal was preferred to the District Judge on the 17th October 1905. Meanwhile the Proclamation by which Sambalpur was transferred from the Central Provinces to Bengal came into force on the 16th October 1905:—*Held*, that whether the suit be deemed as a pending proceeding on the 16th October 1905 or not, the appeal from the decree of the District Judge lay to the Calcutta High Court and not to the Court of the Judicial Commissioner of the Central Provinces. 3 Cal. 662 and 16 Cal 267 ref to. **Harrabati v Satyabadi Behara.** **5 C L J 550=34 Cal 636**

2.——S. 6——Sambalpur District——Divisional Judge, appellate decision of-Second appeal to the Calcutta High Court—Bengal and Assam Laws, Act VII of 1905 Sch. D—Act II of 1904, before repeal by Act VII of 1906—C P C., S. 584.

The District of Sambalpur was part of the Central Provinces until 16th October 1905, when it was added to the Province of Bengal by proclamation. *Held*, that under Act VII of 1905 an appeal preferred on the 21st December, 1905, against an appellate decision of the Divisional Judge of Sambalpur of 22nd August 1905 lay to the Calcutta High Court and not to the Judicial Commissioner of the Central Provinces. A second appeal though not expressly provided for by Act II of 1904 (which was in force at the time this appeal was preferred) lay under S. 584 of the Civil Procedure Code, the Court of the Divisional Judge being a Court subordinate to the Calcutta High Court since Act VII of 1905 came into operation. **Balbhadra v Musstt Bhavani** **6 C L J 233=11 C W N 957=34 Cal 853.**

Bengal Alluvion and Diluvion Act.

See Accretion.

Bengal Alluvion and Diluvion (Act IX of 1847).

Notes.—Supplemented, and s. 7 Rep. Ben. Act IV of 1868; S. 8 rep. Act XIV of 1870; formal words in ss 2, 3, 5, 6 and 9, and part of s. 4,

Bengal Acts-(Alluvion & Diluvion Act)-*Concld.*

rep Act XVI of 1874; s. 1 Rep in pt Act XII of 1891, Ss. 4, 5, 6, 9 Rep in pt Act I of 1903 rep., (in the Assam, except the Lushai Hills), reg I of 1886; declared in force—throughout Bengal (except the Sambalpur District) and Eastern Bengal, except as regards the Scheduled Districts, Act XV of 1874, s. 6; in the Sonthal Parganas, reg. III of 1872, s. 3, as amended by reg. III of 1899, s. 3).

Bengal Army Regulations.

—Para. 24—Lease of house for period exceeding one month—Validity of such lease,

See Cantonments.

Bengal Bhootan Duars Act VII of 1895.

See Bhutan Duars Act

Bengal Cess Act (X of 1871) Road Cess Act.

See (1) Evidence—Civil Cases-Miscellaneous documents—Road Cess Papers. **22 W R 192.**

(2) Cess.

(3) Fishery, right of. **9 Cal 183.**

1.-Income tax-Suit for arrears of rent set off-Effect of Act on agreement before possession of Act-A patni-settlement of lands was made in 1862 between A and B in which B agreed to pay enhancement of Revenue made by Government or "any impost in future levied by Government, the income tax to be paid by A according to his in come B having nothing to do with the same. "In 1876 A brought a suit for arrears of rent. In 1871, the Road Cess Act was passed and *B* claimed to have setoff, as a tax on income, a sum which he had paid under the Act after the repeal of the income tax. Heid that the Road Cess Act could not be considered as a tax on Income. Although the Road Cess Act contains no saving clause in favour of contracts it does not prohibit in future the making of contracts which shall interfere with the incidence of the road cess as directed by the Act, nor vacate contracts that may have been made before the passing of the Act; and in the absence of any provisions to that effect an agreemet entered into before the passing of the Act could not be affected by the subsequent passing of the Act. **Surnomoyee Dabee v Purresh Narain Roy 4 Calc 576.**

Notes:—Fol 3 C L J 337; 11 C L R 140; 22 Cal 680. Ref; 33 Cal 683=3 C L J 391; 12 C W N 154; 8 C L J 525.

Bengal Acts-(Cess Act X of 1871) *Contd.*

2—Construction of kabuliat-Suit for rent—Right of set-off.

The defendants executed a kabuliat, dated 1st October 1870, which contained the following stipulation: "If in future any chowkidari tax or any other new abwab or tax or fee or kor, or any additional fee of jumma, be fixed upon the mehal by Government, I will pay that separately." In a suit by the zamindar for increase of rent, the defendants claimed to set off a sum representing the amount which the zamindar was bound to contribute under the Road Cess Act and Public Works Cess Act, and which amount they had paid to the Collector. *Held* that the amount in question came within the terms of the kabuliat, and that the defendants were not entitled to the set-off claimed by them. 4 Calc. 576, followed **Shumbhu Nath Mookhopadhya v Hurro Sundari Dabia Chowdrain. 11 C. L. R. 140.**

Notes.—Ref: 8 C L J 525=12 C W N 154.

3——S. 3—Liability of chakran or service tenure for road cess—"Tenure"

A chakran or service comes within the definition of "tenure" in s. 3 of Bengal Act X of 1871, and is therefore liable for Road Cess and Public Works Cess under that Act. **Joy Sunkur Roy v. Sidhi Moham. 7 C L R 373.**

4.—S. 3 and ss. 9, 10, 23, 25, and 26—Sale for arrears of road cess, Effect of—Right of purchaser—Interpretation clause, construction of.

In a suit on a bond by which certain land admittedly lakhiraj was mortgaged, the purchaser of a portion of the mortgaged property at an auction sale for arrears of road cess due under Bengal Act X of 1871 was added as a defendant and the lower Courts, holding that the effect of such a sale was to pass the property to the defendants, free of incumbrances, made a decree excluding that portion from liability in respect of the mortgage-bond. *Held*, on the construction of Bengal Act X of 1871, that the sale had no such effect, and that the whole of the property was liable to be sold in satisfaction of the plaintiff's claim. Although the effect of an interpretation clause is to give meaning assigned by it to the word interpreted in all places in the Act in which that word occurs, it is not the effect of an interpretation clause that the thing defined has annexed to it every incident which

Bengal Acts-(Cess Act X of 1871)-*Contd*

may seem to be attached to it by any other Act of the Legislature. It does not follow, therefore, that because lakhiraj property is defined in the Road Cess Act, 1871, to be a tenure, all the interests and consequences attached by other Acts to tenures generally, or to particular classes of tenures, become annexed to lakhiraj property.

Umachurn Bag v Ajadannissa Bibee.
12 Cal 430.

Notes.—Fol: 24 Cal 27.

5.—Ss. 5, 7 and Part II, sch. A, part ii—— Bhowli tenures—Suit for rent.

S. 5 of the Road Cess Act requires the holders of any estate or tenure, of which the annual rent shall exceed one hundred rupees, to lodge returns of all lands comprised in an estate or tenure; bhowli lands are therefore to be included in such returns. Where such a return has not been made, the holder of the estate or tenure is precluded from suing for or recovering any rent due therefor. **Jugnohun Tewari v Finch.**
9 Cal 62=11 C L R 100.

6.—S. 41-Landlord and tenant—Cess, liability of tenant to pay, although tenure not assessed.

When the Collector has determined the annual value in respect of certain land and a portion of that land is subsequently granted as a tenure to an under-tenant and the Collector has not separately assessed the annual value of the land of the tenure so created, the under-tenant will nevertheless be liable for any cesses in respect of that land. In such a case it is competent to the Court to ascertain the annual value of the land comprised in the defendants' tenure.

Harimohan Dalal v Ashutosh Dhur
4 C W N 776.

7.—Bengal Cess Act (Act X of 1871) s. 47—Decree for arrears of cess—Effect of sale in execution.

Although the procedure for the realization of cesses may be the same as the procedure laid down for the realization of rent due upon the tenure, yet it does not necessarily follow that the effect of a sale for cesses should be the same as that of a sale for arrears of rent for which the tenure itself is liable to be sold. 12 Cal 430, followed. S. 47 of the Act provides that "Every holder of an estate or tenure to whom any sum may be payable under the provisions of this Act

Bengal Acts-(Cess Act X of 1871)-*Concld.*

may recover the same with interest at the rate of twelve and a half per cent, per annum in the same manner and under the same penalties as if the same were arrears of rent due to him." Notwithstanding the above, the effect of a sale by the Collector in execution of a decree for cesses against some of the owners of a tenure is not to convey to the purchaser the whole tenure, but only the right, title and interest of the particular individuals against whom the decree was obtained. **Mahanund Chuckerbutty v Bani Madhub Chatterjee.** **24 Cal 27.**

Notes.—Appl: 36 Cal 753.

8.—Bengal Cess Act X of 1857 ss. 58—71—Rent free lands—Notice.

The plaintiffs sued to recover arrears of road and public works cesses on account of certain rent-free land, and they claimed to recover double the amount due under s.58. The first Court found that as notice of the valuation had not been published in accordance with s. 52, the provisions of s. 58 were not applicable. It was then contended that the plaintiff was, at any rate, entitled to recover the amount of the cesses with interest under s. 62. *Held* that the required notices not having been published, no cess has become payable under that section and that his suit must be dismissed. **Ras Behari Mukerjee v Pitambori Chowdhrani.** **15 Cal 237.**

9.—Ss. 52, 53—Evidence Act, s. 114—Presumption.

Where under an Act certain things are required to be done before any liability attaches to any person in respect of any right or obligation, it is for the person who alleges that that liability has been incurred to prove that the things prescribed in the Act have been actually done. *Held* that the notice provided by s. 52 of the Road Cess Act did not come within the presumption of s. 114, cl. (*e*), of the Evidence Act, and must be proved. **Ashanullah Khan Bahadur v. Trilochun Bagchee.**
13 Cal 197.

Notes.—Dist: 30 Cal 1; 25 Cal 725; 28 Cal 109.

—s. 56 See Cess.

—S. 95

See—Evidence—Civil Cases—Miscellaneous documents—Road cess—Papers. **[3 C W N 343.]**

Bengal Cess Act IX of 1880.

Notes.—[Ss. 64-A, 64-B Ins., Act VII of 1881;

Beng. Acts-(Cess Act IX of 1880)-*Contd.*

S. 9 Am. (In Bengal), ss. 10, 13, 42 (1), 43, 44, 45 46 (3), 108, schs. A and C, am, s. 40-A. Ins. (in Bengal and Eastern Bengal), Ben. Act II of 1881; ss. 110 to 181 and s. 182 (*a*), (*b*). (*c*), (*e*), (g) and (h) rep., ss. 9, 40, 108 rep. in pt., ss 4, 38, 82, 83, 98, 109 am. (in Eastern Bengal and in places in Bengal in which Beng Act III of 1885 is declared in force), Bengal Act III of 1885, S.II; S. 1 rep. in pt., S.29, Example B, am., Act I of 1903; S.109 am. (in places in Bengal in which Bengal Act III of 1885 is in force), Ben. Act V of 1908, s. 64].

1.—Tenure-holder, holding Mela, liability to pay road-cess, incometax.

A tenure-holder who holds an annual mela on the lands of tenure at a certain part of the year and pays separate rent for it is not liable to pay road-cess although he is liable to pay income-tax on account of the profits of the mela. Umed

Rasul Saha v Anath Bandhu Chowdry. 6 C W N 128=28 Cal 637.

Notes.—Dist: 32 Cal 1031=9 C W N 824 Diss: 6 C L J 342 F B. Dist: 34 Cal 257 =5 C L J 148; 32 Cal 1031, Disap: 35 Cal 82 F B= 11 C W N 1053=6 C L J 342.

2.—Cess Act Ss. 2, 4—Cess, new imposition of—Notification, date, of—Publication date of.

A lease executed on 13th June 1877, contained the following clause: "Whatever new cess imposed by the Government on the said lots will be borne by you" (lessee). The notification as to imposition of Public Works cess in the Calcutta Gazette was dated the 6th June 1877. It was published in the Gazette of the 13th June 1877 and it was declared therein that the liability of property in certain districts to pay Public Works cess would accrue from the year beginning with the 28th June 1877. *Held*, that the lessee is liable under the contract to pay the entire amount of the Public Works cess payable on account of the tenure, as it was imposed after the execution of the lease. **Bhola Nath Lahiri v Chunder Madhub Ghose. 6 C L J 212.**

3.—S. 4, explanation, and S. 20 (a) and (b)—Road-cess return—Conversion of *nakdi* into *bhaoli* rent shortly before return submitted——Annual value how to be assessed—Alteration in area of holdings and tenures by reason of exchange amongst tenants, if must be specified in return.

The plaintiffs who had a share in a mouzah had their share separated by partition in 1300, F S. Subsequently to the partition the defendants who were tenants and were paying *nakdi* rent agreed to pay *bhaoli* rent from the beginning of 1302, F S. It also appears that, after the partition, the tenants of the whole estate agreed amongst themselves to respectively hold lands in that share only in which they held homestead lands and in this way an exchange of lands took place between them. On the 4th of Assin 1302, F S., the plaintiffs submitted a road-cess return in respect of their separated share, in which the *nakdi* rents which prevailed up to the end of 1301, F S., and the recently settled *bhaoli* rent were mentioned. Further the statement of land, holding or tenure given in the return corresponded with the state of things as they existed prior to the exchange effected between the tenants. Plaintiffs having sued the defendants for *bhaoli* rents calculated on lands held by them since the exchange the defendants objected that the provisions of cls. (*a*) and (*b*) of S. 20 of the Act had not been complied with.

Held, that as there was no enhancement of rent but only conversion of *nakdi* into *bhaoli* rent and as no calculation of annual value based on the average money-value of three years' *bhaoli* rent as contemplated in the explanation to section 4 of the Act was possible in this case, the plaintiffs had substantially complied with the provisions of S. 20, cl. (*b*) of the Act.

that cl. (*a*) of the section had also been complied with inasmuch as all the lands for which rent was payable were mentioned in the return although it appeared that by reason of the exchange of lands amongst the tenants, the lands for the rent of which each of the defendants was sued in this case was greater than that shown in the road-cess return.

Gouri Saran Mahto v Moulvi Mahomed Latif. 11 C W N 211

4.—S. 4—Cultivating tenant-Tenure-holder.

A tenant holding land and paying as rent therefor a sum of money exceeding one hundred rupees per annum is, for the purposes of assess-

Beng. Acts-(Cess Act IX of 1880)-*Contd.*

ment under the Cess Act. a tenure-holder and not a cultivating raiyat. **A Caspersz v Kumar Singh. 5 C W N 535.**

5.—Act IX of 1880 S. 4—Hat, Profits from, not liable to Road cess.

The profits from a *hat* not being rent or revenue or annual value of land within the meaning of S. 4 of the Act are not liable to road-cess. Therefore a land-lord who pays road cess upon such profits cannot recover it from his tenant.

The Rule of the Revenue Board authorizing the assessment of *hats*, being at variance with the provisions of the Bengal Cess Act, is *ultra vires* (6 C L J 342: 11 C W N 1053 (F B), Fol. 28 Cal 637 Fol. **Surajdeo v Narain Mackenzie 5 Ind Cas 254.**

6.—Road Cess Act (Bengal) Ss. 4—6.—Mela profits of whether liable to be assessed with cess —Income tax-Immoveable property—Lessee and licensee, difference between Annual value of land Lease.

When a person agrees to pay the zamindar a separate fixed rent for the rights or privileges to hold a fair annually for a few days on lands which are included in the jotes or holdings of agricultural tenants, at a time when no crops are standing on them, but was given no right or interest which could be enforced against the ryots, and he in turn gave to certain persons, who are described as *ijaradars* what is called an *ijara* of the rights to hold the fair at a certain yearly rental.

Held, that the profits, of the *mela* cannot be lawfully assessed with Road and Public works Cesses.

The liability to pay income tax does not carry with it as a necessary consequence exemption from payment of Road Cess.

Per Rampini A. C. J.—Whether the profits of a *mela* are derived from land or are immoveable property and whether the persons in enjoyment of them are tenure holders within the meaning of the Road Cess Act or not depends upon the terms of each particular lease.

Per Brett, Woodroffe and Mookerjee JJ.—

The profits derived from a fair do not fall within the description of "annual value of land" as defined in section 4 of the Road Cess Act.

Distinction between a lessee and a licensee explained.

Per Brett and Woodroffe JJ.— A *mela* or fair is not an immoveable property within the meaning of section 4 of the Road Cess Act.

The amount paid by the *ijaradars* is not liable to assessment for Road Cess.

The profits of the fair are not liable to assessment under Chapter V of the Road Cess Act as other immoveable properties not included in chapter II. 28 Cal 637. **The Secretary of state for India in Council v Karuna Kant Chowdhry. 6 C L J 342=11 C W N 1053=35 Cal 82.**

7—Ss. 4, 41—"Holder of a tenure," whether includes a raiyat.

A raiyat may be a tenure-holder within the meaning of the Cess Act of 1880. S. 41 of the Act draws a distinction between a holder to a tenure and a *cultivating raiyat*, and not between a holder of a tenure and a *raiyat*. **Peary Mohan Roy v Sarat Kumari Debi 15 C L J 428.**

8—S. 5—Charge.

The words in s. 5 of the Cess Act (B C IX of 1880) "all immoveable property shall be liable to the payment of a Road-cess or a Public Works cess" are sufficient to lead to the conclusion that the amount assessed as cess is a charge. **Assanullah Bahadur v Manjura Banu. 8 C W N 357=30 Cal 778.**

9—Ss. 6, 72, 81.—"Annual net profits of mines," meaning of—"Owner," "Occupier," meaning and difference—Return, liability of both to submit—"Sources of income," meaning of:—

Per Rampini, J:—The word "owner" in s. 72 of the Road Cess Act (IX of 1880 B C) is not restricted to the actual worker or the lessee of a mine. It is applicable to the proprietor of the land in which mines have been excavated and who is in receipt of a share of the annual profits in the form of royalty. The lessees under such proprietors, especially if they hold leases for only limited terms, cannot be considered the owners of the mines. The word "owner" used in the section is not necessarily the same person as the "occupier"

Beng. Acts-(Cess Act IX of 1880)-*Contd.*

and is not restricted to the "occupier." A proprietor of land in which mines are situated and who is in receipt of royalties of a certain specified sum for the working of the mines is in enjoyment of annual net profits of mines and is as such liable to pay road cess in accordance with the provisions of s. 6 of the Road Cess Act. S 72 of the Road Cess Act does not contemplate the service of only one notice on the owner or occupier of a mine, the submission of only one return by him, and the levying of only one assessment on the annual net profits enjoyed by him. The terms of that section read with s. 14 (2) of the Bengal General Clauses Act, applies as well to two notices and to two returns as to one. The submission of separate returns having regard to Ss. 72 and 81 of the Road Cess Act and the making of separate assessments on the "owner" and "occupier" are not necessarily illegal under the Act, as they are not expressly prohibited by the Act. The "annual net profits" from a mine is a quantity which is independent of the circumstance whether the mine is worked by the owner himself or by lessees or adventurers holding the property under him: the difference between the gross earnings and the working expenses which constitutes the net receipts is the net annual profits from the mine. If the mine is worked by the owner himself, the whole of the net receipts is taken by him as the net profits. If the mine is worked by a lessee from the owner the whole of the net receipts becomes divisible between landlord and tenant according to the terms of the Contract Act which regulates their rights. In such a case when the landlord takes a rent and royalty the amount received by him represents a portion of the annual net profits from the mine, and the royalty received by him is liable to be assessed with cesses and the balance left in the hands of the tenant constitutes his share of the annual net profits from the mine. S. 6 of the Cess Act of 1880 makes the cess leviable upon the annual net profits form a mine, no matter whether such profits are taken entirely by the owner or are, distributed between the owner and the lessee who is in actual occupation of the mine. The Legislature contemplates in s. 72 of the Act the service of one notice and the submission of one return in respect of the whole of the net annual profits from the mine and not in respect of any portion of the same. The term "owner" in s.72 is used in a limited sense; it means an owner who is in possession of the mine or who has control over it, or in whom the mine is for the time being, beneficially vested, and who has the occupation or control or usufruct of it. 46 L J Q B 559, 7 Ad. and Ell. 124, 46, 164; 80 R R 507 and 3 Q B 449; 61 R R 249 ref. to. *Quere* Whether s. 424 of C P C, is limited in its application to cases of what might be called torts or wrongs 25 Cal 239 ref. to. **Manindra Chandra Nandi v The Secretary of State for India in Council. 5 C L J 148=34 Cal 257.**

Beng. Acts-(Cess Act IX of 1880)-*Contd*

10—Ss. 6, 72, 76, 80 and 81 and Sch. E—Proprietor of land—Coal mines—Royalty—Cess on Royalty—Annual net profits—Liability to pay cess—Policy of Cess Act.

Where the plaintiff, who was the owner of landed property, leased such property to various parties for the working of coal mines, and who, besides the rent of surface land, received, under the designation of royalty, a percentage on the coal raised by the lessees or mine-owners, had been assessed for "cess" under the provisions of the Cess Act (IX of 1880, B, C.) in respect of the royalty received or receivable by him from the coal mines on his estate:

Held, that the return required under S.72 of the Act was not with regard to the mine owner's profits, but had reference to the general net profits of the property; that the royalty receivable by the plaintiff was part of the "annual net profits" of the mine within the meaning of those words in ss. 6 and 72 of the Act; and that the plintiff had been properly assessed with "cess" thereon.

In S. 81 of the Act, the word "owner" is used in the sense of proprietor, but the liability for the "cess" lies on both "occupier" and "owner" in the case of mines, etc., as in the case of land it lies on holders of estates or tenures or raiyats, the policy of the Act being that all persons, who benefit by the maintenance and construction of "roads and other means of communication" or "works of public utility" out of the cesses, should bear the liability of paying the same **Manindra Chandra Nandi v The Secretary of State for India in Council. 8 A L J 140 (P C) =9 M L T 196=15 C W N 210= 13 Bom L R 82=9 Ind Cas 311= 21 M L J 365.**

11—S. 10—Jurisdiction—Lease of land lying outside Chota Nagpur—Question of law taken for the first time in second appeal.

Where a certain estate in the district of Manbhum was taken charge of under the Chota Nag-

Beng. Acts-(Cess Act IX of 1880)-*Contd.*

pur Encumbered Estates Act, and thereupon the manager proceeded to cancel under that Act a lease of land lying in the district of Bankura.

Held that the Act had no application, inasmuch as the Act applies only to land in Chota Nagpur.

The High Court allowed this question to be raised for the first time in second appeal.

Ajodhya Nath Chowdhury v Keshub Chandra Mukherjee. 11 C W N 1127.

12—Sec. 17—Powers of revision of the commissioner and the Board of Revenue—Certificate—Sale-Setting aside Certificate issued under the Cess Act(IX B C of 1880)—Limitation-deciding in a party's absence-proper remedy.

Bengal Act VII of 1880 for the recovery of public demands applied to cases of road and other cesses. (P R 14 Cal I) referred to.

Where a commissioner setaside a sale held in execution of a certificate granted by a Deputy Collector in respect of a fine imposed for failure to comply with a notice under sec, 16 of the Cess Act, on the ground that the evidence for the petitioner made out a *prima facie* case of fraud or at any rate of irregularities which prevented the Petitioner from obtaining knowledge of the proceedings against him,and caused the sale of his estate at a most inadequate price. *Held*—That the power of revision-conferred on the commissioner by sec. 17 of Act VII of 1880, B. C, was amply—sufficient to justify the order setting aside the sale.

The Board of Revenue also had power to interfere in this case under sec. 24 of the Act.

Sec. 17 of Act VII of 1880 B. C. applied to order made after as well as before sales in execution of certificates issued under the Act.

The periods of limitation applicable in ordinary cases were not binding on the Commissioner when he was acting in exercise of his revisional jurisdiction.

It is an elementary principle which is binding on all persons who exercise judicial or quasi judicial powers that an order shoud not be made against a man's interest without there being given him an opportuuity of being heard.

In this case the order of the Commissioner annulling the sale was challenged in a regular suit brought in the Civil Court on the ground that the order was made without hearing the purchaser.

Held, That the proper remedy of the purchaser was to apply to the Commissioner for a rehearing.

Babu Lalliteswar Singh v Mohunt Ram Kishen Das. 1 M L T 308.

Beng. Acts-(Cess Act IX of 1880)-*Contd*

13—Suit for rent by one sharer. Alternative claim—Bengal Cess Act, S. 20.

A suit is maintainable by one of several joint landlords for recovery of balance of rent due from a tenant, and in the alternative,for recovery of the sum which may have been collected by his co-sharers in excess of their legitimate share. So far as the claim against the co-sharers is concerned S. 20 of the Cess Act has no application. 4 Cal 350 applied. **Sham Singh v. Kishan Satai, 6 C L J 190.**

14—Bengal Act IX of 1880 (Road and other Cesses), ss. 34 and 35—Publication of valuation roll—Liability to pay cess.—

In the case of rent-paying lands the publication of the valuation rolls under s. 35 of the Cess Act is not a condition precedent to the attaching of liability to pay road cess in accordance with the valuation rolls. 13 Cal 197, distinguished.

Bhugwati Kuweri Chowdhrani v. Chutterput Singh, 25 Cal 725=2 C W N 407.

Notes:—Fol: 28 Cal 109.

15—Ss. 36, 41—Valuation roll, publication of—Condition precedent.—

Looking to the provisions of Ss. 36 and 41,the publication of a valuation roll is not a condition precedent to the attaching of liability to pay road cess for rent-paying lands.

Ricketts v. Rameswar Malia, 28 Cal 109.

16—Abwab—Bengal Cess Act (IX of 1880 B C) Sec. 41, scope of—Bengal Tenancy Act (VIII of 1885) Sec. 74—Road-cess.—

A contract by which a tenant,as between himself and his landlord, undertakes to pay the whole road-cess, is not illegal.

Section 41 of the Cess Act is neither exhaustive nor prohibitive and does not invalidate such a contract.

Road-cess is not an *abwab* within the meaning

Beng. Acts-(Cess Act IX of 1880)-*Contd.*

of section 74 of the Bengal Tenancy Act.
Ashutosh Dhar v Amir Mollah. 3 C L J 337.

Notes:—Ref: 33 Cal 683=3 C L J 391=12 C W N 154=8 C L J 525.

17—S. 41 — Perpetual mokarari lease, construction of—Bilmokhta — Statutory liability—Extraneous evidence—Evidence Act S. 92:—

It is open to the Zemindar and the tenure-holder to contract themselves out of the provisions of S. 41 of the Bengal Cess Act. (1872) 4 Cal 576; (1882) 11 C L R 140; (1900) 3 C L J 337 and (1906) 3 C L J 391; 33 Cal 683 ref. to. The word Bilmokhta means, according to agreement, stipulated, fixed, or consolidated. Under a perpetual mokarari lease a tenure-holder stipulated to pay Rs. 1,585 as the total amount of rent inclusive of abwabs and cesses during the whole period of the continuance of the tenancy. It contained the following words "Yeh Sal Samilusi pundrah sao panchasi rupea men hai, bilmokhta". Held — That the tenant undertook to pay the whole of the cesses which were levied at the time of contract, inclusive of the share payable by him under the state as also the share the burden of which would otherwise have to be borne by the landlord himself. If any additional cess is imposed or if the amount of cess is increased, the incidence of the new burden is regulated according to the statute. When an exemption is claimed from statutory liability, the contract under which exemption is claimed must be strictly construed against the claimant and it must appear from its terms, beyond the possibility of any dispute that the parties intended to vary the liability as imposed by the State. The rule is specially applicable, when exemption is claimed from exaction imposed by the State. The construction to be placed on a deed ought to be such as will render it reasonable rather than unreasonable and will make it just to both the parties rather than unjust to one of them. (1856) 1 C B N S 110 and (1845) 14 M & W 187, ref. to. In the construction of contracts, Courts may look not only to the language employed but to the subject-matter and the surrounding circumstances and may avail themselves of the same light, which the parties possessed when the contract was made, but this may be done only with a view to interpret the contract and not to contradict it. (1878) 3 A C 552 (576) and (1859) 1, El.& El. 977 ref.to.
Mahamud Sahay v. Saidunnessa Bibi, 8 C L J 525=12 C W N 154.

Beng. Acts-(Cess Act IX of 1880)-*Contd.*

18—Ss. 46, 112, 113, 114, 351 A-Model Rules, Rule 33—Appointment of paid Assessor, whether valid.—

At a meeting of the Municipal Commissioners of a certain Municipality, the question of appointing a paid Assessor was raised as an amendment which was lost. Within six months from that date, the question was again raised as a substantive proposition which was carried. An Assessor was appointed accordingly, who revised the assessment of the plaintiff, which was confirmed by the appeal committee under S. 114 of the Bengal Municipal Act. The plaintiff brought this suit, to have the assessment of his holding declared void as being made by an assessor appointed in contravention of law.

Held, that the appointment of a paid assessor had not been "finally disposed of" at the first meeting, within the meaning of Rule 33 of the Model Rules under S 351 A of the Act; that, therefore, its reconsideration at the second meeting was permissible; that the validity of the determination of the Appeal Committee could not be impeached; and that the plaintiff's suit must fail. (S A No. 2499 of 1906, decided on April 1, 1908). **Chairman of Chittagong Municipality v. Jogesh Chandra Rai, 3 Ind Cas 1=37 Cal 44.**

19—S. 95, art. 2, sch. III—Evidentiary value of road-cess returns rendered under—Suit for enhancement—Suit for arrears of rent—Suspension of the law of limitation.—

In a suit for enhancement of rent, some road-cess returns rendered under Bengal Act IX of 1880, s. 95 of which makes them admissible in evidence against the person by or on behalf of whom they were filed, were held to be, though not conclusive, evidence to show that the claim for enhancement could *prima facie* be supported on the ground that the existing rate was not "fair and equitable," within the meaning of the Bengal Tenancy Act. This evidence (found to be the only reliable evidence produced by either party) shifted the *onus* on the tenants to rebut any presumption raised by the returns, by producing their collection papers. If they had not done so, the Court would be justified in acting on the presumption under s. 114 (*g*), I E A. (Dist: 32 Cal 118). Where, in a suit for arrears of rent, brought more than three years from due date, it is found that the plaintiff had, within the three

Beng. Acts-(Cess Act IX of 1880)-*Contd*

years, brought a suit claiming enhancement of rent including that for the year in question, the operation of the law of limitation would be stayed.

Hem Chandra Chowdhry v. Kali Prosnna Bhaduri, 30 Cal 1033, P C=30 I A 177=8 C W N 1.

Notes:—Dist: 32 Cal 118.

20—S. 95—Road Cess returns—Admissibility—Admissions by defendant's fellow-tenants—No evidence against defendant.—

S. 95 of the Cess Act lays down that returns made under it "shall be admissible as evidence against such person (that is, the person by or on whose behalf they were filed), but shall not be admissible in his favour". It does not enact that such a return shall be admissible only as evidence against the maker, and the first part of the provision is clearly declaratory, but not exhaustive. (8 C W N 1 (P C), relied on).

Admission in Road Cess returns made by a defendant's fellow-tenants (especially when they were made by them not *qua* tenants but *qua* landlords, and when it is denied that the makers are dead, and there is no finding to the contrary) are no evidence whatever against the defendant. (8 C W N 1 (P C), Dist:).

Mohan Pandey v. Lala Bhagavati Charan, 1 Ind Cas 813.

21—Sec. 95, applicability of—Document, admissibility of, not objected to in the lower Court—Decree, not *inter partes* admissibility of.—

The plaintiff alleging himself to be a *kashtkar* or holder of a right of occupancy sued the defendants for the possession of the land on the ground that they were in occupation without any right. The defendants produced certain rent-receipts showing that the landlords recognised them as *kashtkars*. The plaintiff produced a rent decree of 1869 (which contains a statement contrary to that which appears in the receipts) and road-cess returns:

Held, that the road-cess returns are admissible in favour of the plaintiff and their admissibility is not affected by section 95 of the Road Cess Act. Section 95 of the Road Cess Act has no application to the case where the parties who tendered road-cess returns in evidence were not the persons who filed them, in pursuance of the provisions of the Act.

Beng. Acts-(Cess Act IX of 1880)-*Contd.*

The decree, though not *inter partes* is evidence to show that the landlords recognised the plaintiff as *kashtkar*, and that the rent receipts granted to the defendants were fraudulent. When no objection was taken as to the admissibility of a document in the Court of first instance, it is not allowable to take the objection in appeal.

Ram Prasad Roy v. Lala Sham Narain, 6 C L J 22.

22—S. 7—Suit for enhancement—Road cess returns as evidence—Cess Act (IX of 1880 B C). (S. 95—Evidence Act (1 of 1872) ss. 114 (g) 32-Presumption—Burden of proof :—

In a suit for enhancement of rent, payable by certain fractional shareholders in a Talook, the Zemindar put in as evidence several road-cess returns which had been filed on behalf of another fractional shareholder and which showed that the tenants were receiving from subtenants considerably higher rent than they were paying to the Zemindar,—and this was found to be the only reliable evidence produced by either party. *Held*, that the returns, though not conclusive, *prima facie* showed that the existing rate was not fair or equitable and this evidence shifted the onus on the tenants to rebut any presumption raised by the returns by producing the Collector's papers. As the tenants had not done this the Court was justified under s. 114 (g) of the Evidence Act, to award enhanced rate on the basis of the returns.

Hem Chunder Chowdhry v. kali Prosunno Bhaduri. 8 C W N I=30 Cal 1033 (P C)=30 I A 177 P C.

Notes.—Dist: 32 Cal 118.

23—S. 99—Cess payment of, by purchaser of Estate—Liability of previous owner.

The power given to a Collector under S. 99 of the Act is in the nature of a right to attach the rents payable to the person from whom the dues are recoverable; he has no power to realise the amount by sale of the estate as if it was a charge having priority over other charges. Plaintiff purchased a revenue paying estate belonging to the defendants in execution of a mortgage decree; the sale was confirmed on the 5th May 1898. The Collector proceeded under S. 99 to realise the amount of cesses up to March 1897. Plaintiff paid the same and brought a suit to recover it from the defendants. *Held*, that the amount of cesses was payable by the defendants as a personal

Beng. Acts-(Cess Act IX of 1880)-*Concld.*

debt and the plaintiff having been compelled to pay the same on account of the proceedings taken by the Collector under S. 99 was entitled to be reimbursed. 19 Cal 783 : 6 Cal 389 ref to.

Nawab Assanullah Bahadur v Manjura Banu. 8 C W N 357=30 Cal 778.

24—S. 106—Power to make rules—Bengal Road Cess Manual—Rule 33—Validity of, ultra vires :

Rule 33 of the Road Cess Manual framed by the Board of Revenue under S. 106 is *ultra vires* **Umed Rasul Shaha v Anath Bundhu Chowdhury.** 6 C W N 128=28 Cal 637.

Bengal Chambers of Commerce Rules.

1—Bengal Chamber of Commerce—Rules for arbitration.

The rules for the guidance of the arbitration 'tribunal' of the Bengal Chamber of Commerce were constructed to contemplate the parties being notified of the names and the fact of the appointment of the arbitrators. Where the arbitrators appointed by the Bengal Chamber of Commerce under its Rules did not appoint a time and place for the hearing of the reference:- *Held*, that the arbitrators failed in their duty in doing so. **Hurdwar Mull v Ahmed Musaji Selaji** 13 C W N 63=1 Ind Cas 371.

2—Bengal Chamber of Commerce, arbitration by—Rules—Umpire, appointment of—Failure to appoint, effect of.

The rules of the Arbitration Tribunal of the Bengal Chamber of Commerce were construed to contemplate the appointment of the umpire before the arbitrators entered upon the reference and not on their disagreement.

If the terms of a reference provide that the umpire is to be appointed before the arbitrators enter upon the reference . the same cannot go on until such umpire is appointed, and the award of the arbitrator cannot be made a decree of the Court. 4 Dow 756 (1836) and 1 Exch 572 (1847), Fol. **Chooni Lal v Madhoram,** 13 C W N 297 =36 Cal 388=1 Ind Cas 391.

3—S. 4—What constitutes written submission —Award made *ex parte*, is valid.

To constitute a submission within the meaning

Bengal (Chambers of Commerce rules)-*Concld.*

of S. 4 of the Indian Arbitration Act, is not necessary that there must be an agreement on a single piece of paper signed by both parties. It is sufficient if the bought and sold notes containing a term to refer to arbitration are signed by both parties or their authorised agents. But a mere stipulation, inserted by one party and not formally agreed to by the other, does not constitute such a submission.

Although the Court will not decree specific performance of an agreement to arbitrate, yet it will enforce an award when validly made. *Held* on the facts of this case, that the award, though made *ex parte*, was valid. (60 L J (Q B) 640, Exp: 26 Q B D 545 Ref:) **Ram Narain Ganga Bissin v Liladhur Lowjee.** 10 C W N 814 =33 Cal 1237

Bengal Chaukidari Act VI of 1870.

See Chaukidari Act.

Bengal Chaukidari Chakran Land Act VI of 1870.

See Chaukidari Chakran Land.

Bengal Chota Nagpur Incumbered Estates Act VI of 1876.

See Chota Nagpur Incumbered Estates Act.

Bengal Chota Nagpur Landlord and Tenant Procedure Act I of 1877.

See Chota Nagpur Landlord and Tenant Act.

Bengal Civil Courts Act VI of 1871

Notes—Rep Act XII of 1887.

Bengal Civil Courts Act (VI of 1871)

See Cases under Subordinate Judge Jurisdiction of.

1—Power of High Court to hear appeals.-Per Jackson, J.

The power of the High Court to hear appeals from the Civil Courts in the interior is regulated by Act VI of 1871. **Runjit Singh v Meharbans Koer.** 3 Calc 662: 2 C L R 391.

Bengal Acts-(Civil Courts Act VI of 1871)-*Contd.*

Notes:—Appl. 13 Cal 86. Fol: 3 C L R 206 ; 4 C L R 23 ; 5 Cal 259. Ref: 4 C L R 18 ; 4 Cal 825 ; 16 Cal 267 F B ; 22 Cal 364 ; 12 Bom 449 ; 5 C L J 550 ; 34 Cal 636.

2—S. 6—Transfer of District and Sessions Judge—Jurisdicton.

On the 24th August, 1881, one K, District and Sessions Judge of Mirzapur, was transferred to Benares. On the 17th August, 1881, he was appointed to be also in charge of the Mirzapur Sessions Judgeship. *Held*, that he had no power to hear civil cases and appeals within the Mirzapur district. **Sadho Ram v Ajudiya Prasad 11 W N 104.**

3—S. 8—Powers of Subordinate Judge in charge of District Judge's office—Execution of decree.

An application for the execution of a decree passed by a District Judge was presented to the Subordinate Judge, who was in charge of the District Judge's office, under S. 8 Act VI of 1871, and an order granting the delivery of certain immoveable property and the arrest of the judgment-debtor was passed. *Held*, that the order passed by the Subordinate Judge was *ultra vires* and altogether outside the scope of the duties he was authorized to perform under s, 8 of Act VI of 1871, during the absence of the Judge, **Salimunnissa v Dildar Husain, A W N 1882, 19.**

4—Ss. 8 (2). 21 (3)—Assignment to Additional Judge of cases coming from a particular district—General order.

S. 8, sub-section 2, of the Civil Courts Act, empowers the Additional Judge to discharge any of the functions of the District Judge which the District Judge may assign to him. A District Judge acting under S. 21 (3) has power to assign appeals and other cases coming from a particular district to the Additional Judge. **Mutsaddi Lal v Mule Mal. 9 A L J 95**

5—S 10—Subordinate—Judge in temporary charge of District Court—Jurisdiction.

An application, for the execution of a decree made by a District Judge was presented to the Subordinate Judge who was in charge of the District Judge's Office under s. 8 of Act VI of 1871. The Subordinate Judge granted the relief asked by the decree-holder, *viz.*, delivery of certain immoveable property and arrest of the judgment-debtor. *Held* that the order passed by the Subordinate Judge was *ultra vires* but that as no appeal lay in the case to the High Court the appeal must be dismissed. **Salimunnissa v Dildar Husain. 11 W N 19.**

6—S. 10—Bengal Civil Courts Act.

Whether or not a Subordinate Judge in charge, under s. 10 of the above Act, of the office to the District Judge, in the latter's absence, has power to hear a Revenue Court appeal, he certainly cannot continue hearing such an appeal after the District Judge has returned and resumed his functions as such. **Malhi Kuar v Jwala 21 W N 111.**

7.—Subordinate Judge, Court of Bengal Civil courts Act VI of 1871—Inferior Court.

Having regard to the provision of the Bengal Civil Courts Act VI of 1871, the Court of a Subordinate Judge is a Court inferior to the Court of the District Judge. **Prosad Doss Mullick v Kedar Nath Mullick 7 Cal 157 = 8 C L R 329.**

Notes:—Diss 5 All 500. Ap: 5 Mad 256 F B Fol: 7 Cal 428. Dist: 22 Cal 692. Ref: 10 Cal 669.

Bengal Act Civil Courts Act (VI of 1871).s.15

See (1) Civil Procedure Code 1882 s 2.= s. 2 (1908).

(2) Insolvency—Insolvent Debtors under Civil Procedure Code.

—S 17—

See Holiday. **9 All 366.**

8.—S 17—Munsif—Small Cause Court suit.

A Munsif having certain Small Cause Court powers, went on leave, and his place was filled by an officiating Munsif who had not such powers. A plaint was presented to the officiating Munsif and registered by him as a plaint in a regular suit. Before the suit was decided the first Munsif returned and completed the trial of the suit as Munsif's suit. In appeal the Subordinate Judge, holding that the suit was a Small Cause Court suit, returned the plaint to be presented to proper Court, viz, to the Munsif as a Small Cause Court. *Held* that the Munsif was right in continuing the trial of the suit as a Munsif's suit;

Bangal Acts-(Civil Courts Act XII of 1887)-*Contd.*

of 1887 a sum of money was paid in part satisfaction. A second application was objected to on the ground that the Maldah Court had no jurisdiction. A fresh application with a certificate transferring the decree from the Nowabgunge Court was resisted on the ground of limitation. *Held*,—That the Nawabgunge Court did not cease to have Jurisdiction but that the decree could also be executed by the Maldah Court.

Sheik Jaffer v Kamni Debi. 5 C W N 150 =28 Cal 238.

Notes—Ref: 12 C W N 859. Fol: 35 Cal 974=12 C W N 859 : 9 O C 281.

5—S. 17—Holding enquiry on close holiday —Waiver—Consent.

Holding an enquiry on a close holiday and deciding upon a matter within the ordinary jurisdiction of the Court is a mere irregularity the right to object to which can be waived by the conduct of parties; so, where a party on a close holiday, does attend, and without protest takes part in a judicial proceeding, he cannot subsequently dispute the jurisdiction of the Judge to hear and determine the matter on such close holiday. A W N 1887, 34 Fol.

Ajudhia Prasad v The Official Liquidator of the Cotton Ginning Company Ltd. Cawnpore. A W N 1887, 57.

6—Suits valuation Act Ss. 819 12—Bengal N W P and Assam Civil Courts Act XII of 1887—Ss. 18, 19—General Clauses Act I of 1887.

S. 3 (13)—"Value"—Jurisdiction—Suit for conjugal rights—capability of valuation—long practice.

The practice, which has prevailed for upwards of half a century, of allowing the plaintiff, in a suit for restitution of conjugal rights, to put a value on the relief, which he asks for, and thus determine the jurisdiction, is not illegal and shall not be departed.

The word "Value" is S. 19 of Act No. XII of 1887 may be interpreted to mean the valuation put by the plaintiff on the relief sought by him.

A suit for restitution of conjugal rights does not admit of being satisfactorily valued, but the plaintiff can put his own valuation, subject to the power of the Court to refuse to accept the valuation if it is not *bona fide*. A money value, however arbitrary, can be placed on all suits. A Munsiff can, therefore, try a suit for restitution of conjugal rights, the value of which, as fixed by the plaintiff, is within his pecuniary jurisdiction. (31 Cal 849, Diss) **Laer Husain Khan v Kurshed Jan. 3 A L J 266 (FB)=A W N (1906) 99=28 All 545.**

Bengal Acts-(Civil Courts Act XII of 1887)-*Contd.*

7—Ss. 18, 19, Sub-Section 1—Restitution of conjugal rights and suit for—Appeal, forum of.

A suit for restitution of conjugal rights is incapable of being valued and to such a suit a special money value cannot be attached for the purposes of jurisdiction.

A suit for restitution of conjugal rights is not therefore triable by a Munsiff under s. 19, Sub-Sec. I of Act XII of 1887 (Civil Courts Act), but is triable by a District Judge or Sub-Judge under s. 18 of that Act.

A suit for restitution of conjugal rights was valued at Rs. 49 and brought in the Munsiff's Court. The Defendants did not object to the valuation and to the jurisdiction of the Court. In second appeal it was argued by Defendant that the suit ought not to be dismissed on the ground of the Munsiff's want of jurisdiction.

Held—That s. II of the Suits Valuation Act covers a case like the present in which a Court has exercised jurisdiction by reason of an arbitrary valuation when no valuation can or ought to be made, and the suit ought not to be dismissed, no objection to jurisdiction having been taken in the manner provided in s. II of the Suits Valuation Act. **Aklemunnessa Bibee v Mahomed Hatim. 8 C W N 705= 31 Cal 849.**

8—S. 20—"Subject-matter in dispute"—Suit for redemption.

According to the proper construction of s. 20 of the Bengal Civil Courts Act, the "subject-matter in dispute" in suits for redemption is the amount of the mortgage-debt and the mortgagee's rights which are sought to be paid of.(2 All 778= 8 All 438 F B Fol.) **Ajgar Singh v Barmha Singh, A W N 1887, 262.**

9—Suit for restitution of conjugal rights-Bengal, N W P and Assam Civil Courts Act (XII

Bengal Acts (Civil Courts Act XII of 1887)-*Contd.*

of 1887), Sec. 21—Valuation Act (VII of 1887), Sec 21—Valuation of suit—Jurisdiction purposes of—Valuation by plaintiff—Appeal.

Under section 21 of the Bengal, North Western provinces and Assam Civil Courts Act, appeals from the judgments of Subordinate Judges lie to the District Judge excepting in cases the value of which exceeds five thousand rupees.

The value of a suit for purposes of jurisdiction must be held in cases which are incapable of satisfactory valuation to be the value put upon it by the plaintiff except where it is proved that from improper motives he has placed a wrong valuation upon it.

A suit for restitution of conjugal rights is not capable of money valuation and therefore the value of such a suit must be held to be the valuation put upon it by the plaintff and such valuation alone will determine the forum of the suit and of the subsequent appeal. 8 C W N 705=31 Cal 849. Diss: 28 All 545; 13 Cal 232; 18 Cal 378 Ref: **Jan Mahomed Mandal v. Mesher Bibi 5 C L J 400=11 C W N 458=34 Cal 352.**

Notes.—Ref: 17 M L J 573 F B ; 31 Mad 89 F B; Fol 11 Bom L R 1352.

10—Bengal, N W P and Assam Civil Courts Act (XII of 1887), S. 21—Appeal-Forum-Value of suit—Acceptance of lesser sum by consent decree.

When the original value of a suit was over Rs. 5,000, and by a consent decree the plaintiff accepted a sum of less than Rs. 5,000, an appeal against an order passed in execution of such decree by the Subordinate Judge lies to the High Court, and not to the District Judge.

Quœre:—Whether, when such appeal is presented to the District Judge, he should return the memorandum of appeal to the appellant, for presentation before the High Court. or he is justified in dismissing the appeal. **Jogendra Nath Roy v Saraswati Debi. 6 C L J 38.**

11.—C P C (ACT XIV of 1882), S, 586—Suit for mesne profits—Valuation of claim by plaintiff—No leave asked to increase valuation—No offer to pay additional Court-fee—Value of suit, what to be taken as—Court Fees Act (VII of 1870) S 8—Civil Courts Act (XII of 1887), S. 21.

In a suit for recovery of mesne-profits the plaintiff valued his claim at Rs. 300 for the purposes of ascertainment of the jurisdiction of the Court and the amount of the Court-fee payable. He stated that, if the amount of mesne profits was found to be greater than Rs. 300, he might be awarded a decree for the excess amount after payment of additional Court-fee A Commissioner was appointed to ascertain the rates at which rent was payable in respect of the different classes land. He submitted his report that if the meane-profits were assessed at a certain rate, the plaintiff would have been entitled to a decree for Rs. 580. But the plaintiff made no application for the amendment of the plaint nor did he ask for leave to increase the valuation of his claim or offer to pay any additional Court-fee. The first Court gave him a decree for Rs. 223 and he appealed to the Sub-Judge and valued his appeal at Rs. 357, that is, the balance of Rs. 580. The appeal was dismissed and the plaintiff filed a second appeal.

Held, that the mere circumstance that the plaintiff chose to value his appeal at Rs. 357 did not show that the value of the suit was raised to Rs 580, for such an alteration could not be made without a proper application to the Court in that behalf, and even if such an application were made, it could not be granted unless the plaintiff paid the additional Court-fee, and that consequently the value of the suit must be taken to be Rs, 300 and the second appeal was incompetent. 11 Cal. 169, Rel. on; 34 Cal 954; 6 C L J 255; 11 C W N 1133 (F B) Ref. **Kali Kamal Maitra v Fazlur Rehman Khan Chowdhry, 7 Ind Cas 778**

12.—S. 21—Court Fees Act (VII of 1870), S. II—Valuation of suit—Execution of decree—Deficiency made good—Appeal—Jurisdiction.

So long as there has been order accepted by the plaintiff to make good the deficiency, the original value placed by the plaintiff must be taken as the value of the suit, for the purpose of regulating the jurisdiction of the appellate Court, but when there has been such an order made and accepted by the plaintiff, from that moment the value of the suit must be taken as being in accordance with the fee actually paid by the plaintiff.

So, where a suit for sale on foot of a mortgage was valued at Rs. 1,945, but the plaintiff payed for the redemption of prior mortgages and for a decree, for the consolidated amount, exceeding

Bengal Acts-(Civil Courts Act XII of 1887)-*Contd.*

Rs. 15,000, and the Court granted him a decree in terms thereof in the event of the mortgagor's default, conditional upon his making good the deficiency in Court fees, and the deficiency was made up, *held*, that the proper appellate *forum* was the High Court, and not the District Judge. 34 Cal 954 (F B) Fol. 16 All 286, Dist. **Sriraman Lalji v Desraj, 7 A L J 203=32 All 222.**

13.—Civil Courts Act, S. 21—Suit originally valued over Rs. 10,000—Part of the claim subsequently withdrawn—Effect of—Valuation of the suit—Appeal.

Held, that an appeal lay to the High Court from a decree in a suit the value of which was over Rs 5,000 and that valuation was not affected by the plaintiff's subsequently withdrawing a part of the claim. **Jaggi Lal v Gopinarain 3 A L J 136.**

14.—S 21—Appeal, form of—Partition suit—Valuation for jurisdictional purposes.

In a suit for partition, the value of the entire estate sought to be partitioned and not the value of the plaintiff's share in the property is to be taken as the value of the original suit, within the meaning of S. 21 of Act XII of 1887.

Where, therefore, in a suit for partition, the value of the entire estate is above Rs. 5,000, but that of the plaintiff's is below that amount, an appeal shall lie from the decree of the subordinate Judge, direct to the High Court.

Biraj Mohini Dasi v Chintamani Dasi. 3 C L J 197=10 C W N 565.

15—S 21—General Clauses Act (II of 1887), s. 3, cl. (13)—Valuation of suit—Appeal—Suit for partition.

In a suit for partition of the share of one only out of several co-sharers in immoveable property, the proper valuation of the suit for the purposes of jurisdiction is the value of the share sought to be separated from the rest of the property, and not the value of the entire property out of which the share is to be taken. **Wajihuddin v Wali-ullah. 1902 A W N 88=24 All 381=31 Cal 365.**

16—S.21—Transfer-District Judge's power to transfer to Additional District Judge cases heard and pending—Particular cases transfer of—Functions—C P C s. 25.

A District Judge cannot transfer to an Additional District Judge a case which he has heard though only in part. *Quære*:—Whether under s. 21 of the Civil Courts Act he can so transfer any particular case pending in his court which he has not heard. A District Judge reserved judgment in an appeal which he had heard and thereupon on the appplication of the appellant made an order directing a fresh local investigation by an *Amin*. On a subsequent date, the *Amin's* fees not having been deposited, he ordered that if the fees be not paid within a week, the appeal would be dismissed. The fees were duly paid and the *Amin* who was appointed submitted his report. The District Judge thereupon transferred the case to the Additional District Judge who decided the appeal. *Held*, that the order of transfer and the judgment of the Additional District Judge were without jurisdiction. A District Judge has no inherent power to transfer a case either from his own file or from the file of an officer under his administrative control. The power must be one conferred by the statute. **Bidyamoyee Debya Chowdhrain v Maharaja Suryakant Acharya Bahadur. 9 C W N 705=32 Cal 875.**

17.—Valuation of Suit—Appeal—Jurisdiction—Bengal, N. W. P. and Assam Civil Courts Act (XII of 1887), S. 21.

Under S. 21 of the Bengal, N. W. P. and Assam Civil Courts Act regarding the valuation of a suit for the purposes of determining the forum of appeal, the rule is that where a plaintiff definitely fixes a certain sum as the amount of his claim that sum should be considered as the value of the original suit, but when he fixes a sum only approximately or tentatively and prays that the amount of his claim may be ascertained in the course of the suit, then the amount found by the lower Court to be due to him must be regarded as the value of the original suit.

Gulab Khan v Abdul Waheb Khan. 8 C W N 233=31 Cal 365.

Notes.—Fol: 11 C W N 1133 F B. Appr: 34 Cal 954 F B; 6 C L J 255 F B. Ex: 34 Cal 216. Ref: 6 C L J 38; 5 C L J 380.

Bengal Acts-(Civil Courts Act XII of 1887)-*Contd.*

18.—S. 21, Sub. S. 2—Suits Valuation Act, S. 11,—Jurisdiction wrongly exercised—Appeal forum.

Where a Munsiff tries a suit holding that the value of the suit is within his jurisdiction and decides it, an appeal lies to the District Court and if objection as to the jurisdiction of the Munsiff is taken before him, the proper questions for determination are (1) whether there has been an under-valuation (2) whether such under-valuation has affected the disposal of the suit on the merits and if he holds against the plaintiff, in both the proper course is to return the plaint to be presented to the proper Court, and not at once return the appeal memo. An appeal will lie to the High Court from the decision of the District Judge that the under-valuation has not affected the decision on the merits.

Ragunath Charansingh v Shamo Koeri. 31 Cal 344.

19.—S.22—Subject-matter in dispute-Execution of decree—Appeal.

Where the Subordinate Judge made an order in execution of a decree respecting the amount of the mesne profits made payable by the decree, the amount being in dispute, and the disputed amount exceeding Rs. 5,000, and it appeared that the subject-matter in dispute in the suit in which the decree was made did not exceed Rs. 5,000, *held* that an appeal lay from the order of the Subordinate Judge to the District Judge and not to the High Court. (N. W. P. 1873. 108, 9 B L R 198, Fol.; 3 All 633, Dist.)

Ram Kirpal v Rup Kuar. A W N 1886, 286.

Bengal Civil Courts Act (XII, 1887)-S. 22-**See** Appeal—General. **A W N 1883, 134.**

20.—Ss.22,23-Withdrawal by District Judge of a suit—Re-transfer of the same—Powers of District Judge.

When once the District Judge withdraws a suit to his own file for trial, he is not competent to re-transfer it again to the Court from which the case has been withdrawn. **Ram Charittar Ray v Bidhata Ray. 10 C W N 902.**

Notes.—Ref: 35 Cal 1060=8 C L J 193=12 C W N 621. Fol: 14 C W N 114.

Bengal Acts (Civil Courts Act XII of 1887)-*Contd.*

Bengal Civil Courts Act (XII of 1887)—S. 26—**See** Civ Pro. Code, 1908, s. 99.

21.—Valuation of suit—Appeal—Jurisdiction Bengal, N. W. P. and Assam, Civil Courts Act (XII of 1887) s. 27.

Plaintiff sued for an account and valued the suit at Rs. 2000, but added that if any further sum were found due he would pay the additional court fee. A preliminary decree was passed directing the Defendant to render accounts. On Defendant's failure to account, plaintiff filed an account claiming that the amount of Rs. 11,000 was due and prayed for a decree for that amount. Plaintiff subsequently reduced the amount to Rs. 9000. Defendant thereupon objected and on an account being taken plaintiff's suit was dismissed and he preferred an appeal to the District Judge valuing his appeal at Rs. 4500. The District Judge held that the appeal did not lie to him as the value of the suit was Rs. 9000 and not Rs. 2000. *Held*—That the appeal lay to the District Judge as the value of the suit must be considered as that stated in the plaint (Rs.2000). **Nogendra Nath Mozumdar v Russik Chandra Rai. 6 C W N 346.**

Notes—Ref: 31 Cal 301; 365; 34 Cal 954 F B; 11 C W N 1133. Rel: 8 C W N 233. Appr. 6 C L J 255. F B.

22.—Beng. Civil Courts Act Ss. 28, 8-Transfer of appeal to additional District Judge.

The Court of an additional District Judge is a Court under the District Judge's administrative control and the District Judge is competent to make over to the additional District Judge an appeal which he had withdrawn from a Subordinate Judge to whose file it had at first been transferred. 32 Cal 875 com. on. **Chandra Tewary v The Secretary of State for India. 14 C W N 841.**

Bengal Civil Courts Act (XII, 1887) s. 29.

See Right of Appeal.

23.-Civil Courts Act, S. 37—Mahomedan law—Evidence not admissible to prove custom at variance with the Mahomedan law.

Where the parties to a suit are Mahomedans, governed, with regard to the matters mentioned

Bengal Acts-(Civil Courts Act XII of 1887)-*Concld.*

in S. 37 of Act No. XII of 1887, by the ordinary rules of the Mahomedan law, evidence is not admissible to prove a custom of succession at variance with the law. 23 All 20 and 1 Agra F B R 58 foll. So *held*, the parties being Beluchi Mahomedans. **Ismail Khan v Imtiaz-an-niss.** **1908 A W N 7.**

24.—S. 37—Evidence of custom at variance with Mahomedan Law not admissible.

Where the parties are Mahomedans, governed by S 37 of the Bengal Civil Courts Act in regard to matters mentioned in it, a custom at variance with that law cannot be proved. **Jammya v Diwan.** **23 All 20.**

25.—S. 37–Hindu Law-Suit for enforcement of conjugal rights – Act XII of 1887—Husband contracting out of his rights——Public Policy—Marriage under Hindu Law.

Where in a suit by a Hindu husband for enforcement of conjugal rights, the wife relied on an agreement, executed at the time of marriage by the guardians of the husband, then a minor, and also by the husband covenanting that the husband would always lie at his mother-in-law's house, and that the wife would never be required to leave her parental home and reside elsewhere with her husband.

Held—That the parties being Hindu the rule of decision in such a case is, in accordance with s. 37 of Act XII of 1887, the Hindu Law except in so far as it has by legislative enactment been altered or abolished.

Held also—That the agreement relied on by the wife, if permitted, would defeat a rule of Hindu Law and is opposed to public policy.

Tekait Non Mohini Jomadai v Rai Basant Kumar. **5 C W N 673=28 Cal 751**

Bengal Courts of Wards Act IV of 1877.

See (1) Collector.
(2) Court of Wards.
(3) Lunatic.

Bengal District Municipal Improvement Act III of 1864.

Notes:—Rep., Ben Act V of 1876.

Bengal Acts-(District Municipal Improvement Act)-*Concld.*

1.—S. 87-Bengal Municipal Act (III (B.C.) of 1884) Sec. 363—*Act* (III) B.C. of 1864), Sec. 87—Limitation.

There is no difference between section 87 of act III (B. C) of 1864 and section 363 of act III (B.C.) of 1884. As the former section, so also the latter, is applicable only in those cases where the plaintiff claims damages or compensation for some wrongful act committed by the Commissioners or their officers in the exercise, or the honestly supposed exercise, of the statutory powers. In cases other than these, section 363 has no application, 6 All 8 Fol.

Shudhangshu Bhushan Roy Chowdhury v Bejoy Kali Roy Chowdhury. **3 C L J 376.**

Bengal District Road-Cess Act X of 1871.

Notes:—[Rep. (in Assam), Act V of 1897; (in Bengal and Eastern Bengal), Ben. Act IX of 1880]

Bengal Drainage Act (VI of 1880).

See Drainage Act.

Notes—[Rep in Pt. and Am , Ben. Act II of 1902; S. 1 rep. in pt., Ss. 60 to 63, rep., Act I of 1903; Declared in force in the Sonthal Parganas, Reg. III of 1872, s. 3. as amended by Reg. III of 1899, s. 3].

1.—Bengal Drainage Act, Secs. 42, 44—Suit by landlord to recover from tenant certain drainage charges–Limitation-Time from which limitation runs—Bengal Tenancy Act (VIII of 1885), Sec 3, Sub-section 5, Sch. III—Limitation Act (XV of 1887) Sch. II, Art. 116—Suit for compensation for breach of contract in writing and registered, and suit for rent, difference between,

Bengal Acts-(Drainage Act)-*Contd.*

Under section 42 of the Bengal Drainage Act the right of the landlord to recover from his tenant, any sum as drainage charges payable by him, accrues on the date on which the landlord has entered into an engagement with the Government to pay the sum assessed by the Commissioners appointed under the Act, and not on the date on which the Collector assesses the amount payable by the tenant under s. 44.

Clause (*c*) of section 42 of the Act does not entitle the landlord to recover from his tenant in any one year more than one-tenth of the total sum payable by him.

A suit for the recovery of drainage charges payable by a tenant to his landlord under section 42, clause (*b*) and section 44, sub-section (1) of the Bengal Drainage Act must, having regard to the provisions of clause (*2*) of Schedule III of the Bengal Tenancy Act, be brought within three years from the last day of the Bengali year in which the sum claimed fell due.

It is perfectly lawful for parties to substitute for their statutory obligation under the Bengal Drainage Act a contractual obligation.

Where, however, the contract of tenancy contains nothing more than a covenant by the tenant to pay to his landlord drainage charges in accordance with the statute, and no contractual obligation is created in supersession or modification of the statutory obligation, but contains merely a recital of the statutory obligation, Art. 116 of Sch. II of the Limitation Act has no application. (8 C W N 640 Fol: and Expl:) **Naffer Chandra Maji v Jyote Kumar Mukerjee. 11 C W N 57= 5 C L J 19**

2.—Ss. 42, 44,—Limitation—Starting point—Bengal Tenancy Act. S. 3 Cl 5, Sch III.

The period of limitation for a land-lord to recover a sum of money payable by a tenant

Bengal Acts (Drainage Act)-*Concld.*

under S. 42 (b) of the Bengal Drainage Act VI of 1880, begins to run from the date on which the landlord engages to pay the costs with which he is charged and not from the date on which the Collector assesses the amount payable by the tenant under S. 44. The period of limitation for such a suit is three years and such a sum is recoverable as rent and the word "rent" in Sch. III of the Bengal Tenancy Act includes "money recoverable under any Enactment for the time being in force as if it was rent."

Mon Mohini Dasi v Priya Nath Besali. 8 C W N 640.

Notes —Fol: 11 C W N 57; 5 C L J 19.

3.—S. 43—Suit to recover defendant's share of cost of drainage of joint-holding—Proper notice under, not given—Maintainability of suit.

A suit was brought for recovery of the defendant's share of the costs of drainage of a holding owned jointly by the parties and for which the plaintiffs had given an engagement to the Collector. The main defence was that no proper notice under s. 43 of the Act had been served. *Held* the notice was only a fifteen days' notice, instead of its being a thirty days' notice, as the law required. The notice was a bad one. As the claim was founded upon the notice, it must fall with it. Suit was properly dismissed. **Nabin Chandra Mukerji v Amrita Lal Chatterji. 1 C L J 260.**

4.—Ss. 44 (2) 55, 56, 3.—Collector, power of, when exercisable by Deputy Collector—Award—Finality.

An order under Sub-S. 2 of S 44 of the Drainage Act passed by a Deputy Collector who is not empowered either under S. 55 or 56 of the Act is not final and binding on the parties. A letter of the Collector to the Commissioner to the effect that he proposes to put the Deputy Collec-

Bengal Acts-(Embankment Act)-*Conta.*

tor in charge of the Drainage Office and the reply of the Commissioner that he agrees, were held not to contain an order under S. 56, such as would have the effect of giving the Deputy Collector the powers of a Collector. **Gadadhar Bhatta v Bosunta Kumar Roy. 8 C W N 669.**

5.--A landlord can under a contract recover "drainage cost." S. 44 (b) does not apply to the case of a special contract.

Held also that such a contract is not invalid under the Drainage Act. **Jyoti Kumar v Haridas. 32 Cal 1019.**

Notes.—Appr: 11 C W N 57. Ref; 5 C L J 19.

Bengal Embankment Act VI of 1873.

See Embankments.

Bengal Embankment Act II of 1882.

—ss. 6, 76, and 80.

See Embankment.

1-2.—Ss. 56, 57, 68, 86-Collector-Power to apportion embankment charges—Contract between *zemindar* and tenure-holder—Civil Court—Jurisdiction to interfere with Collector's order—Specific Relief Act (1 of 1877), Ss. 54, 56.

Under the Bengal Embankment Act, the Collector is authorised to assess the embankment charges on tenures after due notice; and the tenure-holders are bound to pay those sums to the *zemindar*. The Collector's order is not subject to any contract made between the tenure-holders and the *zemindar*; that is, the order is not a nullity even if it be contrary to any such contract.

Section 86 of the Embankment Act enacts that orders passed under section 68 shall be final. The Civil Courts, therefore, have no jurisdiction to modify or alter such orders. **Shiba Prasad v Gossain Dass Datta. 10 Ind Cas 192**

Bengal Acts-(Embankment Act)-*Concld.*

3.—S. 76, Cl. (a) 79—'Shall add to.'

The words 'shall add to any existing embankments, in S. 76, (a) of Bengal Act II of 1882, include an addition to the height of the embankment. 11 Cal 570 overruled. **Ajodhya Nath Koila v Raj Kristo Bhar. 30 Cal 481= 7 C W N 284.**

Bengal Enforcement of Decrees Act (V of 1836)

Notes.—Rep., Act VIII of 1868.

Bengal Estates Partition Act. VIII of 1876.

See Estates Partition Act.

1.—C P C S. 12—Private partition under Bengal Act VIII of 1876—Act V of 1897, if applicable—Revenue Court, partition by, if can be questioned—Act XV of 1877 (Limitation Act), Art. 14—Amendment of plaint—Entry in Collector's order sheet, weight of.

The plaintiffs and the defendants were owners each of an eight annas share in a *mehal*. It was alleged that the *mehal* was privately partitioned between the plaintiff's and the defendant's ancestors, that they were in enjoyment of their shares and that the partition was subsequently confirmed by a decree of Court also. Then in 1884, the defendant petitioned the Collector to make a partition but on the plaintiff's objection that there had been a private partition, the petition was dismissed. But, on appeal to the Commissioner, the order of the Collector was reversed and he was asked to proceed with the partition. After various objections by the plaintiff, the Deputy Collector of Durbhangha, to whom the case was sent, partitioned the estate and sent the case for the sanction and approval of the Collector, under s. 58 of Act V of 1897 (B. C.). The plaintiff then filed the present suit for a declaration that the properties, the subject-matter of the suit, having been privately partitioned, could not be partitioned again by the Collector, under the Estates Partition Act. *Held*, that under s. 2, cl. (b) of Act V of 1897, all subsequent proceedings in the suit for partition, instituted under Act VIII of 1876, must be carried

Bengal Acts-(Estates Prtition Act VIII of 1876)-*Contd.*

on under Act VIII of 1876, as if Act V of 1897 had not been passed. The Civil Courts are competent to decide the matter in controversy between the parties, when the question raised goes to the very root of matter and relates to the jurisdiction of the Collector to make a partition in spite of the provisions of s. 12 of Act VIII of 1876. *Held*, also, that the suit was not barred under s. 26 of Act VIII of 1876 and that s. 25 of the Estates Partition Act did not apply. *Held*, also, that the suit was not barred by Art. 14 of the Limitation Act, XV of 1877, since the order of the Collector was clearly without jurisdiction in view of s. 12 of Act VIII of 1876. (24 Cal 149; 32 Cal 716, 32 Cal 1107, 33 Cal 693, Fol. 29 Cal 367, Dist). Where the plaintiff sues for a declaration but subsequently the defendant is found to be in possession, the plaintiff can ask for leave to amend the plaint so as to make it appropriate to a suit for possession. (6 C L J 74, 21 Bom 701, 6 C L J 612 Ref; 26 Cal 845 Dist.). An *ex parte* order in a Collector's order sheet by itself is no proof of possession. 7 C L J 251 Ref.

Ananda Kishore Chowdhry v Daije Thakurain. 36 Cal 726=10 C L J 189 =1 Ind Cas 549.

Bengal Act VIII of 1876 (Estate Partition)

—S. 54—Batwara Khasra—Measurement papers —Proof. See Parties, **8 Ind Cas 890.**

2.—C P C s. 57—Butwara papers—Admissibility in evidence—Estates Partition Act (VII B C of 1876), S. 57.

The partition paper prepared under S. 57 of the Estates Partition Act is admissible in evidence under S. 13 of the Evidence Act, as a record of a transaction in which the right to certain plots is recognised.

The filed book or *chitta*, which describes the various plots, is also admissible under S. 9 of the Evidence Act, as explanatory of the partition paper, which without the *chitta* might be very difficult to understand. 10 W R 197: 21 W R 29 dist. **Sheikh Jaki v Dino Bandhu. 2 Ind Cas 367.**

3—Bengal (Act VIII of 1876) Ss. III, 149—Suit for declaration of title and fixity of rent—Prior Revenue proceedings under the Estates Partition Act—Whether jurisdiction of Civil Court

Bengal Acts-(Estates Partition Act VIII of 1876)-*Contd.*

excluded—Scope and effect of s. 111—Mirasi or permanent tenure—Circumstances leading to the inference of the existence of such tenure—Fixity of—Rent—Separate suit.

Plaintiff instituted the present suit for a declaration of his title as a *Mirasdar* in respect of a portion of land in a taluk of which plaintiff and the defendants are co-owners, and also for a declaration that the rent was fixed in perpetuity. In the course of prior proceeding for partition of the estate by the revenue authorities under the Estates Partition Act (Bengal Act VIII of 1876), the present plaintiff set up title as *mirasdar* in respect of land now in dispute, and the Collector came to the conclusion that the *miras* set up by the plaintiff was not proved. It was contended on behalf of the defendants that the order of the Collector was made under s. 111 of the Act and that the suit was not maintainable under s. 149 of the Act. *Held* that s. 111 did not apply, because neither the existence of a permanent tenure nor the fact that the rent of the tenure was fixed in perpetuity was admitted. S. 111 provides for cases of permanent intermediate tenures, and prescribes the mode in which the partition is to take place when the fact of such tenures is established. *Held*, also, that s. 149 does not exclude the jurisdiction of Civil Courts in matters which involve a question of title. (36 Cal 726 Ref.) If, in the course of a partition proceeding under Act VIII of 1876, any question arises as to the extent or otherwise of the tenure, as the tenure-holder is not a party to the proceedings, he is not affected in any manner by the decision which may be arrived at by the revenue authorities for the purposes of partition between the proprietors. It would be unreasonable to hold that a party, who has appeared before the revenue authorities in his character as a proprietor, should be finally concluded by a decision upon a question of title, which would not have been binding upon him if he had been a stranger to the proceedings where the tenure had been in existence for at least seventy-five years prior to the commencement of the suit, and the plaintiff was in undisturbed possession of the lands in dispute from the date of his purchase up to time when, in the partition proceedings, the existence of the tenure was denied by his co-charers, and, on the conveyance executed in favour of the plaintiff, his vendors asserted that they had a *miras* right in respect of the lands

Bengal Acts-(Estates Partition Act VIII of 1876)-*Contd.*

in dispute. *Held*, that, under such circumstances, the inference is perfectly just that the tenure was of a permanent character. (32 Cal 51, 34 Cal. 602, Ref. 21 Cal. 496, Dist). The only effect of the decree in favour of the plaintiff in this suit is to decide that the tenure is permanent, and the question as to whether the rent is or is not fixed in perpetuity is left open for decision in suit properly framed for the purpose. **Janki Nath Chowdhury v Kali Narain Chowdhury.**

37 Cal 662=Ind Cas 881.

4—Estates Partition Act (VIII (*B C*) of 1876) s. 116-Limitation Act (XV of 1877) Sch. II, Art 14—Suit to set aside decision of revenue authority—Declaration of title, suit for.

Where a fractional co-owner of an estate which was the subject of partition under the Estates Partition Act raised an objection that certain lands which have been measured by the Amin as appertaining to that estate did not really so appertain but that they belonged to some other estate of his, and the Collector passed an order under s. 116 of the Act overruling the same objection, and the order of the Collector was confirmed by the Board of Revenue.

Held—That the suit brought by the Plaintiff for declaration of title to the said lands as set up was barred by limitation inasmuch as the said suit was brought by one year after the decision of the Revenue authorities, and Art 14 Sch II of the Limitation Act applied to the case.

Parbati Nath Dutt v Rajmohan Dutt.

6 C W N 92=29 Cal 387; 24 Cal 149.

5-S 116-Order of Collector striking off partition—Proceedings under s, 116, Estates Partition Act, in consequence of disputes as to title to certain land—Suit for declaration of title to and possession of land in dispute—Applicability of.

In consequence of a dispute in partition proceedings as to whether certain plots of land should be included in the property to be partitioned or not, the Collector passed an order, under s. 116 of the Estates Partition Act, directing that the partition proceedings be struck off. The plaintiffs brought a suit for declaration of their title to the said disputed plots of land and to recover possession thereof. On behalf of the defendant, it was contended that the suit was barred by

Bengal Acts-(Estates Partition Act VIII of 1876)-*Concld.*

limitation under Art 14 of the Limitation Act. *Held*, the present suit was not brought to set aside the order of the Collector but to obtain the lands and for a declaration of their title thereto. The Collector's order could not stand in the way of the plaintiff's obtaining the reliefs prayed for and it was, therefore, unnecessary for the plaintiffs in this suit to have that order set aside. As the suit was not brought to set aside the order of any public officer, Art 14 did not apply and the suit was not barred by limitation.

Raj Chandra Roy v Fazijuddin Hossein.

32 Cal 716.

Notes:—Ref 10 C L J 189; 36 Cal 726.

6—Estate Partition Act (VIII of 1876, B C), S. 116—Order directing execution of lands from partition.

Suit for a declaration of the plaintiff's right to certain lands, for a direction that the Collector should proceed with their partition under the Estates Partition Act, and for possession to be given to the plaintiff and his co-sharers It appeared that, in proceedings before the Collector under this Act, the Collector passed an order excluding the disputed lands from the partition and proceeded with the partition in respect of other lands. The question for decision was whether Art. 14, Sch 2 of the Limitation Act, barred the suit, the same having been brought more than one year from the date of the Collector's order. *Held*, Art 14 of the Act did not apply, because the Collector had no power, under S. 16 of Act VIII of 1876, to pass an order excluding the disputed lands from partition that such order was *ultra vires* and consequently, a nullity, and that, therefore, Art. 14 was not applicable to the suit, and the suit was not barred (21 Cal 626, 11 Bom 429, 15 Bom 434 and 32 Cal 1107 Fol: 29 Cal 367, Distd.)

Alimuddin v Ishan Chandra Dey.

33 Cal 693.

Notes:—Ref: 30 Mad 280; 17 M L J 147, 10 C L J 189: 36 Cal 726.

Bengal Act V of 1897 (Estates Partition)-Sale of land by widow—Non-registration of vendee's name—Partition under—Right of vendee to lands allotted to vendor. **See** Sale.

9 Ind Cas 67.

Bengal Acts-Estates Partition Act (V of 1897)

1-S. 29-Manager of Court of Wards, power of, to assert the claim of pre-emption—Delay in assertion of right—Formality-Claim, when can be made —Act V of 1897 (Bengal Estates Partition) Ss 29 and 95—Custom.

A guardian or manager under the Court of Wards can assert a claim of pre-emption, based on the ownership of the ward's property, and such manager does not need any express sanction from the Court of Wards. He can also perform on behalf of an adult female ward the ceremonies of *Talab-i-mowasibat and Talab-i-ishtishad.*

There is no fixed time within which the *talab-i-ishtishad* should be performed. It is a question of fact for the Court to determine, whether such ceremony was done within proper time.

The performance of the ceremoney of *tab-i-ishtishad* is not meant to be done for the information of the vendor or vendee, though its effect may be to give them information. The formality is insisted on with the object of getting evidence that the pre-emptor has really asserted his right, and because evidence is wanted in order to establish proof before the Magistrate. It may be that no witnesses are present at the time of the performance of the *talabi-mowasibat.* The *talab-i-ishtishad* must be performed in the presence of witnesses so that there may be proof that the claim has been made.

The performance of the ceremony in the Raj *kachary* or law office of the vendor is a sufficient compliance with the law.

The existence of the custom of pre emption among Hindus in the district of Champaran, Bihar had been judicially recognised.

The assertion of the claim of pre-emption must be made without delay; but before the *shafee* can assert his right to pre-emption, he must be satisfied by evideuce, which he holds to be credible, that the sale has been completed.

It is clear from the authorities that under the Mahomedan Law, before it can be held that the sale was complete, there must have been a cessation of the vendor's right in the property.

An order passed under S. 29 of Act V of 1897 has not the effect of dividing the shares of the proprietor finally, until the date specified in S. 9 > of the Act, and until the latter date the right of pre-emption subsists. 1 All 521 and 23 All 129 Ref. 16 W R (F B) 13 Fol; 17 Cal 543 Ref. 27 All 160 diss. W R (1864) 259; W R (1863) (F B) 143; 1 W R 264; (1837), 6 Sel Rep 197 Fol; 11 All 15; 16 All 344 fol; 8 W R 255 Fol; 12 W R 484 Ref; 14 W R 476 Dist. **Jadu Lal Sahu v Janki Koer. 35 Cal 575.**

Bengal Acts-(Estates Partition Act V of 1897)-*Concld.*

2 —S. 81-Joint landlords-Partition-Effect on holding-Division of holding-Act V of 1897 (Estates Partition), s. 81.

An estate having been partitioned between the plaintiff and his co-sharers under Act VIII of 1876 (Bengal), a portion of a holding, which, formerly, appertained to the joint estate fell within plaintiff's share: *Held*, that the partition had the effect of dividing the holding, so that the plaintiff became the sole landlord with regard to the portion of the holding that fell within his share of the estate. (5 Cal 273, 26 Cal 852, Ref.; 1 C W N 160, 2 C L J 369, Dist.) Act VIII (B C) of 1876, whilst it did not provide for the division of holdings, did not also contain any prohibition against such division. **Protab Chandra Das v Kamala Kanta Shaha. 10 C W N 818.**

3—S. 99—Private partition amongst proprietors—"Tenancy in common," cessation of—*Putnidar* of separated share, if bound by subsequent butwara by Collector.

S. 99 of the Estates Partition Act does not apply, when the estate partitioned by the Collector had already been privately partitioned amongst the proprietors and the proprietors were holding their shares of the lands in severalty and not in common tenancy as contemplated in that section. A *putnidar* in possession of a separately allotted portion of such estate is not, therefore, affected by the subsequent partition by the Collector.

The fact that the Government was not bound to recognise the private partition for purposes of revenue does not affect the question. (20 Cal, 285 Ref).

Syed Abdul Latiff Miah v. Amaunddi Patwari 15 C W N 426=9 Ind Cas 539.

Bengal Evidence Civil Cases Marriage, Registration of, Act I of 1876

See Evidence—Civil Cases—Marriage, Registration of.

Bengal Excise and Licensing (Act VII of 1878).

Notes:—[S. 36 rep in pt., Ben Act VII of 1880; ss. 4, 9, 19, 64, 75, 82 am., ss. 17-A. 61-A. ins, s. 58 rep in pt, and am, S. 64 rep., Ben. Act IV of 1881; ss. 4, 15, 17. 26, 29, 30, 53, 60, 61 am., ss. 10-A, 19-A ins., Ben Act I of 1883; s. 18 am., Act IX of 1885, s. 3; s. 81 (proviso) rep., Act XIII of 1889; ss. 18, 19 am, Act XIII of 1890, ss. 6, 7; s. 2 rep in pt, Act V of 1897; ss. 3, 51 rep. in pt., Act I of 1903; title, preamble, ss. 1, 11, 27, 28, 67 am., s. 27-A, ins (for Bengal and Eastern Bengal), Ben Act II of 1903; Declared in force—in the Sonthal Parganas, reg. III of 1872, s. 3, as amended by Reg III of 1899, s. 3, in the Angul District, Reg. I of 1894, s. 3.].

1—Contract Act (1872) S. 23—Excise Act (Bengal Act VII of 1878)—Protection of Revenue—Public Policy.

The Bengal Excise Act is not intended to be merely an act for the protection of revenue, but is an Act having other objects of public policy in view as well. An agreement for the sale of fermented liquor, by a person who has not obtained a license under Bengal Act VII of 1878, is illegal and therefore void. **Boistub Churn Naun v Wooma Churn Sen, 16 Cal 436.**

Notes:—Ref: 24 Mad 401; 8 C W N 635; 31 Cal 798.

Bengal General Clauses Act.

1—C P C O.21, r.89 (1882 S. 310A)—Application to set aside rent sale—Bengal Tenancy (Amendment) Act (I of 1907), S. 54 — Bengal General Clauses Act (I of 1899), S. 8, cl. (c)—Right accrued previous to, but application after, repeal.

A raiyati holding having been sold on the 7th May, 1907, in execution of a rent-decree, an under raiyat applied to have the sale set aside under s. 310-A, C. P. C., on the 23rd May following.

Held, that the application could not be entertained, the Bengal Tenancy [Amendment] Act I of 1907 having come into operation on the 22nd May, 1907.

Bengal Acts (General Clauses)—*Concld.*

S. 54 of the amending Act, by enacting that S. 310-A, C. P. C., shall not apply to a tenure or holding attached in execution of a decree for arrears due thereon, does not repeal any portion of the Bengal Tenancy Act within the meaning of Sub-sec. (c) of S. 8 of the Bengal General Clauses Act. **Asiruddi Mondol v Mukhodamoyee Dassi, 12 C W N 434=35 Cal 543.**

Notes:—*Ref*: 13 C W N 224.

Bengal Grant Act I of 1879.

See Grant.

Bengal Insolvency--Insolvent debtors under Civil Procedure Code. Act VII of 1868.

See Insolvency — Insolvent Debtors under Civil Procedure Code.

Bengal Irrigation Cess Act III of 1876.

Notes:—Ss. 42, 73, 85 rep. in pt., Ben. Act VII of 1880; S. 2, Sch. A, rep., S. 95 Am., Act I of 1903.

1—Irrigation Cess Act III of 1876. Ss. 1 & 6.

Where under a notification under s. 1 of Bengal Act III of 1876 (Irrigation Cess Act) the Act was extended to a district and was to have taken effect from January 1882, a notification under S. 6 of the same Act before that date was *ultra vires*.

Secretary of State for India in Council v. Nritya Gopal Adhikary, 28 Cal 487.

Bengali Will.

1—Vested interest—Construction — Bequest to "eldest son to be born"—Vested interest–Direction that the estate to remain in the hands of executors till the sons arrive at 21 years.—

A testator died in 1857, leaving a will in Bengali, dated the 5th January 1857, whereby he provided that his residuary estate "shall descend in equal shares to the eldest son to be born to each of the daughters of my late brother (namely) C and F who are now alive. The sons of those daughters (of my brother) shall after their birth remain under the control and guardianship of the Executor Sahib until they attain the majority at the expiry of 21 years, and whenever the eldest

Bengal Act (Bengali Will)-*Concld.*

son of any of the ladies shall attain majority, the executor will make over his share to him to his satisfaction.

At this time C was married; but F was not married. C had a son born on the 17th May 1858 who lived to be 21, and to whom on his attaining his majority, one moiety of the estate was handed over by the executor. F married W in 1875, and she had a son born on 23rd August 1883, who only lived a few hours.

Held. (1) that on the birth of the son of F the half share in dispute became vested in him and on his death it passed to his father as his heir.

(2) That a bequest in favour of a person simply that is, without any intimation of a desire to suspend or postpone its operation confers a vested interest.

(3) That there is no line of precedents attaching to Bengali terms' meanings, which make them understand as terms of art by Bengali lawyers

(4) That the words "descend to the eldest son" meant to go down to him,to belong to him,in succession to the testator referred to his birth.

Harris v. Brown, 3 Bom L R 808=5 C W N 729=28 Cal 621=28 I A 159 P C.

Bengal Judicial Officers Liability of Act VI of 1868, Sch. K.

See Judicial Officers, Liability.

Bengal Jurisdiction of Civil Court --Revenue Courts-Orders of Revenue Courts Act VII of 1868, S. 18.

See Jurisdiction of Civil Court — Revenue Courts—Orders of Revenue Courts.

Bengal Landlord and Tenant Pro. Act.

See Bengal Rent Act.

Bengal Land Registration Act VII of 1876.

See Cases under:—

Land Registration Act.

II C. C 13

Bengal Land Redemption & Foreclosure Act.

1—Land Redemption and Foreclosure—Regulation-XVII of 1806, S.8-Mortgage by conditional sale—Foreclosure—Procedure:—

Before a mortgagor in the case of a mortgage by conditional sale to which Regulation No.XVII of 1806 was applicable can be held to have entirely lost his right to redeem under that Regulation, it must be proved that the procedure prescribed therein has been strictly followed. For instance, it must be proved that there was a previous demand by the mortgagee from the mortgagor of payment of the mortgage debt. It must also be shown that the notice required by the Regulation has been duly served upon the mortgagor. (N W P) H C Rep. 358, 5 All 9 and 3 Cal 397 ref. to.—

Radal Ram v. Taj Ali, (1907) A W N 266= 4 A L J 717.

Bengal Municipal Act III of 1864.

1— Power of Municipal Commissioners t close or divert public highways.

Bengal Act III of 1864, which vested public highways in Municipal Commissioners for the purposes of the Act, did not by so vesting them give power to the Municipal Commissioners, nor, *a fortiori*, to the Vice-Chairman alone, to stop up or divert such public highways.

Empress on the prosecution of Jodoonath Ghose v. Brojonath Dey, 2 Cal 425.

2—S. 10—Public Highways—Right to subsoil of roads—Civil Procedure Code 1882, S.13-Roads vesting in the Municipality.

It is not intended by S. 10 of Bengal Act III of 1864, to deprive any person of any right of private property that he may have in land used as a public road or to vest the subsoil of such land in the municipality; and when the land is no longer required for a public road, the owner is entitled to its possession. A suit brought to recover certain land from the municipality by the plaintiff's predecessor in title, on the ground that the plaintiffs had been ousted therefrom by reason of the Municipality using a portion of it, having been dismissed, the decision was held not be *res judicata* in a suit brought by the plaintiffs for ejectment and declaration of title to such land against a purchaser of the land from the Municipality. **Modhu Sudan Kundu v. Promoda Nath Roy, 20 Cal 732.**

Bengal Acts-(Municipal Act III of 1864)-*Contd.*

Notes:—Ref: 2 Mad 635; 33 Cal 1290=10 C W N 1044=4 C L J 343.

3—S. 19—Refusal to permit excavation of tanks—Discretion of municipality —

By s.19 of the bye-laws of the Howrah Municipality, framed under s. 84, Bengal Act III of 1864, and confirmed by the Lieutenant-Governor, it is within the discretion of the municipality to refuse permission for the excavation of a tank, and the Courts have no power to interfere with the *bona fide* exercise of such discretion.

Bhyrub Chunder Bannerjee v. Chairman of the Howrah Municipality. 17 W R 215.

4 - S. 63—Right to pull down ruinous house —Notice of action.

By S. 63, Bengal Act III, 1864, Municipal Commissioners, if they deem a house or building to be in a ruinous state, may, after the notice prescribed by that section, cause the same to be taken down. **Gopee Kishen Gossain v. Ryland, 9 W R 279.**

5-S. 97—Fine for suffering premises to be in filthy state —Owners and occupiers —

The Municipal Commissioners were empowered under section 67, Bengal Act 111 of 1864, to fine either the owner or occupier of the land who suffered it to be in a filthy state. Where the land was occupied by tenants, and the owner admittedly lived in another district, and there was nothing to show that he sufferd the land to be in a filthy state.—*Held*, that the imposition of a fine on owner was not a proper exercise of the discretion given by section 67, of the Act.

Queen v Dwarknath Hazrai. 8 B L R Ap 9 S C: 16 W R Cr 70.

6-S. 73—Expense of clearing away jungle after notice to defendant.

The Municipal Commissioners were held entitled, under s. 73, Bengal Act 111 of 1864, to recover from the defendant the expense of clearing away any jungle which they found on his land upon his failure after notice to clear it himself within the time specified in the notice.

Browne v. Woomesh Chunder Roy 7 W R 213

7-S. 77-Notice of action-Suit against Municipal Commissioners,

Bengal Acts-(Municipal Act III of 1864)-*Contd.*

A notice of action against Municipal Commissioners is absolutely necessary under s. 77 Bengal Act 111 of 1864 A notice of objecting to, and asking for a reconsideration of the order complained of is not sufficient. **Abhoy Nath Bose v. The Chairman and the Deputy Chairman of The Municipal Commitee of Kishnagur. 7 W R 92.**

Notes:—Fol: 15 W R 415

8 S. 79—Procedure—Medical report—Closing burning ground.

A proceeding taken under Bengal Act 111 of 1864 s, 79, is not a judicial proceeding, and the evidence referred to therein means evidence without oath. Regular reports signed by medical men would constitute evidence within the meaning of that section. S. 79, does not authorize Municpal Commissioners to close a burning ground, which has been used for very many years merely because they think that the burning of dead bodies is offensive. It allows them to interfere only when it shall appear to them upon the evidence of competent persons that any burning ghat or burying ground is in such a state as to be dangerous to the health of persons living in the neighbourhood thereof.

Brindabun Chunder Roy v. Municipal Commissioners of Serampore 19 W R 309

Notes:—Dist: 25 Cal 4.5.

9—S. 81—Notice of action-Mistake in notice.

A notice under any of the sections of Bengal Act 111 of 1864 preceding s. 81 may under that section either be served upon the person addressed, or left with some servant of the family. The mistake of a few rupees in a notice caused by an error in addition is not suficient to impeach or affect the demand where the directions of the Municipal Act have been substantially complied with, s. 48 protecting the Commissioners against such mistakes. **Gopee Kishen Gossain v. Ryland. 9 W R, 562.**

10—C. P. C. S 87—Cause of action—Suit for possession against Municipality as wrong-doers.

Plaintiffs as proprietors sued the Howrah Municipal Committee to recover possession of land from which they had been ousted by defendants' stacking stones thereon: and they regarded their cause of action as arising when the Municipal

Bengal Acts-(Municipal Act III of 1864)-*Contd*

Commissioners refused to remove the stones. Defendants' case was that the land had been in possession of Government till Bengal Act III of 1864 was extended to Howrah since which time the Commissioners had held the land. *Held* that the plaintiffs' cause of action could not be considered to have first arisen on the refusal of the Municipality to remove the stones. *Held* (by Bayley, J.) that the Municipal Commissioners had acted properly under the law, and were entitled to the application of s 87, Bengal Act III of 1864. *Held* (by Phear, J.) that s. 87 could only protect defendants if sued for damages consequent on a wrong done by them in the reasonable belief that they were exercising their lawful powers: not if they were sued by parties kept out of possession by their continued wrong doing. **Poorno Chunder Roy v Balfour** **9 W R 535.**

Notes:—Fol: 12 B H C R 250; 1 All 269. Ref: 13 W R 461; 20 Cal 732; 22 Bom 289 F B; 25 Bom 142; 28 All 600.

11—C. P. C. S. 87-Notice of action-Municipal Commissioners.

Municipal Commissioners are entitled to one month's notice of action under s. 87, Bengal Act III of 1864, while they have been acting *bona fide* in the belief that they were exercising powers given to them by that Act; not if their proceedings were not justified by that Act, and only colourably done under cover thereof. **Gopee Kishen Gossain v Ryland** **9 W R 279.**

12—C. P. C. S. 87—Suit against Municipal Commissioners for possession of land.

Previous to the institution of the present suit, one of the shareholders of a piece of land brought a suit against the Chairman of the Municipality for recovery of possession of his share. The other shareholders were made *pro forma* defendants in the suit. This suit was dismissed as barred by the law of limitation. After the dismissal of the suit the Plaintiff brought the present suit for recovery of his share of the land, on the allegation that his tenant had relinquished the land within three months in consequence of his having been dispossessed by the Municipal Commissioners. *Held* that s 87, Bengal Act III of 1864, did not apply. *Semble* —Bengal Act III of 1864, s. 87, relates only to actions brought in respect of acts done by the

Bengal Acts-(Municipal Act III of 1864)-*Concld.*

Commissioners under that Act for the purpose of the Act. **Price v Khilat Chandra Ghose** **5 B L R Ap, 50, 13 W R, 461.**

13—Cause of action, accrual of-Damages for detention of omnibus.

In a suit for the recovery of damages on account of a daily fine imposed by the Municipality of Howrah and the detention of an omnibus, which fine had been set aside by the High Court, and the detention pronounced illegal,—*Held* that, if the plaintiff had any cause of action, it accrued upon the seizure of the omnibus, and not upon the order of the High Court, which allowed the conviction to stand as to one rupee, and that he could not under the circumstances treat the continued detention of the omnibus as a fresh cause of action from day to day, and his suit, not having been brought within three months, was barred by s. 87, Bengal Act VI of 1864 **Hughes v Municipal Commissioners of Howrah** **19 W R 339.**

14—C. P. C. S. 87—Suit to recover possession of land taken by Municipal Commissioners

S. 87 of Bengal Act III of 1864 is applicable only in those cases where the plaintiff claims damages or compensation for some wrongful act committed by the Commissioners or their officers, in the exercise, of their statutory powers. The notice in the earlier part of the section is meant to give the defendant an opportunity of making some pecuniary amends for the wrong without incurring the cost of litigation. **Chunder Sikur Bundopadhya v Obhoy Churn Bagchi** **6 Cal 8.**

Notes—Appl. 4 All 102. Fol: 16 Mad 296; 3 C L J 376. Ref: 16 Mad 317; 474; 3 M L J 223; 22 Bom 289. F B; 25 Bom 142; 28 All 600.

Bengal Municipal Act V of 1876.

Notes—S. 159 rep. in pt., act II of 1901; rep. (in Bengal and Eastern Bengal and locally in Assam), Ben. act: III of 1884.

1—C. P. C. S. 32—Municipal Corporations—Commissioners—Right of way—Compensation—Land Acquisition Act, X of 1870.

S. 32 of Act V of 1876, the Bengal Municipal Act, enacts that "all roads, bridges embankments,

Bengal Acts-(Municipal Act V of 1876)-*Concld.*

tanks, ghats, wharves, jetties, wells, channels, and drains in any municipality (not being private property), and not being maintained by Government or at the public expense, now existing or which shall hereafter be made,and the pavements, stones, and other materials thereof, and all erections, materials, implements, and other things provided therefor, shall vest in, and belong to, the Commissioners." *Held* that the word "roads" in this section does not include the soil beneath the roads. **Chairman of the Naihati Municipality v Kishori Lal Goswami 13 Cal 171.**

Notes—Ref: 20 Cal 732; 25 Mad 635; 33 Cal 1290=10 C W N 1044=4 C L J 343.

Bengal Municipal Act III of 1884.

See Jurisdiction of Civil Court—Municipal Bodies.

—Prosecution under:—

See Magistrate, Jurisdiction of-General Jurisdiction.

—S.2.

See Bengal Municipal Act, 1876, S. 313.

1—Bengal Act III of 1884—S. 2-Notification —Bengal Act V of 1876, s. 234—Order notified.

The word "notification" in s. 2, Bengal Act III of 1884, includes an order made under s. 234 of the old Act *i e* of 1876. **Baikantha Nath Das v Lolit Mohun Sarkar. 20 Cal 699.**

Notes:—Bef: 23 Bom 22.

2—Ss. (11), 15, 103, 105—Voter, qualification of—Payment of income-tax and rates, to qualify if must be by person legally liable-"Owner," meaning of—Property acquired by father with contributions from sons—Son if joint owner.

A person whose income-tax is below the taxable minimum, does not become qualified as a voter within the requirement of S. 15 of the Bengal Municipal Act by submitting to the levy of the tax. Similarly, a person, who is not legally liable to pay the Municipal rates as required by that section does not become qualified as a voter by paying such rates.

General words used in a statute will be interpreted in a qualified sense, when grounds for doing so appear within the statute itself.

Bengal Acts-(Municipal Act III of 1884)-*Contd.*

Per Mukerjee, J.—The term "owner" as defined in cl. 11, S. 6 of Bengal Municipal Act, is not restricted, in the case of an owner not in possession, to one who is in receipt of rent from the occupier of the premises. Such a person is an "owner" within the definition, though the premises are in the occupation of his son. The son as "manager" or "agent" of the father, would also be "owner" within the definition.

The son appearing to have contributed considerable sums towards the acquisition and subsequent improvement of the property, the presumption, moreover, was that he was joint owner with the father.

As the son was also proved to have paid the rates out of his own money :

Held—That he was legally liable to be assessed with those rates as an "occupier," if not as an owner, and was thus properly qualified to vote and to be elected as a commissioner.

Per Teunon, J.—That the son having been proved to have a substantial interest in the property was rightly treated by the Municipality as an owner and as liable to be assessed under S. 103 of the Act. (10 C W N 76=3 C L J 618 (1906), Ref.) **Narendra Nath Sinha v Nagendra Nath Biswas. 15 C W N 586= 13 C L J 471.**

3—Ss. 6 (18), 9 (e) 44. 65, 66, 85 and 114—Reduction in number of Commissioners-Commissioners at a meeting-Rates imposed by improperly constituted body——Provincial Small Cause Courts Act (IX of 1887), Sch II, cl. 35 (J)—Second appeal.

The Local Government superseded the Commissioners of a certain Municipality under S. 65 of the Act, and the Sub-Divisional Officer was given all the powers of the Commissioners. The Local Government at the recommendation of that officer proceeding under S. 9 (e) re-establish the Municipality with a reduced number of Commissioners, who imposed and recovered certain new rates from the appellant. He brought this suit for the recovery of the amount.

Held, that the suit falls under cl. (35) (f) of Sch II to the Provincial Small Cause Courts Act and a second appeal lies.

Bengal Acts-(Municipal Act III of 1884)-*Contd.*

Held, also. that the "Commissioners at a meeting" and not the "Commissioners" had the power under S. 9, cl (e), to recommend the alteration in the number of the Commissioners, and, therefore, the new rates imposed by a body, not duly constituted, were not legally imposed and the appellant was not bound to pay them. **Bepin Behary Sen v Chairman of Santipur Municipality. 1 Ind Cas 388.**

4—Ss. 30, 34—Road, abandonment of—Making new road—Power of Commissioners-Exchange of land for a public purpose.

Municipal Commissioners have power to abandon an old road for a new one.

Ss. 30 and 34 of the Bengal Municipal Act enable them to straighten a crooked road and dispose of the fragments of the old road that fall outside the alignment of the new one.

Under S. 34. the Commissioners have ample power to exchange a piece of land for a public purpose, namely, the acquisition of another piece of land necessary for the improvement of a road.

Khalil Rahaman v Dacca District Board. 11 Ind Cas 28.

5—Ss. 30, 87, 98—Ghat, meaning of:

The word "ghat" ordinarily means a flight of steps made of wood, brick, stone, etc. for access to the water of a tank or a river ; it also means the place on a river bank, (or on a tank), where people ordinarily bathe or where boats are moored for purposes of a ferry or otherwise or which is used for the purpose of loading or unloading goods. The word 'ghat' does not include a tract of land used as a burning ground.

Chairman Howrah Municipality v Khetra Krishna Mitter. 4 C L J 343=33 Cal 1290 =10 C W N 1044.

6—C. P. C.—Ss. 34, 37-Lease taken in favour of Municipality—Execution—Validity.

S. 34 of the Bengal Municipal Act should be read with S. 37 of that Act.

Where, therefore, a Municipality purported to take a lease of lands involving a value exceeding Rs. 500, but the kabuliyat was signed by the Chairman and was merely witnessed by two other Commissioners but not signed by them as

Bengal Acts-(Municipal Act III of 1884)-*Contd.*

contracting parties and further the document was not sealed with the Common Seal of the Commissioners.—*Held*—That the lease was not binding on the Commissioners **The Chairman of the Municipal Commissioners of South Barrackpur v Amulya. (1907) 12 C W N 50=34 Cal 1030.**

7—Chairman's power to lease or sell—Bengal Municipal Act, s. 44—Estoppel.

The Chairman of a Municipality has no power under s. 44 of the Bengal Municipal Act to sell or lease a land belonging to the Municipality. Only the Commissioners at a meeting can do so.

Where the plaintiff was allowed 2 years and 4 months after taking lease, to construct a drain round the house :

Held, that the Municipality was not estopped from questioning the lease. **Jagannath Saha v The Chairman on behalf of the Commissioners of Berhampur Municipality. 9 C L J 286.**

8-Bengal Municipal Act, Ss. 44, 45, 210, 219—Notice or requisition requiring removal or repair of building—Vice-Chairman, power of, to issue such notice—Delegation of powers, if and how proved—Presumption—Evidence Act (1 of 1872) s. 114—Objection, informal, if to be taken notice of and dealt with—Daily fine, if legal.

A petition of objection to a notice purporting to be under s. 210 of the Bengal Municipal Act (III of 1884 B C) though not stamped, and therefore informal, should be taken notice of by the municipality and dealt with according to law.

When an objection is raised that a particular person who does an official act has no power to do it, it is for that person to prove that he has such power. No mere presumption under s. 114 of the Evidence Act, that official acts have been rightly done, can dispose of the objection.

A notice issued by the Vice-Chairman of a Municipality under s 210 of the Act, in the absence of proof of delegation of powers under s. 45 of the Act, is invalid.

The notice in this case being invalid, the conviction under s. 219 of the Bengal Muncipal Act was bad.

Bengal Acts-(Municipal Act III of 1884)-*Contd.*

The law does not allow a daily fine to be imposed in anticipation of an offence being committed. (2 C W N 187 Rel.)

Harendra Nath Mukerji v Chairman Birnagar Municipality. 1 C L J 51.

9.—Ss 46, 112, 113, 114, 351A—Model Rules-Rule 33—Appointment of paid Assessor, whether valid-Question of appointment raised as amendment and lost—Raising of the same question as substantive proposition within six months—Validity of

At a meeting of the Municipal Commissioner of a certain Municipality, the question of appointing a paid Assessor was raised as an amendment which was lost. Within six months from that date, the question was again raised as a substantive proposition which was carried. An Assessor was appointed accordingly who revised the assessment of the plaintiff, which was confirmed by the Appeal Committee under s 114 of the Bengal Municipal Act. The plaintiff brought this suit to have the assessment of his holding declared void as being made by an Assessor appointed in contravention of law:

Held, that the appointment of a paid Assessor had not been "finally disposed of" at the first meeting, within the meaning of Rule 33 of the Model Rules under s 351 A of the Act, that therefore, its reconsideration at the second meeting was permissible: that the validity of the determination of the Appeal Committee could not be impeached, and that the plaintiff's suit must fail. S A No 2499 of 1906 decided on April 1, 1908 Fol.

Chairman of Chittagong Municipality v Jogesh Chandra Rai. 3 Ind Cas 1 = 37 Cal 44.

—Ss 85, 114, 116.

See Jurisdiction of Civil Court—Municipal Bodies **27 Cal 849.**

10.-S. 85-"Circumstances and property within the Municipality." meaning of.

Under S 85 of the Bengal Muncipal Act, both the circumstances and the property of the person must be within the Municipality, according to which he is to be taxed.

Bengal Acts-(Municipal Act III of 1884)-*Contd.*

Therefore, where a person's total income of property situate within and outside a Municipality was taken into consideration in imposing a tax upon him: *Held*, that the assessment was invalid. **Deb Narain Dutt v Chairman of the Barnipur Municipality 12 Ind Cas 32.**

11.—S 85—Arable land—Assessment—Court when can override plain language of state—Proviso, use of.

A parcel of arable land, occupied as such, is a holding and liable to be rated under the Bengal Municipal Act 1884.

In order to justify a Court in over-riding the plain language of a statute by reference to its spirit and general tenor, the argument must be cogent and convincing.

A proviso may be used as a guide in the selection of one or other of two possible constructions of the words to be found in an enactment, where there is doubt as to its scope or as to the proper view to be taken of it (L R 1896 A C 647, Fol). **Mohadeb Aon v Chairman Howrah Municipality. 11 C L J 524.**

12.—Ss 85 (a), 112, and 363—Liability to assessment—Persons occupying the holdings—Limitation—Notice.

Held that, under the Bengal Muncipal Act. s, 85 (a), persons living with a particular individual occupying a holding by reason of some connection with or relation to him, such as sons or servants would not be separately assessable, by reason of possessing separate incomes. *Held*, also, that the right to obtain a declaration that the plaintiffs were not liable to assessment under the Act was a recurring right, and an action to obtain such a declaration would be maintainable even if brought more than three months after the assessment. *Held*, further, that a refund of the money paid under protest can be claimed under these circumstances without giving a notice under s. 363 of the Act respecting the refund claimed as the word "act" used in the section refers to tortious acts. and not to any act arising out of a contractual or quasi-contractual basis. **Ambika Churn Mozumdar v Satish Chunder Sen 2 C W N 689.**

Bengal Acts-(Municipal Act III of 1884)-*Contd.*

13.—Secs 85, 87 (d) 92, 113, 114, and 116—Assessment of a holding—Assessment if ultra vires—Assessment, legality of, if may be questioned in a Civil Court—Civil Court, jurisdiction of—Principle of assessment—" Circumstances and property, " meaning of.—

Section 116 of the Bengal Municipal Act (III of 1884), does not take away the jurisdiction of the Civil Courts in a case in which it is alleged and established that the assessment, the propriety of which is in controversy is open to objection on the ground that it is *ultra vires*; in other words, it is only when the action of the Municipality has been exercised in conformity with the powers conferred upon it by the Act, that the Civil Court has no authority to interfere. The test in such cases is, whether the assessment is or is not in conformity with the statutory provisions.

Errors in assessment which constitute irregularities merely and do not go to the ground work of the tax and render the assessment void, can be corrected only in the manner provided by the statute, which creates the authority, and the remedy so provided must be treated as exclusive. On the other hand where the defects in assessment are jurisdictional, rendering them void, the persons aggrieved thereby are entitled to invoke the ordinary judicial remedies, and all clear violations of law give rise to jurisdictional questions. In other words, while mere erroneous exercise of judgment is not reviewable by the Civil Courts, any excess of jurisdiction makes the act liable to challenge in such Court.

The term "*property*" designated as a subject of taxation without any qualification includes both real and personal property or estate and intangible as well as tangible rights of value.

The word "*circumstances*" was not introduced in section 85 of the Act, to restrict the term "property" the intention of the Legislature seems to have been on the other hand to widen the scope of the section so as to make taxable what might perhaps be not properly comprised under the term "*property*" and at the same time ought not to escape assessment. The property of the defendant which was taxable in the present case, under the law was unquestionably his whole income and the fact that he spent only half of it within the Municipality does not make his circumstances and property within the Municipality worth only that much. **Chairman of Giridith Municipality v Sreesh Chandra Mazumdar. 7 C L J 631=12 C W N 709= 35 Cal 859.**

Bengal Acts-(Municipal Act III of 1884)-*Contd.*

14.—Ss 113, 116—Land-holders—Liability to assessment-Power of Municipal Commissioners, to levy tax-Assessment—The word "liability" in the second portion of s 113 of Bengal Act III of 1884 meant liability a part from the question of occupation, and must be taken to refer to the liability to assessment or rating of a person who is the occupier of a holding. S 116 has no application to a dispute as to whether a person assessed to the tax does or does not occupy a holding and to the same restricted meaning ought to be placed on the word "liability" in this section also. Hence, a suit brought to set aside an assessment on the ground that a person assessed does not occupy a holding is not barred by s 116.

Dwarka Nath Dutt v Addya Sundari Mittra. 21 Cal 319.

15.—Section 116—Jurisdiction——Municipal assessment-Fresh assessment—Civil Court's power to revise and correct valuation.

The Civil Court has no jurisdiction to decide the correctness or otherwise of the amount of assessment made by a Municipality. It can only interfere when the assessment is ultra vires.

Where a Municipality have the power to make a fresh assessment every three years and merely raise the valuation, the Civil Court has no power to revise the valuation but is bound to accept it as conclusive. **Chairman Municipal Board Chapra v Basudeo Narain Singh. 11 C L J 400=37 Cal 137= 14 C W N 437=5 Ind Cas 321.**

16—Bengal Municipal Act Ss. 155, 156—Meaning of word ' Ferry ' in the Act—Authority of Ferry man to demand tolls from passengers in an unlicensed boat.

A ' ferry ' in the Bengal Municipal Act means the exclusive right to carry passengers across the stream from one Bank to the other on payment of certain stated tolls. The object of Section 155 of the Act appears to be to prevent the crossing of passengers from one bank of the

Bengal Acts-(Municipal Act III of 1884)-*Contd.*

river to the opposite bank by a boat plying for hire without a license within the prescribed limits.

A ferry man has under no circumstances authority to demand tolls from persons who are passing merely as passengers in an unlicensed boat. The remedy is provided by Section 156 of the Municipal Act against the person who keeps a ferry boat without license plying within the prescribed limits. **The government of Bengal v Senayat Ali.** **27 Cal 317 =4 C W N 348.**

Notes—Ref: 28 Mad 517=15 M L J 466.

17—Bengal Municipal Act, Sections 202. 233—Encroachment, removal of—Suit,—scope of—

When a Municipality took proceedings for the removal of an alleged encroachment under sec 202 of the Bengal Municipal Act and the plaintiff sued for a permanent injunction to restrain the Municipality and proves that the obstruction has existed for at least 50 years, he is entitled to a decree. His suit cannot be dismissed on the ground that the Municipality might possibly have proceeded under section 233. **Gopal Chandra Das v Chairman of the Santipur Municipality.** **10 C L J 613=2 Ind Cas 512.**

18—Bengal Municipal Act (Act III of 1884) S. 204—Projection—Meaning of " which may have been so erected or placed"—Metropolis management-Amendment Act (1882) S. 75—

S. 204 does not apply to a projection caused by restoring a portion of an old building, which has been pulled down with the object of being rebuilt. The words " which may have been so erected or placed " in S. 204 mean erected or placed for the first time. **Eshan Chander Mitter v Banku Behari Pal. 25 Cal 160= 1 C W N 660.**

Notes:—Fol: 23 Bom 248.

19—Ss. 224, 245, and 246—Acts done in accordance with ss. 245 and 246, whether subject to the jurisdiction of a Civil Court—Notice under s. 246 whether sufficient for the purpose of the removal of huts in a basti as well as a pucca privy.

Where a Municipality, having proceeded in accordance with Ss. 245 and 246 of the Bengal Municipal Act, decide that certain works are necessary, that conclusion in the absence of *mala fides* or fraud or considerations of that nature cannot be questioned in a Civil Court. The action of the Municipality, so far as a privy was concerned, was held not to be *ultra vires*, although in the notice issued in accordance with s. 246 of the Bengal Municipal Act they directed the plaintiff to remove not only certain huts, but also a pucca privy, inasmuch as the Municipality had a right to require him to remove the privy under s. 224 of the Act. **Duke v Rameswar Malla.** **26 Cal 811=3 C W N 508.**

Bengal Municipal Act III of 1884 S. 238

See s. 273 (1).

20—Secs. 243, 244, 267—Hut. erection of without notice to Commissioners, offence—Notice to remove hut, not condition precedent to conviction.

Section 243 of the Bengal Municipal Act forbids the erection of a hut within a Municipality without a month's notice to the Municipal Commissioner. When, therefore, a person was prosecuted under section 267 of the Act for having erected a hut without such notice and it was found that the hut was so erected.

Held, upon the facts found, the accused ought to have been convicted.

Held further, section 267 of the Act provides for two distinct classes of offences, *namely*, (1) erecting a hut without a month's notice to the Commissioners, and (2) failing to remove a hut, erected without such notice, when required to do so, the latter only being an offence of a continuous nature, liable to be punished with a daily fine. Notice of removal of the hut is not a condition precedent to a conviction for the first class of offences mentioned above.

Chairman Howrah Municipality v Golapi Bewa. **10 C L J 16.**

Bengal Acts-(Municipal Act III of 1884)-*Contd.*

21-22—S. 260 A—License to employ cremation priest—Specific performance.

An agreement with the Municipal Corporation that the plaintiff alone would officiate as a priest at the cremation ceremony is not specifically enforceable. S. 260-A of the Bengal Municipal Act does not contemplate that the Commissioners should create a monopoly in favour of any person, even in respect of fuel shops. More than one person can get licenses to keep fuel shops for the sale of the necessary articles at the prescribed rates. The Municipality and the license from them are not entitled by the grant of the license under S. 260-A of the Bengal Municipal Act to compel any person to employ a particular cremation priest, and they have no authority to levy any fee for this purpose.

Gourmoni Debi v Chairman of Panitrati Municipality.
(1907) 12 C L J 74.

——S. 260-A—See Right of suit—Office of emolument, suits relating to. **12 C L J 75=6 Ind Cas 864=14 C W N 1057.**

23—Sec. 261—Fees for certain trade license.

A Municipality is not entitled to any fees for a license under section 261 of the Bengal Municipal Act, where no limits have been fixed by the Commissioner at a meeting, no license has been granted, and no scale of fees approved by the Commissioner of the Division. **Chairman Bansberia Municipality v Karunamoy Ganguli. 10 C L J 22=9 Ind Cas 944.**

—S. 266 A

See Right of suit. **14 C W N 1057.**

24—S. 273—Keeper of hackney carriages—Milkmaid—License, neccessity for—

Where it was found that a person had seven or eight ponies and some cows and sheep and let out one carriage and a pair of ponies on monthly hire and kept the same in her stable, and also kept other ponies for sale and supplied milk of her cows to others—*Held*, that the facts found do not render her liable within s. 273 of the Bengal Municipal Act. **Fairweather v Sures Chunder Dutt.**
(1899) 5 C W N 331.

25—Bengal Municipal Act (III of 1884), Secs. 273 (1), 238—Sanction to build when not given within specified period—Right to build without sanction - Period of Sanction, computation of—

Bengal Acts-(Municipal Act III of 1884)-*Contd.*

Adoption of suggestion of Municipality, if waiver of right.

A person who submitted for the sanction of the Municipal Commissioners' plans and specifications of a building and the Commissioners omitted to pass orders within six weeks cannot be convicted under sec. 273 (1) of the Bengal Municipal Act for commencing to building according to his own plan after such period.

That he made certain alterations after such period at the suggestion of the Municipality does not make him forfeit his right under sec. 238 of the Act to build on his own plan.

The period in such cases is to be computed from the date when complete plans and specifications are submitted in such a form as makes it possible of its being considered by the Municipal Commissioners. **Sewnandan Rai Kayab v The Vice Chiarman of the Darjeeling Municipality 5 C W N 42.**

26.—Ss. 321, 322, proviso—Latrine tax—Fixing of scale—Shop-keeper, liability of, to pay latrine tax—Liability of shop-owner.

If the Commissioners at the meeting did not fix any scale for the levy of latrine fees, as enjoined by S. 321 of the Bengal Muncipal Act, the assessment and levy of the latrine tax must be deemed to be *ultra vires*.

The meaning of the proviso to S. 322 of the Act is, that, when a shop-keeper lives elsewhere, and pays latrine tax for his house, he shall not be made to pay again for his shop, unless the shop contains a privy or cesspool. The owner of a shop, who is not its occupier, cannot claim exemption under the proviso.

From an owner of shops, which, together with the dwelling-house, are all included in one holding, fees are to be levied on the annual value of the holding inclusive of the shops. The wording of S. 321 shows that the fees are to be levied with reference to the annual value of holdings containing dwelling-houses or privies, and not with reference to dwelling-houses only.

Bechu Ram v. Chairman of Chapra Municipality, 9 Ind. Cas. 218=15 C W N 519=12 C L J 674.

26A.—S 339—Obligation of Municipality to grant license—Interpretation of statute—"May," "shall."

There are no words which render it obligatory

Bengal Acts-(Municipal Act III of 1884)-*Contd.*

on a municipality to grant a license under s. 333 of Bengal Act III of 1884. The word "may" in s. 339 of that Act is not to be construed as "shall."

Moran v Chairman of the Motihari Municipality. 17 Cal 329

Notes.—Ap: 20 Cal 654. Con: 21 All 348. Ref: 19 All 313.

27.—Ss 341, 336, 286, 3 Sub s (7)—Fixture—Obstruction on public street.

A verandah adjoining a house the pillars of which are sunk down into the soil between the street and a drain which runs between the street and the front of the house is a fixture within the meaning of s. 413 and an encroachment on the public street. **Corporation of Calcutta v Imadul Huq.** 34 Cal 844.

28.—Ss 350 and 370-Bye law No 64 made under S 350-Ultra vires-Reasonable construction—Interference with private property by municipality—Allowing offensive matter to be thrown into a private drain.

The road or drain referred to in cl 2 of S 270 of the Bengal Municipal Act is a road or drain belonging to the Municipality. If the bye-law No 64 made under S 350 of the Municipal Act authorizes the Municipality to interfere with private property, it is *ultra vires*

Mahesh Chundra Pandey v Basant Kumar Das. 10 C W N 667

29.—S 363—Notice before suit against Municipality—Premature institution of suit—Objection not taken in written statement but in course of argument.

The plaintiff's cause of action against a Municipality accrued on August 30th; he served the required notice under S. 363 of the Bengal Municipal Act on October 28th, and instituted the suit on November 28, on which date the plaint was returned for amendment, and it was again presented on December 1st. The objection that the suit was premature was not taken in the written statement but in the course of argument.

Held, that, if the suit be considered to have been instituted on December 1st, the suit was barred under the second paragraph of S. 363 and if it be considered to have been instituted on November 28th, it was premature by one day under the first paragraph.

Held further that a plea of want or insufficiency of notice may be taken in the course of

Bengal Acts-(Municipal Act III of 1884)-*Contd.*

argument, though not taken in the written statement 5 C L J 148; 34 Cal 257 Dist; 24 Cal 306, 25 All 18 relied on. **Bisambhar Lal v. Chairman of the Municipal Board of Chapra,** 5 Ind Cas 81.

30.—Bengal Municipal Act (III (B. C.) of 1884) Sec. 363—Act (III) B. C. of 1864), Sec. 87—Limitation.

There is no difference between section 87 of act III (B. C.) of 1864 and section 363 of act III (B. C) of 1884. As the former section, so also the latter, is applicable only in those cases where the plaintiff claims damages or compensation for some wrongful act committed by the Commissioners or their officers in the exercise, or the honestly supposed exercise, of the statutory powers. In cases other than these, section 363 has no application. 6 All 8 Fol. **Shudhangshu Bhushan Roy Chowdhury v. Bejoy Kali Roy Chowdhury** 3 C L J 376.

31.—Malicious prosecution, suit for—Reasonable and probable, cause what is Conviction in first Court—Acquittal in appeal—Plaintiff what to prove Malice, inference of, from absence of reasonable and probable cause—Prosecution originally not malicious may become so during pendency—Circumstances of suspicion—Question of absence of reasonable and probable cause is mixed question of fact and law—Limitation—Bengal Municipal Act (III B C of 1881) S. 363.

The fact that the plaintiff has been convicted by competent Court, though he may subsequently have been acquitted on appeal is evidence of the strongest possible character, if unrebutted, against the plea of want of reasonable and probable cause.

But if the conviction at the original trial has been procured by the defendant by false or fraudulent testimony or other unlawful means, and such conviction is subsequently reversed by a higher Court and the plaintiff is acquitted and discharged, the fact of conviction ought not to be treated as conclusive proof of probable cause.

Reasonable and probable cause is an honest belief, based upon a full conviction founded upon reasonable grounds, in the existence of a state of circumstances, which, assuming them to be true, would reasonably lead any ordinarily prudent and cautious man, placed in the posi-

Bengal Acts-(Municipal Act III of 1884)-*Contd.*

tion of the accuser, to the conclusion that the person was probably guilty of the crime imputed.

In a suit for compensation for malicious prosecution before the plaintiff can succeed. he must establish that the prosecution was both without reasonable and probable cause and malicious.

The mere absence of reasonable and probable cause does not justify the conclusion. as a matter of law, that the prosecution was malicious, though it is quite conceivable, that the evidence which is sufficient to prove absence of reasonable and probable cause, may also establish malice.

A prosecution. though in the outset not malicious and commenced under a *bona fide* belief in the guilt of the accused. may nevertheless become malicious in any of the stages through which it has to pass it, the prosecutor, having acquired positive knowledge of the innocence of the accused, perseveres *malo animo* in the prosecution. with the intention of procuring *per nefas* a conviction of the accused.

Circumstances of suspicion cannot be treated as evidence of reasonable and probable cause as a defence to an action of a malicious prosecution.

The question of the absence of reasonable and probable cause or the presence of malice, is a mixed question of fact and law; and whether, from the facts found, absence of reasonable and probable cause or presence of malice can be inferred, is a question of law for determination by the Court alone.

Where the decision of the Court in the Criminal proceedings in favour of the plaintiff was given on January 3. 1905, the notice on the defendant Municipality was served on November 29, 1905, and the suit for malicious prosecution was commenced on January 4, 1906, and it was found that the act of which the plaintiff complains was done in good faith and that there wes reasonable and probable cause for the criminal prosecution : *Held*, that the suit was clearly barred under S. 363 of the Bengal Municipal Act. 10 W R 439 ; 13 W R 276 ; *relied upon* 8 Q B D 167; 51 L J Q B 268. 30 W R 545 , 46 L T 127 : 40 J P 420 ; 10 Q B D 252 ; 74 R R 287; 16 L J Q B 158; 6 Jur 346 ; L R 6 Ex 329 ; 25 L T 337 : 40 L J Ex 201 ; 24 All 363, *relied upon*: 11 B L R 321 ;

Bengal Acts-(Municipal Act III of 1884)-*Concld.*

17 W R 283 ; 11 A C 247 ; 55 L J Q B 457 ; 55 L T 63 ; 50 J P 659. Fol: 10 C W N 253 Ref: 28 Bom 226 ; 5 Bom L R 940, Ref. 7 H and N 56 ; 30 L J Ex 389; 7 Jur (N S) 851; 4 L T 805; 9 W R 808; 18 Q B 378 ; 21 L J Q B 265 ; 16 Jur 886 18 Q B 378, 21 L J Q B 265 : 16 Jur 886 L R; 4 H L 521; 39 L J Ex 177; 23 L T 269; 19 W R 9 Ref.

Shama Bibi v Chairman of Baranagore Municipality. 6 Ind Cas 675. =12 C L J 410.

Bengal Municipal Act Amendment Act 4 of 1894.

—S. 85.

See Jurisdiction of Civil Court—Municipal Bodies **27 Cal 849.**

Act IV of 1894 (Bengal Municipal Amendment).

Notes:—[S. 37 rep. in pt. Ben. Act VI of 1894; S 7 (1) rep. in pt., S. 31 rep. Ben., Act II of 1896, S. 19; S. 1, rep. in pt, ss. 5, 9, 46. 51, 77, 83. 89 rep S 34, Am., Act I of 1903; Declared in Force in the Sonthal parganas, Reg. III of 1872, s, 3. as Amended by Reg. III of 1899, s. 3].

Bengal N W Provinces and Assam Civil Courts Act XII of 1877

See (1) Central Pro Judicial Commissioner.

(2) Sonthal Pergunnahs Settlement Regulations

(3) Valuation of Suit—Appeals

Bengal N W P and Assam Civil Courts Act XII of 1887 ss. 9, 22 (2)

See Transfer of civil case

—S. 13.

See Execution of Decree—Transfer of Decrees for Execution.

See Sale in Execution of Decree—Invalid Sales—Want of Jurisdiction.

Bengal Acts-(N. W. P. and Assam Civil Courts Act)-*Contd.*

Bengal N W Provinces and Assam Civil Courts Act S 18

1.—S. 18—Mesne profits—Antecedent to suit and pendent lite—Jurisdiction of Court-Amount when exceeds Court's pecuniary jurisdiction —Course to follow C P C (Act XIV of 1882), Ss. 211, 212—*Bengal Civil Courts Act* (XII of 1887) S. 18 et seq.

Where plaintiff institutes his suit for possession and mesne profits antecedent to the suit in a Court of limited pecuniary jurisdiction he may be rightly deemed to have limited his claim to the maximum amount for which that Court can entertain a suit. In such a case if the plaintiff subsequently puts forward a claim in excess of the jurisdiction of the Court, he may justly be required to remit the execess, because he has, with his eyes open, brought his suit deliberately in a Court of limited pecuniary jurisdiction. 1 Ind Cas 86; 13 C W N 493; 9 C L J 367; 5 M L T 360. Fol: 7 Ind Cas 385. dissented from.

Bhupendra Kumar v Purna Chandra. 8 Ind Cas 34.

—s. 19

See Valuation of Suit—Suits.

—s. 20.

See Appeal—Decrees. **Case No (420). 19 Cal 275**

—s. 21.

See (1) Appeal—Receivers. **Case No (1041) 17 Cal 680**

(2) Valuation of Suit—Appeals.

(3) Valuation of Suit—Suits,

2—S 21—Jurisdiction—Aggregate value of reliefs claimed exceeding Rs. 5,000—Appeal to High Court.

Where the plaintiff in a suit for sale on foot of a mortgage claimed also a declaration to the effect that certain prior encumbrances on the property had been discharged, and paid Court fees upon both reliefs, the aggregate value of both exceeding Rs.5,000. *Held* that the appeal lay to the High Court, and not to the District Judge. **Pirthi Singh v Maru Singh 8 A L J R 266= 9 Ind Cas 571.**

Bengal Act-(N. W. P. and Assam Civil Courts Act)-*Concld.*

—S. 22

See Subordinate Judge. Jurisdiction of

—s. 23.

See Probate—Jurisdiction in Probate Cases.

— ss. 23 and 24.

See District Judge, Jurisdiction of.

3.—s. 36—Meaning of the word "officer".

The word "officer" in s. 36 of the Bengal, N W. P. and Assam Civil Courts Act includes an officer with judicial powers. **Haladhar Mahato v Kali Prasanna Ghose 2 C W N 127.**

Bengal Partition Act V of 1897.

See Partition Act.

Bengal Pensions Act XXIII of 1887.

See Pensions Act.

Bengal Port Commissioner's Act V of 1870.

See Port Commissioner's Act.

1.—Highway—Dedication—Acquisition under the Bengal Port Commissioners Act and Land Acquisition Act—Public purpose.

A declaration in the notification issued under the joint operation of the Bengal Port Commissioners Act and the Land Acquisition Act cannot by itself. make a road a public road. A public right of way may be created either by Act of the Legislature or by the dedication express or presumed. by the owner of the land of a right of passage over it to the public at large. In order to constitute a valid dedication to the public of a high way by the owner of the soil, there must be an intention to dedicate, there must be an *animus dedicandi*, of which the user by the public is evidence and no more. *Held*, also, that in the particular case, there was no such intention. 11 M & W. 827 ref. **Akshoy Kumar Ghose v Commissioners of the Port of Calcutta. 33 Cal 1243=3 C L J 585.**

Bengal Provincial Public works Act.

Rep. Ben. Act IX of 1880.

Bengal Public Demands Recovery Act VII of 1868.

See Public Demands Recovery Act.

Bengal Regulation-1793-I, s. 9.

See (1) Jurisdiction of Civil Court—Registration of Tenures.

(2) Right of Suit—Registration of Name.

—III of 1793.

See Cases under Limitation—Regulation III of 1793.

—III of 1793 s. 8.

See Jurisdiction of Civil Court—Societies.

—III of 1793 s. 9.

See Bengal Regulation XLVIII of 1793, s. 24.

—III of 1793 s. 14.

See Limitation.

1—Rules for decision in suits regarding Succession, Inheritance, Marriage. Caste, etc.—Law applying to one sect.

According to the true construction of the rules for decision in suits regarding succession, inheritance, marriage, and caste, and all religious usages and institutions provided in Bengal Regulation IV of 1793,—*viz.*, that Mahomedan law with respect to Mahomedans, and Hindu law with regard to Hindus, are to govern such decisions,—the Mahomedan law of each sect ought to prevail as to the litigants of that sect. and not the general or Suni Mahomedan law. **Deedar Hossein. v Zuhooroonnissa. 2 Moore's I A 441.**

Notes:—Expl: Agra F B 38. Ref: 19 W R 8; 1 Cal 186 P C; 20 Cal 116 F B; 12 All 229; 14 All 429 F B; 25 All 236 P C; 30 I A 94; 5 C L J 664.

—III of 1793 s. 15.

See Restitution of Conjugal Rights.

1—s. 25—Landed proprietors.

S. 25 of Regulation IV of 1793 was applicable to landed proprietors. **Roghoobur Dutt v Government. 6 W R Mis, 50.**

Bengal Acts (Regulations of 1793) -*Contd.*

—VIII of 1793.

See Cases under Enhancement of Rent—Liability to Enhancement—Dependent Talukhdars.

—VIII of 1793 ss. 5 and 50.

See (1) Enhancement of Rent-Right to enhance.

(2) Ghatwali Tenure.

(3) Onus of Proof-Enhancement of Rent.

(4) Resumption—Right to resume.

(5) Sale for Arrears of Revenue—Purchasers, Rights and Liabilities of.

—VIII of 1793 s. 41.

See (1) Jurisdiction of Civil Court-Rent and Revenue Suits, N. W. P.

(2) Bengal Chaukidars Act.

1—s. 46—Suit for recovery of Malikana.

A suit for recovery of malikana was barred by limitation if the malikana has not been received for a period of twelve years. *Quere*—Whether, under Regulation VIII of 1793, s 46, a suit for recovery of malikana will lie at all ? **Bhuli Sing v Nehmu Behu. 4 B L R A C 29 = 12 W R 498.**

—IX of 1793, S. 2.—Resumption of rent-free lands;—**See** Revenue Sale Law, S 37.

—X of 1793.

See Act XI of 1858 s. 3.

—XI of 1793 s 33

See Court of Wards.

—XI of 1793.

See (1) Hindu Law—Custom—Inheritance and Succession.

(2) Hindu Law—Inheritance—Impartiable property.

Bengal Acts (Regulations of 1793) -*Contd.*

(3) Mahomedan Law—Custom.

—XV of 1793.

See (1) Mesne profits—Right to, and liability for.

(2) Mortgage—accounts.

1—S. 6—Reg. XVII of 1806, s. 3 Interest, Rate of.

Under s. 6 Regulation XV of 1793, interest claimable under a bond must not exceed the amount of the principal. S. 3 Regulation XVII of 1806, is not inconsistent with the application of Regulation XV of 1793 inasmuch as the Regulation of 1806 refers to *rates* of interest and the Regulation of 1793 to accumulations of interest irrespective of rate. **Bardakant Rai v. Bhagwan Das.** **I All 344.**

2-Interest in excess of principal-Act XXVIII of 1855.

S. 6 Regulation XV of 1793 (prohibiting the Courts from awarding as interest a sum larger than the principal) is not applicable to suit instituted after the passing of Act XXVIII of 1855. Even under Regulation XV of 1793 it was the practice of the Court to allow interest in excess of principal where the interest had accumulated owing to reasons not ascribable in any degree to procrastination on the part of the creditor. **Huromonee Gooptia v. Gobind Coomar Chowdhry 5 W R 51.**

Notes: Ref 9 Cal 825.

3-Interest in excess of principal.

Regulation XV of 1793 (prohibiting award of interest in excess of principal) applies to sums decreed only and not to interest which has accumulated through the neglect of the Judgment debtor to pay. **Shib Chunder Goopto v. Allad Monee Dossia.** **5 W R Mis; 22,**

Notes—Doub: 6 W R 21. Ref: 7 W R 219.

4--Interest in excess of principal.

Where under s. 6, Regulation XV of 1793, interest upon the principal prior to the institution of the suit was adjudged to the plaintiff, limited to a sum equal to the principal, although that regulation was repealed when the suit was brought, yet, looking to the time when his contract was made, the plaintiff was held not entitled to any further interest before suit but interest upon the principal was allowed to him from the date of suit to the date of decree. **Jeebnath Singh v. Kureemun Bibee 7 W R 172.**

Bengal Acts (Regulations of 1793) -*Contd.*

5—Usurious transaction.

To an action for recovery of arrears of rent due to the plaintiff under a sub-lease of a pergunna, the defendant pleaded that the sub-lease was part of a loan transaction for the purpose of securing to the plaintiff an illegal interest upon the loan and was void under Bengal Regulation XV of 1793. *Held* by the Privy Council (confirming the decision of the Courts below) that it was an usurious transaction, and that, the suit should be dismissed. **Wise v. Kishen Koomar Bose.** **4 Moorer's I A 201.**

Notes—Fol 2 B L R P C 69.

6—SS. 8 and 9—Maintenance of suit—Usury.

Regulation XV of 1793, ss. 8 and 9 forbids the maintenace of any suit arising out of an usurious transaction. **Wise v. Jagabandhu Bose 2 B L R P C, 69: 12 Moore's I A 477.**

7—Ss.9 And 10—Rate of interest-Usufructuary mortgagee.

In a suit on a bond executed together with an assignment to the plaintiff of the rent of certain mehals farmed out to other parties, the Judge dismissed the suit under s. 9, Regulation XV of 1793 holding that a deduction of a certain sum from the jumma of the assignment was a device to obtain more interest than the legal rate. *Held* that under the decision of the Privy Council in 8 Moors I A 358 that section of the bond and the assignment are one and the same and where the plaintiff has a claim to be treated as a usufructuary mortgagee under s. 10 of the same law.

Rassmonee Dossee v. Monshar Ally **I Hay, 483.**

8—Interest—Usury.

Interference with the rate of interest in India was a thing of positive law and cannot be extended beyond the Provisions of the Regulation (XV of 1793). S. 9. of the Regulation does not declare that where an attempt has been made to elude the usury laws the contract is itself void nor does it direct the return of the pledge without redemption. The mortgagee may retain his pledge until he has received out of it his debt with interest at 12 per cent. the

Bengal Acts-(Regulations of 1793) -*Contd.*

maximum allowed by s. 10 of the Regulation. **Shah Makhunlal v. Srikrishna Singh. 2 B L R P C 44: 11 W R P C 19; 12 Moore's I A 157.**

Tasaduk Hossain v. Beni Singh 13 C L R 128.

—XIX of 1793-See Onus of proof-Resumption and Assessment.

1.—Revenue sale law-Regulation XIX of 1793 sec 2—Rent free grant before 1765——Decennial Settlement-Rent assessment of—Encumbrance—Revenue sale law, sec 37—Purchaser at Revenue sale—Enhancement of rent.

A grant of land rent free was made by a zemindar to a certain person before the acquisition of the Dewani. Since then the grantee and his heirs had been in possession. The village was assessed within revenue in 1773 and the revenue was not altered in the decennial settlement: *Held*, the grantees were not protected by sec. 2 Reg XIX of 1793 and were not entitled to hold the village as revenue free or rent free. *Held*, further, a purchaser at a sale under Act XI of 1859 of the zemindari could not avoid the incumbrance. Sec 37 does not avoid encumbrances of every kind. Nor can the purchaser enhance the rent, as the land was comprised in a tenure existing from before the time of the permanent settlement. (11 M I A 152 Ref.) **Brindaban Behari Lal v Bhawani Sahai 9 C L J 119= 35 Cal 931.**

2—S. 6-Dependent talukhdar—Expiration of settlement, effect of, on omission to renew lease.

A lessee whose interest is that which is declared by Regulation XIX of 1793, s. 6, is a dependent talukhdar, and does not forfeit his lease by simply omitting to renew temporary settlement on its expiration. **Junmejoy Mullick v Gunga Ram Dutt 21 W R 26.**

—XIX of 1793 S. 10.

See (1) Grant—Power to Grant.
(2) Jurisdicton of Civil Court—Rent and Revenue Suits, N. W. P.
(3) Landlord and tenant—Constitution of Relation—Generally.
(4) Resumption—Right to resume.

—XXVI, of 1793 S. 2.

See (1) Court of Wards.
(2) Majority, Age of.

Bengal Acts-(Regulations of 1793) -*Contd.*

—XXVII. of 1793.

See (1) Munsiff, Jurisdiction of.
(2) Resumption—Right to resume.
(3) Settlement-Construction of Settlement.

1—S. 5-Bazars made since 1793.

S. 5, Relugation XXVII of 1793, had no application to bazars which did not exist in 1793. **Aftabooden Ahmed v Mohinee Mohun Dass 15 W R 48.**

Chunder Nath Roy v Zemadar. 16 W R 268.

Ram Manick Roy v Asgur. 11 W R 112.

2—Contract to collect duties.

There is nothing illegal in a contract under a farming lease from the owner of a *hat* to collect a portion of the proceeds of sale from persons in exposing their goods for sale in the *hat* under temporary sheds or in open places, and such collections are not in the nature of internal duties, but of rent for the use of land. The provisions of Regulation XXVII of 1793 applied only to *hats* and bazars existing at the time. **Bungsho Dhur Biswas v Mudhoo Mohuldar 21 W R 383.**

—XXXVI, of 1793. S. 17.

See Registration—Bengal Regulation XXXVI of 1793.

1—Act XXXVII of 1793, Ss. 6 & 5—Malikana or Dasturat, origin and meaning of:

Malikana and Dasturat were imposts originally payable by the holders of the village to the proprietors of the patent estate from which they had been carved out. On the resumption of the village the Government occupied the same position as that of the original holders of the village and when the Government parted with possession by making a permanent settlement the liability to pay these charges passed to the settement holders. Where, however, the settlement in perpetuity was made with the proprietors of the lands in conformity with s. 6, Reg. XXXVII of 1793, and the Jagir was neither let in farm nor held khas, no malikana allowance was permissible to the proprietor with reference to the provisions of s. 5, Reg. VII of 1822, as the proprietor had not been 'expropriated. **Rameswar Singh v The Secretary of State for India in Council. 5 C L J 349=11 C W N 448.**

Bengal Acts-(Regulations of 1793) -*Concld.*

—XXXVII, of 1793 S. 15.

See Grant—Construction of Grants.

—XLIV. of 1793.

See Ghatwali Tenure.

—ss. 2, 5. of 1793.

See Enhancement of Rent—Liability to Enhancement—Dependent Talukhdars.

—s. 5 of 1793.

See (1) Enhancement of Rent-Right to enhance
(2) Sale for Arrears of Revenue—Purchasers, Rights and Liabilities of.

—XLV. of 1793.

See Limitation Act, 1877, Art 12 (1859, s. 1, cl. 3).

—XLV. s. 12. of 1793.

See Sale in Execution of Decree—Setting aside Sale—Irregularity.

—XLVIII, of 1793 S 14.

1—Quinquennial registers—Attestation of Zillah Judge.

According to Regulation XLVIII of 1793, s. 14, no counterpart quinquennial registers in the native language are considered authentic unless attested by the Zillah Judge. **Gobind Chunder Shaha v Puddo Monee Dassee 17 W R 400**

2—S. 24-Reg IV of 1793, s. 9-Jurisdiction of Collector.

S. 24, *Regulation* XLVIII of 1793, and s *9*, Regulation IV of 1793, directed the Zillah and City Courts to transmit their decrees to the Collector, but did not authorize those Courts to make any orders on the Collector as to how he shall enter the result of such decrees in his books. **Nimdhari Sing v Kachun Sing 4 B L R. Ap,44: 13 W R 162.**

—XIII, of 1795 s. 15.

See Grant—Construction of Grant

—XLI of 1795 s. 10.

See Onus of Proof—Resumption and Assessment

—XI. of 1796.

See Forfeiture of Property.

Bengal Acts-(Regulations of 1797-99)-*Contd.*

—IV of 1797 s. 24. cl (2).

See Limitation *Act* 1877 Art 179 (1859. s. 20) Step in aid of Execution—Miscellaneous Act of Decree Holder.

—XVI of 1797 S 4

See Cases under Appeal to Privy Council—Stay of Execution pending Appeal.

—I of 1798.

See (1) Appeal—Regulations.
case no (1047) 19 W R 122.
(2) Mesne Profits, Right to, and Liability for
(3) Mortgage—Redemption——Right of Redemption.

—Act V of 1799 S. 5

See Landord and Tenant—Constitution of Relation – Generally.

—XXVII of 1799.

1.—s 7—Moveable property.

S 7 of Regulation V of 1799 is only applied to moveable property. **Shib Ram Lall v Raj Coomar Mitter 6 W R 48.**

2.—Property of intestate without heirs-Widow with certificate.

A died leaving a widow and two daughters and property in cash and Government securities. None of his heir being present at the time the Magistrate took possession of the property. *Held*, that it should have been made over to the Civil Court under s 7, Regulation V of 1799, and that Court should treat such property as in its temporary care. *Held*, also, that the widow having obtained a certificate under Act XXVII of 1860 though opposed by one H, who alleged himself to be a cousin of the deceased, and who had appealed from the decision granting the certificate, the property might be delivered to the widow, who held the certificate, on her furnishing proper security for the purpose of indemnifying the appellant H. **Abid Hossein v Reazun 15 W R 302.**

Bengal Acts-(Regulations of 1799)-*Contd.*

3.—Es-cheat—Property taken possession of by District Judge—Period from which title vests in the Secretary of State.

Where property of a person dying intestate is taken charge of by a District Judge acting under s. 7 of Regulation No. V of 1799, such property does not vest in the Secretary of State until the period prescribed by the Regulation has expired. **Ram Narain Dube v The Secretary of State. 29 All 277.**

——VII of 1799.

See Limitation Beng. Reg. VII of 1799.

1.—Decree—Act VIII of 1859, s. 206.

S. 206, Act VIII of 1859, did not apply to decree under Regulation VII of 1799

Gopal Chandra Dey v Pemu Bibi. 1 B L R A C 76: 10 W R 104.

2.—Beng. Regs. VII of 1799 and VIII of 1831—Repeal, Effect of.—

A summary suit for rent under s. 15 Regulation VII of 1799, was pending when Act X of 1859 came into force, and was, therefore, governed by Regulation VIII of 1831, s 4 of which declared that the decision in the summary suit should be final, subject to a regular suit. By s. 1, Act X of 1859, Regulation VII of 1799, ss. 1 to 20, and Regulation VII of 1831 were repealed, except as to proceedings commenced before the date of the Act coming into force. *Held* that the repealing section did not take away the right to bring a regular suit. **Gobind Chunder Mookerjee v Kalla Gajee. B L R Sup Vol 626: 2 Ind Jur N S 119.**

Gobind Chunder Mookerjee v Kala Gazi. 7 W R 185.

3.—S 25—"Under-renter"—Sale on default in payment of rent.

A raiyat holding a jote, for which he pays a particular rent to a Collector, who holds the land under Khas management, was an "under-renter" within the meaning of s. 25, Regulation VII of 1799, and if he made default in the payment of rent, the proper procedure for the Collector was to sale his land at the end of the year.

Rungo Kopohooa v Dehassur Mussulman. 13 W R 302.

Bengal Acts-(Regulations of 1799)-*Concld.*

——X of 1800.

See (1) Hindu Law—Custom—Inheritance and Succession.

(2) Mahomedan Law—Custom.

——II of 1803—s. 18. cl. 3.

1—Good and sufficient cause—Limitation.

The words "other good and sufficient cause" in cl. 3, s. 18, Regulation II, 1803, of the Bengal Code, include insanity, whether there has been or is a commission of lunacy or the like or not; and the word "precluded" in the same clause does not mean precluded during the whole term of twelve years or merely at its commencement, but means in effect precluded during any part of it. In computing the twelve years' period of limitation, there should not be reckoned any time elapsing while the person for the time being entitled to seek redress was not free from disability **Troup v E. I. Company. Dyce Sombre v E. I. Company. 4 W R P C 111: 7 Moore's I A 104.**

——XXXI of 1803.

See (1) Grant-Construction of grants.

(2) Mortgage-Accounts.

——VII of 1803.

See Court of Wards.

——II of 1805.

See Limitation—Bengal Reg II of 1805.

——XII of 1805 s. 34.

See Jaghir.

——XIV of 1806.

1—Bengal Regulation (XIV of 1806) Section 8 foreclosure proceedings-Validity of —Purwanha initialled official signature.

Bengal Acts-(Regulations of 1806)-*Contd.*

In a question arising in respect of the validity of foreclosure proceedings under section 8 of the Bengal Regulation XVII of 1806, in which the purwanah required to issued under that section was initialled by the judge, held that the requirement of the Regulation that the purwanah should be under the seal and official signature of the Judge in the absence of evidence to the contrary ought on the *principle omnia praesumuntur rite esse acta*, to be deemed to be satisfied by the affixing of the seal of the Court and writing of the initials of the Judge.

To hold otherwise would be unduly restricting the language of the Regulation. (II Cal III P. C. distinguished) (16 All 59 doubted). Speaking generally a signature is the writing of a person's name by himself or his authority for the purpose and with the intention of authenticating a document as being that of the person whose name or mark is so written. **Bhagwat Kori v Baldeo Rai** 3 A I. J 857=1906 A W N 309=29 All 145

——XVII of 1806.

See (1) Limitation Act 1877 Art. 135.

(2) Mortgage———Foreclosure—Right of foreclosure.

(3) Mortgage—Redemption——Right of Redemption.

(4) Onus of Proof—Mortgage.

(5) Pre-emption—Right of pe-re-emption.

1—Operation of, in Chupra.

Regulation XVII of 1806 came into operation in the district of Chupra on September 11th, 1806. **Bakshush Hosseln v Fuzeelonissa.** W R 1864, 189

2—Bengal Regulation XVII of 1806—Mortgage by conditional sale—Mortgagee taking possession, according to stipulation, on mortgagor's death, but without foreclosure—Whether a trespasser—Suit for ejectment by heirs of mortgagor—Mortgagee's claim to be redeemed Mahomedan marriage—Ghair kuf wife, right of, to inherit—Custom—Proof—Wajib-ul-arz.

A mortgage-deed, dated 11th May 1871, provided that the mortgagor should pay up at a prescribed time, but that if he died within the fixed period then the transaction should be considered as a "complete sale," of the hypothecated properties to the mortgagee. The mortgagor dying before the prescribed time, the mortgagee without instituting any foreclosure proceedings entered into possession.

Held—That this was a mortgage by way of conditional sale within the provisions of the Bengal Regulation XVII of 1806 and that under that Regulation the mortgagee had no right to enter into possession without instituting foreclosure proceedings. The heirs of the mortgagor were therefore entitled to sue him in ejectment as a mere trespasser. **Sheik Hub Ali v Wazir-un-nissa.** 1 M L T 297.

——XVII of 1806 s. 3.

See Beng. Reg. XV of 1793. 1 All 344.

--XVII of 1806 s. 7.

See (1) Limitation Act 1877, Art 120.

(2) Limitation Act 1877, Art 132.

(3) Mortgage—Foreclosure—Demand and Notice of Foreclosure.

(4) Mortgage--Foreclosure-Right of Foreclosure.

(5) Mortgage—Redemption—Mode of Redemption and Liability to Foreclosure.

(6) Mortgage—Redemption——Right of Redemption.

(7) Transfer of Property Act S. 2

Bengal Acts-(Regulations of 1806)-*Concld.*

—XVII of 1806 s. 8

See (1) Limitation Act, 1877, Art 120.

(2) Limitation Act 1877, Art 132.

(3) Limitation Act, 1877, art 144——Adverse Possession.

(4) Cases under Mortgage—Foreclosure-Demand and Notice of Foreclosure.

(5) Mortgage——Foreclosure——Right of Foreclosure.

(6) Mortgage——Redemption—Mode of Redemption and Liability to Foreclosure.

(7) Transfer of Property Act s. 2

3—Notice of foreclosure—Year of grace.

The year mentioned in s. 8 of Regulation XVII of 1806 is to be reckoned from the date of the service of the notice of foreclosure under that section. **Mahesh Chandra Sen v Tarini 1 B L R F B 15.**

S C Mohesh Chunder Sen v Tarinee. 10 W R F B 27

—XIX of 1810.

—Petition under—

See Res Judicata—Parties—Intervenors.

—XIX of 1810.

See (1) Act XX of 1863 s. 18

(2) Endowment.

—V of 1812

1-Notice of suit for arrears of rent-Decree in former suit.

A suit for arrears of rent at a certain rate decreed in former suit may be maintained without notice under Regulation V of 1812 : the decree itself being held to be sufficient notice.

Ramjeebun Bose v Tripoora Dossee, W R F B 93 ; Marsh 396 :2 Hay 449.

Bengal Acts-(Regulations of 1812)-*Contd.*

—V of (1812)—Ss. 2 and 3.

See (1) Cess.

(2) Enhancement of Rent——Notice of Enhancement—Service of Notice

—V of 1812 s 3

See Bengal Tenaney Act sec 2 cl (4) Case No (12) **10 C W N 527.**

—V of 1812 s. 26

See Appeal—Regulations.
Case no (1048) **12 B L R 366.**

Bengal Regulation V of 1812 S. 26.

1—In S C a review was applied for and rejected, and it was held that a consideration of the rights of private individuals, and not only the interests of the public with reference to the Government revenue or otherwise, was sufficient to bring a case under Regulation V of 1812.

Gooroodoss Roy v Ramrunginee Dossee 20 W R 54.

2—Beng. Reg. V of 1827—Manager of joint undivided estate—Power of Judge—

A Judge had power to order the person appointed under Regulation V of 1812, s. 26, and Regulation V of 1827, to manage an estate, to make over the surplus, after payment of revenue and other outgoings, to the person or persons entitled to receive the same. **Collector of Rungpore. B L R Sup. Vol. 655= 2 Ind Jur. N S 178=7 W R 273.**

3—Collector, Position of—Beng. Reg. V of 1827—Possession by Collector.

A Collector, in taking charge of property which came under attachment by an order of the Civil Court under s. 6, Regulation V of 1812, as modified by s. 3, Regulation V of 1827, was held to have taken and retained charge on behalf of the parties entitled, and, unless and until anything could be shown to have changed the state of things during such attachment, the parties in possession at the time when it commenced must be held to have continued in pos-

Bengal Acts-(Regulations of 1812)-*Contd.*

session throughout the attachment. Purchasers subsequently put into possession by the Civil Court, who took from the Collectorate rents relating to an antecedent period, did not thereby exercise rights of ownership for such period.

Soolochuna Dayee v Durp Narain Bose. 12 W R 95.

4—Beng. Reg. V of 1827, s 3—Attachment—Jurisdiction of Collector.

On an application under Act VIII of 1859, s. 200, the Judge ordered the attachment of certain properties, and thereafter sent a precept to the Collector under Regulation V of 1827, and ordered him to hold the properties in question and two others in attachment and to appoint a person for the due care and management of the same. *Held* that Regulation V of 1827 was not intended to apply to any other cases of attachment of landed property than those provided for in the Regulation mentioned therein, and the order was therefore made without jurisdiction. **Collector of Noakally v Paxwell. 20 W R 78.**

5—Beng. Reg. V of 1827-Power of Collector after order made by Judge.

When a Judge has made an order in the terms of Regulation V of 1812, s. 26, as modified by Regulation V of 1827, he is *functus officio*, and it then lies upon the Collector. as manager and and holder, to take at his own proper risk and upon his own responsibility everything that he finds to be part of the joint estate.

Ram Runginee Dossee v Gooroo Doss Roy. 22 W R 212.

Notes—Ap: 19 Cal 132 F B; 22 W R 328. Fol: 24 W R 339; 4 Cal 629; 22 Cal 425. Dist: 25 Cal 203. Ref· 21 W R 241; 8 Cal 89.

—XVIII of 1812 s. 2.

See Cess.

—XX of 1812 s. 5.

See Limitation Act, 1877. Art 84 (1859 s. 1 cl. 9).

Bengal Acts-(Regulations of 1812)-*Concld.*

1.—Hundis.—

S. 5, Regulation XX of 1812 (concerning the registration of " bonds, promissory notes, and generally of obligations for the payment of money "), was not applicable to hundis or other similar negotiable mercantile securities.

Boistub Churn Doss v Prem Chund Mitter 4 W R 98.

—I of 1814.

See Evidence—Civil Cases-Reports of Ameen and other Officers.

—XIX of 1814.

See (1) Jurisdiction of Civil Court—Revenue Courts—Partition.

(2) Partition.

(3) Sale for Arrears of Revenue--Setting aside Sale—Irregularity.

(4) Sale for Arrears of Revenue—Setting aside Sale—Other Grounds.

—XIX of 1814, S. 9.

See Enhancement of Rent—Liability to Enhancement—Lands occupied by Buildings and Gardens.

Bengal Regulation XX of 1814, S. 10.

1—Dak cess—Liability of tenant for—**Tenant** liable under contract to pay dak cess under system then prevailing—System subsequently changed—Liability of tenant.—

Where under the terms of the contract of tenancy a tenant was bound to pay dak cess under the system of zemindari dak as it prevailed at the time of the contract. *Held*,—that he was liable to pay the cess even when the system was changed. **Jillar Rahman v. Bijoychand Mahtap, 28 Cal 293.**

—XXVII of 1814.

See Pleader—Remuneration.

—XXVII of 1814, Ss. 13 and 21.

See Pleader—Appointment and Appearance.

—XXIX of 1814.

See (1) Ghatwali Tenure.

Bengal Acts-(Regulations of 1814)-*Concld.*

(2) Land Acquisition Act. 1870 s 39.

—IX of 1816.

See (1) Bengal Act VII of 1868, s. 1.

(2) Sale for Arrears of Revenue-Incumbrances—Act XI of 1859.

—XI of 1816.

See Hindu Law—Inheritance — Impartible Property.

—XII of 1817, S. 16.

See (1) Evidence Act, s. 35.

(2) Evidence Act, s. 74.

—XX of 1817.

See Confession—Confessions to Police Officers.

—XX of 1817, S. 21.

See Penal Code, s. 188.

Bengal Regulation XX of 1817.

See Chowkidari Register, entry in.

1.—Village chowkidar, Liability to pay wages of—Land-owner.

A liability on the part of a landlord to pay the wages of a village chowkidar appointed under s. 21, Regulation XX of 1817, cannot be inferred from the fact that the chowkidar's salary was fixed by the heads of the village, and apportioned among the several house-holders without objection made by any of them, but must be proved in order to sustain a suit brought by the chowkidar against the land-holder. **Golamee v Paslan 18 W R 298.**

—III of 1818.

See (1) Act of State.

(2) Habeas Corpus.

1.—Validity of—Act XXXIV of 1850 and Act III of 1858—Arrest of native subject-Power of Indian Legislature—13 Geo. III, c. 63, s. 36—

Bengal Acts-(Regulations of 1818)-*Contd.*

37 Geo. III, c 142, s. 8—21 Geo. III. c. 70—3 & IV. Will. c. 85, s. 43.

Regulation III of 1818 was applicable only to natives and those subject to the jurisdiction of the Provincial Courts. It was passed under 37 Geo. III, c. 142, s. 28, not 13 Geo. III, c. 63, s. 36. It was passed by a legislative authority having full power in that behalf. Considering the circumstances under which it was enacted, Act III of 1858, which extended the effect of that Regulation to Calcutta, was not *ultra vires.* **Ameer Khan 6 B L R 392.**

Notes.—Ap: 18 Bom 636. Ref: 13 Bom 600; 6 Bom L R 131.

2.—Act XXXIV of 1850—Act III of 1858.

Assuming the power of a Judge of the High Court to issue a writ of *habeas corpus*, and assuming the right of appeal against an order refusing such writ.—*Held* that, it appearing that the prisoner was in custody under a warrant in the from prescried by Reg. III of 1818, the detention was legal. The detention to be legal, need only be covered by an actually existing warrant of the Governor General in Council in the form prescribed, without regard to the lawfulness of the arrest. The Regulation is not confined to prisoners of war or foreigners held in confinement for political reasons. The substance of Regulation III of 1818 was expressly re-enacted by Act XXXIV of 1850 and Act III of 1858, and therefore, as the result of these later Acts alone, the detention would be legal. Those Acts are not contrary to the power conferred on the Indian Legislature by 3 & 4 Will. IV, c. 85. s. 43. **Ameer Khan. 6 B L R 459: 17 W R Cr. 15.**

Notes.— Disap: 17 W R Cr 15. Ref: 29 Cal 286.

3.—Warrant of arrest and commitment under —Effect of.

The Governor General, in issuing a warrant of commitment under Regulation III of 1818, does not in any way act judicially or as a Court of Justice, nor is he to be considered as having adjudicated that the person placed under personal restraint had been guilty of some specific offence. The proceeding is not in the nature of a conviction of the person so placed under the restraint; therefore the person so placed under

Bengal Acts (Regulations of 1818)-*Concld.*

restraint cannot, in any future proceedings taken against him, plead that he has been already tried convicted, and punished. **Queen v Ameer Khan. 9 B L R 36.**

--II of 1819.

See Settlement—Right to Settlement.

—II of 1819 s. 28.

See Sanad

—II of 1819 s. 30.

See (1) Landlord and Tenant—Constitution of Relation—Generally.

(2) Parties—Parties to Suits—Government **8 B L R 524.**

(3) Resumption—Procedure.

—VI of 1819, s. 13, cl. (2).

Jurisdiction of Civil Court—Ferries.

Bengal Regulation VIII of 1819.

See Cases under:—

(1) Transfer of Property Act, s. 111

(2) Bengal Tenancy Act ss. 29, 69, 70, 101 to 105.

(3) Land Acquisition Act ss. 6, 9, 11, 18 & 46.

(4) Sale for arrears of rent.

(5) Limitation Act art 144.

—VIII of 1819, s. 3, cl. 3.

See Bengal Tenancy Act sec. 3, Case No. (22) **1 M L T 8.**

1.—Transfer of tenure.

A transfer of his tenure by a patnidar is not binding on the zamindar, unless made strictly in accordance with the provisions of Regulation VIII of 1819. **Watson v Collector of Rajshahye. 3 B L R. P C. 48: 13 Moore's I A. 160.**

Notes.—See 13 M I A 160.

Bengal Acts-(Regulations of 1819)-*Contd.*

2.—Application of Beng. Reg. XLIV of 1793.

Regulation VIII of 1819 was intended to apply to leases which might have been avoided by the grantor or his heirs during the time that Regulation XLIV of 1793 was in force: but which so far from having been avoided, had been acted upon by the parties after the expiration of ten years, and were treated and considered as in existence at the time when Regulation VIII of 1819 was passed. **Sheo Pershad Singh v Kally Dass Singh. 5 Cal 543.**

Notes.—Affirm: 8 Cal 664 P C.

3.—Suit for Rent—Patni tenure, Transfer of, by sale—Bengal Tenancy Act (VIII of 1885), s. 195 (*e*).

Regulation VIII of 1819 is not affected by the Bengal Tenancy Act of 1885; the Regulation being specially saved from its operation by s.195 (*e*) of that Act. **Gyanada Kantho Roy Bahadur v Brom Moyi Dassi. 17 Cal 162.**

Notes.—Rel: 10 C L J 453.

—VIII of 1819 s. 2 cl. 4.

4.—Bengal Tenancy Act (VIII of 1895), Secs. 2, cl. (4), 74, 179—Act X of 1859, Sec. 10—Reg. V of 1812, Sec. 3.

Where a permanent tenancy was created by a lease dated 1860, *i. e.*, before the passing of the Bengal Tenancy Act, the provisions of section 179 of the Act would not apply to the case, and the landlord could not recover any *abwab* from the tenant.

Sec. 10 of Act X of 1859 or Sec. 3 of Reg. V of 1812 corresponding to Sec. 74 of the Bengal Tenancy Act made all impositions, upon all classes of tenants, including a permanent tenure-holder, in excess of the specified rent, illegal.

An agreement by a permanent tenant to give a certain number of cocoanuts to the landlord as *bhet* and to perform certain services (*begar*) without any remuneration, in addition to the rent, was illegal under the law as prevailed before the passing of the Bengal Tenancy Act.

Under Sec. 2, cl. (4) of the Bengal Tenancy Act, the landlord cannot now recover the *abwab* which he could not recover under the old law.

Aparna Charan Ghose v Karam Ali. (4) C L J 527=10 C W N 527.

Bengal Acts-(Regulations of 1819)-*Contd.*

—VIII of 1819 S. 3 cl.3

5.—S. 3. cl. 3—Act VIII of 1885 (Bengal), S. 3—Rent, meaning of lease, construction of.

Where by a *putni* lease, the annual *Jama* (rent) was fixed at Rs. 6,000 and, besides the said rent, the putnidar (lessee) undertook to deposit into the Collectorate the Government Revenue of Rs. 40,156-4-9½ fixed for the share of estate granted in *putni* and payable by the lessor, *kist* by *kist*, failing which, the *putni* lease was to be cancelled and would become null and void and the landlord was to take *khas* possession.

Held, that the payment of the *patnidar* of the Government Revenue, though no doubt was a part of the consideration to be tendered by the lessee for the enjoyment of the tenure it was not money payable to the landlord and as such was not rent within the meaning of S. 3 of the Bengal Tenancy Act and could not be recoverable as rent under the special provisions of the putni Regulation. **Maharaja Bahadur Sir Jotindra Mohan Tagore v Bibi Jarao Kumari 3 C L J 7=10 C W N 201=1 M L T 8= 33 Cal 140 (P C).**

6.—Ss. 3, 171-'Decree for rent'——Under-tenure-holder.

An under-tenure-holder is entitled to pay off a decree which is mainly one for rent and save the property from sale. **Jnanada Sundari Chowdhrani v Atul Chandra Chakravarti. 32 Cal 972.**

—VIII of 1819, ss 3 and 6.

See Patni Tenure.

—VIII of 1819, s. 5.

See Bengal Tenancy Act s. 15.
Case No. (81) **19 Cal 504.**

7.—Ss. 5, 6—Transfer of a putni—Deposit by unregistered transferee.

The Zamindar is not bound to accept payment of rent from an unregistered transferee of a putni, nor is he bound to recognise any deposit of rent made by such a transferee in his own name. The payment by the transferee to prevent an impending sale for which the zemindar had applied in spite of the tender and deposit of rent cannot therefore be recovered back by suit. (1870) 14 W R 489. (1889) 17 Cal. 162, (1873 20 W R 380 (P. C.) relied upon. (1875) 24 W R 63 dis. **Saielbesh Chandra Sarkar v Kumar Bonowari Mukunda Deb. (1909) 10 C L J 453.**

Bengal Acts-(Regulations of 1819)-*Contd.*

—Act VIII of 1819, s. 6.

See Appeal—Regulations. Case No (1050) **1 Cal 383: 5 C L R 138.**

8—Putni, purchase of, share of, without the consent of zemindar, effect of—Putni Regulation (VIII of 1819), s. 6—Co-sharer landlords collecting share of rent separately, if constitutes separate tenancy—Sale in execution of decree for share of rent, effect of.

A purchaser of a share of a *putni* acquires a valid title in the property although his purchase was not recognised by the zemindar. He is not exempted from liability for rent jointly with the transferor if the landlord chooses to recognise him as one of the joint-holders of the *putni*. Section 6 of the Putni Regulation only prevents any splitting of the tenure and apportionment of the rent without the sanction of the landlord.

One of the co-sharers in the zemindari who had a 5 annas interest brought a suit for his share of the rent against the registered putnidar and obtained a decree, in execution of which he sold a 5 annas interest in the *putni*:

Held—That the effect of the sale was precisely the same as that of a sale under a money decree; that is, the right, title and interest of the judgment-debtor at the time of attachment passed.

No separate tenancy is constituted under a co-sharer landlord merely by his collecting his share of the rent separately from the tenant. 26 Cal 103, Fol. 11 W R 294 Dist. 20 W R 275 Dist. **Aosub Ali Pramanik v Bisseshuri alias Harani Dasaya Chowdhurani. 8 C L J 554.**

9—S. 6—Landlord and Tenant—Transfer of putni—Suit against recorded tenant for improvement—Purchaser's liability to payment.

A transfer of a putni by the putnidars is perfectly valid in law and the refusal of the landlord to recognise the transferee is entirely indefensible especially when no security is demanded by the landlord under S. 6 of the Regulation VIII of 1819

Bengal Acts-(Regulations of 1819)-*Contd.*

and no default is made by the purchaser, but on the contrary when the purchaser makes repeated tenders of the rent, instalment by instalment, and endeavours to secure recognition when a landlord without any justification refused to treat the purchaser as his tenant and deliberately omitted to implead him as a party in the suit for rent the whole of which had accrued due after the transfer and was payable by the transferor, it is not open to the landlord to treat the purchaser as a tenant and make him liable for the rent that accrued due between the date of the institution of the previous suit and the sale in execution of the decree made thereunder. (1906) 5 C L J 95 (105),(1906-7) 5 C L J 148 (169).(1907) 6 C L J 601 (607); 1909 13 C W N 1197 ref to. **Gobinda Sunder Sinha Chowdhury v Srikrishna Chakravarti. (1909) 10 C L J 538.**

10—Ss. 7, 8—Notice.

Where in a notice under Ss. 7 and 8 the year of grace was set down as running from the date of the notice itself, and not from the date of its service.

Held that the defect in the notice was fatal. (46 P R 1904, 3 Cal 397 Fol, 99 P R 1895 Ref.)

Thakur Das v Muhammad Bakhsh 74 P L R 1906.

—VIII of 1819 s. 8.

See (1) Appellate Court—Objections taken for first time on Appeal. Case No (461). **20 Cal 86.**

(2) Cases under Sale for Arrears of Rent —Setting aside Sale—Irregularity.

—VIII of 1819 s. 8.

See S. 3 Bengal Regulation. Case No (5). **10 C W N 201=33 Cal 140.**

11—Bengal Regulation (VIII of 1819), preamable, and Sec 8-Grant of Putni of certain mahal as well as of lease of certain jote-lands within them, at a fixed indivisible rent—Lease.

Where certain shares in certain mahals were granted in a permanent lease along with certain jote-lands situated in those mahals, by one instrument, which described it as a putni settlement at a rent-fixed in a lump, and where, in such a case, there was no appropriation of the rent of the jote-jamas as distinguished from that of the putni taluks.

Bengal Acts-(Regulations of 1819)-*Contd.*

Held. that the settlement created under this lease cannot be regarded as a valid putni tenure within the meaning of Regulation VIII of 1819, although the parties may have originally agreed that the Putni Regulation will apply.

Hayes v Bidyanund Thakur. (3) C L J 373 =33 Cal 381.

12—Regulation-(VIII of 1819), section 9-Purchase by one of the defaulters, effect of-Contribution, suit for Limitation-Limitation-Act (XV of 1877) Sch II, Arts. 61 and 99.

When at a sale under Regulation VIII of 1819, a Putni is purchased by one of the defaulters, there is nothing in the Regulation to make the sale absolutely void, though it is voidable. Payment of any rent for the putni by the purchaser, until the sale is set aside, is made on his own account.

For a suit for contribution for such payment, against the former co owners of the putni, the cause of action does not arise and limitation does not begin to run until the sale is set aside.

Matangini Debya v Prasannamoyi Debya 3 C L J 93.

13—s. 9—Right of suit to recover deficiency for which defaulting purchaser is made answerable.

A suit to recover the deficiency for which the defaulting purcahser is made answerable under s. 9 of Reg. VIII of 1819 is maintainable in a Civil Court. **Raghu Ram Hazra v Mohesh Chandra Bandopadhya (1902). 7 C W N 111.**

14—Settlement Regulation VII of 1822, s. 9—Duties of Collectors and Settlement Officer—Entries in khewats and khataunis—Evidence Act, S. 35—U P Land Revenue Act, S. 91.

The language of Regulation No VII of 1822 regarding the particulars which a Settlement Officer has to enter in the record proposed by him. is extremely wide. The information which he had to collect was intended to be utilised in the Courts of Justice in determining the rights of litigants before them. The Settlement Officer was directed to ascertain "the real nature and extent of the interests, more especially where several persons may hold interests in the same subject matter of different kinds of degrees." This would include the

Bengal Acts-(Regulations of 1819)-*Contd.*

case of mortgagors and mortgagees whose interests in property are of different kinds of degrees, and entries in kheats and khataunis would be admissible under S. 35, Indian Evidence Act, to prove the existence of a disputed mortgage. An entry contained in a *wajib-ul arz* prepared under the provisions of Act XIX of 1793 is *prima facie* evidence of its accuracy. **Robert Skinner v Chendan Singh. (1908) 6 A L J 197 = 31 All 247.**

15—s. 13—"Profits"—Adjustment of accounts between defaulting tenure-holder and person who has held possession as mortgagee under Reg VIII of 1819, s. 13.

The word "profits" in the 4th clause of s. 13 of Regulation VIII of 1819 means that which is left to the tenure-holder after payment of the rent of the tenure. A person who enters into possession of a tenure as mortgagee under the provisions of that section is bound in the first place to pay the rent due to the landlord out of the collections before applying the same to the liquidation of his own debt, and the defaulter is not to be liable for the rent of the tenure during the period of the possession by the person so holding it as mortgagee. **Lala Bharub Chandra Karpur v Lalit Mohun Singh. 12 Cal 185.**

See—Set-off—General Cases. **2 C L R 414**

16—Ss. 13 and 14, Cl. 4—Under-tenure-holder making deposit—Suit for possession, if necessary—Lien when extinguished—Statutory lien—Statement by putnidar, who has no interest, if binds transferee.

Per Stephen, J.—A special suit to declare the lien, created by S. 13, Cl 4 of the Putni Regulation, terminated by satisfaction of the debt is unnecessary, when the plea of suit is set up as a reply to a claim for rent and the defendant uses it only as a basis for resisting that claim.

The creation of a *gribi* estate is a formal act both according to the language of Reg. VIII of 1819, s. 14, and according to universal practice and cannot be inferred from the conduct of parties.

Per Mookerjee, J.—The under-tenure-holder who makes the deposit under s. 13, Cl 4 of Putni Regulation is entitled to remain in possession only so long as the full amount advanced, with

Bengal Acts-(Regulations of 1819)-*Contd.*

interest, is not realized from the usufruct of the tenure. If, after his debt has been satisfied, he does continue in occupation, he does so at his peril and renders himself liable to account for the profits received in excess. His position is analogous to that of a mortgagee in possession who stays on the premises after his dues have been satisfied.

The lien is extinguished by satisfaction of the debt from the profits of the tenure. No order of the Collector is necessary in this behalf, nor his recourse to a regular suit essential to alter the legal position of the parties The moment the lien is extinguished, the defaulter becomes entitled to recover possession.

S. 13, Cl. 4 of the Putni Regulation makes it a condition precedent to the creation of the lien that the amount lodged should be advanced from private funds and should be paid by the tenure-holder after he had already paid the whole of the rent due from himself.

The lien in question is (a) creation of the Statute, and statutory liens cannot be created by consent; the provision of the law must be strictly complied with before reliance can be placed upon the lien.

A mere treatment of the under-tenure-holder by the landlord as a usufructuary encumbrancer is not sufficient to create the statutory lien.

A statement in the plaint unchallanged and made by the Putnidar after his interest has been transferred is in no way binding upon the transferee (1 C L J 13 = 33 Cal 357 Ref).

Jokhomull Mehara v Saroda Prosad Dey 7 C L J 604.

17—S. 14—All co-sharers if must sue jointly—Parties—Right of minor co owner to sue separately.

One of several co-owners of a putni taluq can alone institute a suit to set aside a putni sale as contemplated by S 14, of Reg VIII of 1819, provided the purchaser is made a party and the whole sale is sought to be set aside. 12 C L R 370 ref to. **Radhika Mohan Ghose v Brojendra Kumar Saha. (1909) 14 C W N 128.**

—VIII of 1819 s. 14.

See Voluntary Payment. **26 Cal 826.**

Bengal Acts-(Regulations of 1819)-*Contd.*

—VIII of 1819 s. 15 cl. (1).

See Registration Act 1877, s. 17.

18—S 65-Applicability to patni taluqs-Patni Regulation VIII of 1819, S. 17—Conflict with.

There is no conflict between Sec. 65 of the Bengal Tenancy Act and sec 17 (3)of the Patni Regulation. **Peary Mohan Mukhopodhya v. Sreeram Chandra Bose. 6 C W N 794.**

Notes.—Ref 32 Cal 643=9 W N 670.

19—S. 17. Cl. (3)—Arrears of rent of a Patni.

By Cl. 3, s. 17 of Regulation VIII of 1819, arrears of rent for a patni being considered personal debts, a person who was no party to an original decree for arrears of rent on account of a patni cannot be held liable for them. **Inder Chunder Banerji v Eshan Chunder Roy. I Hay, 474.**

20—Reg VIII of 1819 S 17 Cl, 3-Arrears of rent—Antecedent balances due for years before the year preceding-Bengal Tenancy Act S. 65.

Where the arrears of rent claimed are for balance due for periods prior to the current year for which the arrears are due when the sale is held in the middle of the year or prior to the year preceding, if the sale be held at the commencement of the following year the balances must be treated as personal debts recoverable, under the ordinary procedure for recovery of debts and not recoverable under the provisions of the Tenancy Law and that in such a case, the provisions of the Bengal Tenancy Act would not have any application and consequently the balances due do not constitute a first charge on any surplus proceeds of a Revenue sale and do not take priority over a mortgage claim. 6 C W N 794 doubted and dist.—**Jagannath v. Mohiuddin Mirza**

(1910) 37 Cal 747.

—VIII of 1819 s 18 cl (4).

See Limitation-Beng Reg V. I of 1799.

21—S. 18—Attachment-Attachment for arrears of rent—Wrongful attachment—Liability to account for receipts and disbursements under.

Bengal Acts-(Regulations of 1819)-*Contd.*

Under Regulation VIII of 1819, a sezawal cannot be deputed and lands attached under its provisions unless the arrears of rent claimed shall have been actually due for an entire month before the date of attachment whenever a person is proved to have exercised the power of attachment alluded to above illegally, he is bound to give true and full account of all receipts (unauthorized cesses not excepted) and disbursements made by his agents during his attachment and only such disbursements as are shown to be necessary and *bona fide*, can be allowed.

Gobind Chunder Burmono v. Allabux. 2 Hay, 347.

22—Protected interest—Incumbrance:—

A putni Kabuliyat contained the following clause: "If I should let out this mehal in durputni to any person, such durputnidar shall act according to the terms of my kabuliyat." *Held* that even assuming that the putni pattah contained the counterpart of the clause the words did not amount to an express or implied permission to create a subtenure, and the knowledge of the proprietor of the creation of the subtenure and the acceptance by him of the rent of the putni taluq through the sub-tenure created a protected interest within the meaning of S 160 of the Bengal Tenancy Act. **Mahammad Khan v. Nattar Chundra Pal Chowdry. 9 C W N 803 =32 Cal 911.**

23—Putni Regulation VIII of 1819—Sale, effect of, on rights of trespassers:—

A person who has held possession of property adversely against a putnidar cannot successfully set up such adverse possession against a person who has purchased the property at a sale under Regulation VII of 1819 as against such a purchaser. The adverse possession commences from the date when the sale becomes final and conclusive. 10 W R 15; 19 Cal 787; 25 Cal 167 ref to.

Harekchand Babu v Bejoy Chand Mahatap. (1902) 9 C W N 795 at 800

24—Record of rights—Decision of Revenue Officer, uncontested proceeding—Effect of Decree—Presumption of accuracy.

The proceedings referred to in S. 107 of the Bengal Tenancy Act mean contested proceedings in which there is an adjudication on disputed

Bengal Acts (Regulations of 1819)-*Contd.*

points. The decision of a Revenue officer in an uncontested proceeding has not the effect of a decree under that section and the entry in the Record-of-rights pursuant to such decision cannot override the effect of a contested Civil Court decree between the same parties. The effect of such a decision and entry would be that, under S. 109 of the Act, there would be a presumption in favour of their accuracy until the contrary was proved. The effect of S. 109 of the Bengal Tenancy Act which lays down a rule of evidence is not to override the rule of *Res judicata.*

Rajah Pudmanunda Singh v Ghaneshyam Misser 9 C W N 610=32 Cal 336=1 C L J 134.

25—Purchase of an occupancy holding by a co-sharer-landlord-Termination of occupancy right.

Held by the Full Bench (Rampini. J; dissenting).—The result of a purchase by a co-sharer-landlord of the occupancy holding of a tenant is not the extinction of the tenancy right altogether but only of his occupancy right in the holding. (24 Cal. 143 Appr:) **Ram Mohan Pal v Shaikh Kachu. I C L J 1=9 C W N 249=32 Cal 386 F B.**

26—Insurable interest in goods sold - Sale of ascertained and unascertained goods—Passing of property in the goods sold-Contract *Act*, S.78.

The plaintiff sued to recover money alleged to be due under policies of insurance granted to her by the defendant-company in respect of certain cases of kerosine oil, which, after landing and while in the petroleum depot, were destroyed by fire. The suit related to two shipments, *viz*: by the steamers "Haddon Hall" and "Crewe Hall." The question for decision was purely one of law, whether, at the time when the fire took place, the ownership in the oil had passed to the plaintiff and whether, the plaintiff had an insurable interest in the oil sold her. *Held*, that so far as the cases ex "Hoddon Hall" were concerned, the property in the oil had passed to the plaintiff at the time of the fire. Risk and property generally go together. In this case the buyer was to take all risks of exchange, the goods were to be insured at her expense and the price of goods was to be paid by her even if the insurance money were not recovered. Apart from this S. 78 of the Court Act is conclusive on the point. Here both the payment and delivery

Bengal Acts (Regulations of 1819)-*Contd.*

were postponed. The goods were ascertained. Consequently, the property in the goods passed to the plaintiff as soon as the proposal for sale was accepted and she had an insurable interest in the goods sold her. The interest was covered by her policy and she was entitled to recover the amount assured. *Held*, that, so far as the shipment by "Crewe Hall" was concerned, there was no ascertainment or appropriation of any lot of cases to any particular buyer. It was clear from the terms of the contract that the buyers were to take delivery of the whole cargo from the ship's side or tackles at their own expense. But, owing to change of rules of the Port Commissioners, until the actual delivery to any particular buyer, all the cases remained together in bulk in the godown, in which they were landed. Until delivery was actually made under a delivery order there was no ascertainment or appropriation of any given lot of cases to any particular buyer. until the fire took place there was no ascertainment and actual delivery of goods to the plaintiff. Consequently, the property in the oil *per*..."Crewe Hall" did not pass to the plaintiff at the time of the fire and she had no insurable interest in it.

Per Maclean, C J.—If in a contract there are certain terms from which, when they exist, the Legislature says that certain consequences shall ensue, these consequences must ensue.

Brij Coomaree v Salamander Fire Insurance Company. 32 Cal 816.

27—Liability of auction-purchaser to pay interest at the rate stipulated in the kabuliyat of predecessor.

A jama was created by a kabuliyat dated 11th Joista 1287 (1880); in which it was stipulated that interest would be payable on arrears at the rate of 1 anna per rupee per mensem. It was sold for its own arrears in 1859. *Held* that the lease being a subsisting one, the purchasers (in this case some of the landlord decree-holders) bought the jama subject to the terms of the lease, one of which related to interest. **Lal Gopal Dutt Chowdhry v Monmotha Lal Dutt Chowdhry 9 C W N 175=32 Cal 257.**

Notes—Ref: 11 C W N 215.

28—Landlord and tenant—Certain portion of rent payable by lessee to lessor's superior land.

Bengal Acts-(Regulations of 1819)-*Contd.*

lord—Non-payment of such amount—Suit by lessor for recovery of same—Suit not for rent but one for damages.

Where a lessee covenanted with his lessor to pay annually a certain portion of the amount due as rent, to the superior landlord of the lessor direct and, in default of such payment, authorised the lessor to realise the same with interest and costs by bringing a suit for *arrears of rent*, a suit brought by the lessor against the lessee for realization of the amount payable, but not paid, to the superior landlord is, for purposes of limitation, a suit not for rent but for damages for breach of covenant. 11 Cal 221 Fol, 27 Cal 67, Distd.

Hemendra Nath Mukerjee v Kumar Nath Roy **32 Cal 169.**

29—Every settlement of rent or decision of a dispute by a Revenue Officer:—

The words 'every settlement of rent or decision of a dispute by a Revenue Officer' can only apply to those cases which the Revenue Officer has jurisdiction to try and therefore such decision does not operate as a decree of a Civil Court.

Radha Kishore Manikya v Durganath Bhutta Charjee, **32 Cal 162.**

30—Sale proceeds attachment and withdrawal of—Suit for recovery of same—Where a putni taluk which belonged to one R was sold by him to the plaintiff and subsequently it was sold under Reg VIII of 1895. and the Defendant in execution of a decree against R, attached the surplus sale-proceeds on the 18th of January 1896 and withdrew the same on the 17th February 1896.

Held—That Plaintiff's suit which was instituted on the 6th May 1898 for recovery of the money upon the ground that the Plaintiff was the rightful owner was not barred by limitation and that Art 29 of Sch II of the Limitation Act did not apply. **Lakshmi Priya Chaudharani v Rama Kanta Shaha** **7 C W N 520= 30 Cal 440.**

Notes:—Ref 18 M L J 590=31 Mad 431= 4 M L T 271; 22 C L R 143.

31—Non-appealable decree—Sale in execution—Order setting aside or confirming sale—Appeal—Held by the majority of the Full Bench (Rampini, J., *dissenting*).

Bengal Acts (Regulations of 1819) -*Contd.*

An order passed on an application under secs. 244 and 311 C P C to set aside a sale held in execution of a decree for rent when the decree-holder is the auction purchaser is an order which decides a question relating to title to land or to some interest in land as between parties having conflicting claims thereto. An appeal therefore lies from such order although no appeal lies from the decree in the suit on account of the prohibition contained in S 153 of the Bengal Tenancy Act. 28 Cal 116 overruled. I C L J 255; Misc. App. No. 438 of 1901 since reported I C L J 454 aute, Ref: and Fol: **Kali Mamdal v Ramsarbasya Chakravarti.** **I C L J 476= 9 C W N 721=32 Cal 957: F B.**

32.—Protected interest—Darputni—Mortgage.

A mortgage of a darputni is not a protected interest within S 160 (g) of the Bengal Tenancy Act. **Akkoy Kumar Soor v Bejoy Chand Mohatap.** **29 Cal 813.**

33.—Suit by purchaser of certain howla to avoid incumbrances thereon—notices on all defendants except one, who disclaimed all interest in the tenure—Succession Act Ss 179, 187 and 260—Suit by executrix—Necessity of copy of will and grant of administration.

Held, that where probate of a will has been granted and an executor appointed, the executor, in order to bring a suit as such, is, under Ss 179, 187 and 260 of the Indian Succession Act, bound to prove her title. In order to prove her title as executrix, the plaintiff was bound to file, not merely the copy of the grant of the administration but also the copy of the will, of which probate was granted. On her failure to produce the complete probate, the plaintiff was not entitled to proceed with the suit. *Held*, also that notices were given to all the defendants except one, within one year. The fact that notice was served on that one defendant beyond the period of limitation could not be taken to prejudice the plaintiff in the present case or in any way to bar her present suit by limitation. For, the defendant disclaimed all interest in the tenure. *Held*, futher, that the Courts below

Bengal Acts-(Regulations of 1819) -*Contd.*

having found that the notices were not served on the defendants in accordances with law and that finding being one of fact, the High Court could not interfere in second appeal. Suit dismissed accordingly. **Delaney v Rohamat Ali 32 Cal 710.**

34.—Sub-section (b)—Proviso (1).

Proviso (1) to section 29 of the Bengal Tenancy Act does not control sub-section (b) of that section. It applies only to sub-section (a).

The case of (25 Cal 781 Dist.) so far as it decides to the contrary was wrongly decided.

The rate contemplated by priviso (l) does not mean the average rate. **Bepin Mondal v Krishna Dhone Ghose. I C L J 10= 9 C W N 265=32 Cal 395 F B.**

35.—Land Acquisition Act—(1 of 1884), sections 6, 9, 11, 18, 46—Procedure—Declaration-Enquiry under section 40–No notice to the owner–Award-Proceedings before Collector, administrative—Suit to set aside.

Where enquiry under section 40 was held without notice to the owner and in his absence. *Held* that the declaration under section 6 of the Act was not void upon that ground. The proceedings of the Collector under section 9 of the Act No., 1 of 1894 leading to an award are not judicial but administrative, and the award in which the enquiry result is merely a decision binding only the Collector as to which sum shall be tendered to the owner. The Collector conducting the enquiry and making the award, is justified in availing himself of information supplied to him without the knowledge of the owner was not disclosed at the enquiry. **Ezra v The Secretary of State for India in Council 2 A L J 771= 1 C L J 227=9 C W N 454=32 Cal 605= 32 I A 93 P C=7 Bom L R 422.**

Notes:—Ref 30 Bom 275=7 Bom L R 697, 13 C W N 241.

36—Suit by landlord against a third party.

Ss. 69 and 70 of the Bengal Tenancy Act refer to and contemplate proceedings between landlord and tenant, and do not bar a suit by the landlord against third party, 32 Cal 480 Fol. **Chhedi v Chhedan 32 Cal 422.**

37—Record of rights—Jurisdiction of Revenue officer.

Bengal Acts-(Regulations of 1819) -*Concld*

Per Ghose J.—S. 101 of the Bengal Tenancy Act applies where the record-of-rights is required for reasons of state, while s. 103 applies where a proprietor or tenure-holder or a large proportion of the raiyats require for their own purposes an authoritative official ascertainment and record of the same particulars as would be recorded under an order made under s. 101.

The particulars specified in s 102, when recorded and compiled under s. 103, amount to a "record of rights" as contemplated in ch. X of the Act, and therefore the proceedings of the Revenue officer setting the rent under s. 103, are legal and not void for want of jurisdiction.

Per Pergtor, J.—Material difference between the old s. 103 of the Bengal Tenancy Act, and the present section is that under the former the Revenue officer recorded the particulars specified in s. 102, i e. all the particulars, since no option was given to the applicants to select among those particulars, which under the present section, the applicants can select. **Shudhendu Narain Acharja Chowdhury v Tarini Kanta Nath I C L J 239=9 C W N 504=32 Cal 518.**

38—Merger—Intention to keep alive—How far merger prevented–Exception.

Except in cases where a question of estoppel would arise, the mere intention or act of a person in whom the interests of both the lessor and lessee vest will not prevent the merger under S. 111 Cl. (d) of the Transfer of Property Act.

Mitter v Kali Prasanna Choudry. 28 Cal 744

Notes—Disc. 36 Cal 802. Ref 1 N L R 108: 22 P L R 183.

—I of 1821.

See Sale for Arrears of Revenue—Setting aside Sale—Other Grounds.

—VII of 1822.

See (1) Cases under Act XIII of 1848.

(2) Contract Act, s. 23—Illegal Contracts—Illegal Cases.

(3) Enhancement of Rent—Liability to Enhancement—General Liability.

(4) Evidence Act, s. 74.

(5) Government Officers, Acts of.

Bengal Acts-(Regulations of 1822) -*Contd.*

(6) Jurisdiction of Civil Court—Revenue Courts—Partition.

(7) Limitation Act, 1877, Art. 45.

(8) Sale for Arrears of Revenue—Incumbrances—Act XI of 1859.

(9) Settlement—Miscellaneous Cases.

(10) Settlement—Mode of Settlement.

—VII of 1822, S. 33.

See Survey Award.

Bengal Regulation VII of 1822.

1—Order of Commissioner—'Final and conclusive' meaning of—Notice—Regulation VII of 1822 — Proceedings whether binding on Civil Courts—Evidence Act (I of 1872), S. 114 (e)—Presumption as to official acts—Onus of proof.

If the proceedings under S. 61 of the *Chaukidari Act* are conducted in compliance with the provisions of Reg. VII of 1822, which are applicable to proceedings under the *Chaukidari Act*, and after full notice to all the parties concerned, then the order under S. 61 is final and binding upon the Civil Courts. If it is found that there was an order under S. 61, the presumption under S. 114, cl. *(e)* of the Evidence Act, *viz.*, that official acts have been regularly performed, would arise.

Where the plaintiff claimed possession of certain lands as *chaukidari chakran*, but the defendant claimed them as *lakhiraj*.

Held, that if the defendant was not a party to, and had no notice of the proceedings under S. 61 of the *Chaukidari Act*, they are not such evidence against him as to shift the *onus* of proof upon him. (11 Cal 632; 2 C L J 302, 2 C L J 107, 33 Cal 1107; 2 C L J 336, Ref.).

Baikuntha Nath Sen v. Bidhu Bhushan Jash, 9 Ind Cas 322.

—X of 1822.

See (1) Boundary.

(2) Jurisdiction of Civil Court—Rent and Revenue Suits, N.W.P.

—X of 1822, S. 29.

See Limitation Act, 1877, Art. 134.

Bengal Acts-(Regulations of 1822- -*Concld.*

—X of 1822, Ss. 30, 33.

See Cases under Sale for Arrears of Revenue —Incumbrances—Beng Reg. XI of 1822.

—VI of 1823, S. 5, cl. (2).

See Damages—Measure and Assessment of Damages—Breach of Contract.

Bengal Regulation VI S. 5 cl. (2)-1823.

1—S. 5, cl. (4)—Contract to sow indigo—Default in sowing—

Held, that, in a contract to sow indigo, not sowing would be *prima facie* evidence of dishonesty; and that, in order to claim the benefit of cl. 4 of s. 5 of Regulation VI of 1823, it was necessary to show that the negligence to sow had been accidental. **Lal Mahomed Biswas v. Watson, 1 Ind Jur, N S 3; 4 W R 62.**

2—S. 8—Joint liability in contract—Specification of liability.—

In a suit to recover the value of the produce of land from defendants, who had agreed to cultivate it, but had failed to do so, it was held that, as defendants were jointly liable, a specification of liability was not required, as the case did not come within s. 8 of Regulation VI of 1823.

Munraj Muhton v Hudson, 12 W R 309.

—I of 1824.

See Railway Company **10 B L R 241.**

Bengal Regulation I of 1824.

1—Assessment of land formerly occupied for Government salt-works.

Upon the relinquishment by the Government of lands, within the ambit of a permanently-settled zamindari, continuously used before and since the perpetual settlement of salt-works from the commencement of salt-making by the Government, until after the passing of Regulation I of 1824, the provisions of that Regulation are applicable to the mutual rights of the zamindar and of the Government. Such lands were held by the officers of the Salt Department, in terms of cl. 11 of that Regulation, "free of rent" and "under a perpetual title of occupancy", whether belonging to a permanently-settled estate or not. The force of the Regulation and the right of the Government to assess such lands are not affected by 'khalari', payments having been made, among other compensations, by the Government to the

Bengal Acts (Regulations of 1824) -Concld.

zamindar; and cl. 11 appears to contemplate some such payment. On a settlement of the relinquished lands, 'khalari' payments, being "sums remitted to the zamindars and to be allowed in perpetuity" within the meaning of cl. 4 of s 9 of Regulation I of 1824, must be continued to the zamindar; or,if a settlement should be made with others, he should be assessed only for the land retained by him. **Secretary of State for India in Council v. Anandomoyi Debi, 8 Cal 95.**

2—Reversing the judgment of the High Court in a decision unreported given after remand in.

Gujandro Narain Roy v. Collector of Midnapore. 23 W R 197.

—VII of 1825, S. 7.

See Attachment—Mode of Attachment and Irregularities in Attachment. **20 W R 433.**

—IX of 1825.

See (1) Act XIII of 1848, Case Nos. (4-6). **10 Moore's I A 511 ; 2 B L R, P C 111.**

(2) Collector, Jurisdiction of. **7 N W 302.**

(3) Accretion.

1—In newly accreted land, if follows parent estate. There may be an out-and-out sale of the *malikana* rights in a newly accreted estate apart from the parent estate. 2 B L R 349 (1869), followed. **Promotha Nath Majumdar v Robert Watson & Co , 7 C W N 846.**

—XI of 1825.

See (1) Cases under Accretion.

(2) Act IX of 1847, Case No. (1) **6 B L R 255.**

(3) Boundary, Case No. (1) **9 W R 426.**

(4) Land Acquisition Act, 1870. S. 39.

(5) Cases under Landlord and Tenant—Accretion to Tenure.

(6) Settlement—Effect of Settlement

—XIV of 1825.

See Onus of Proof—Resumption and Assessment.

—XIV of 1825, S. 3.

See Sanad.

—XX of 1825.

See Jurisdiction of Criminal Courts — European British Subjects.

—XII of 1826.

See Stamp—Bengal Regulation XII of 1826.

Bengal Acts (Regulations of 1825) -Concld.

—V of 1827

See Cases under Bengal Regulation V of 1812.

—III of 1828.

See (1) Bengal Act VII of 1868, S. 1

(2) Sale for Arrears of Revenue—Incumbrances—Act XI of 1859.

(3) Special Commissioners.

(4) Sunderbuns Settlement Regulation.

1—Succession to mokurari tenures.

S. 11 Regulation XXVIII of 1828, requiring successions to mokurari tenures to be reported to the Collector within six months, referred only to the security of the revenue, and not to private interests. **Umrith Nath Chowdhry v Coonj Behary Singh W R F B 34**

—XIV of 1829.

See Security for costs—Appeals.

—VIII of 1831.

See (1) Bengal Reg. VII of 1799, Case No.(2). **B L R Sup Vol 626.**

(2) Sale for arrears of rent—Incumbrances.

—VII of 1832.

See Mahomedan Law.

1.—Conversion to Mahomedanism, effect of—Joint family—Regulation VII of 1832 S. 9.

A member of a joint Hindu family becomes civiliy dead by reason of his conversion to Mahomedanism, and, all his property whether joint, ancestral or self-acquired devolves on the other members of his family. This rule of Hindu Law is not abrogated by S. 9 of Act VII of 1832 which lays down a mere rule of procedure under which a Judge may refuse to enforce the consequences, such as in the case where a son sues for possession of the whole property alleging the civil death of his father as his cause of action. So where a Hindu father and member of a joint family consisting of himself and his son became a convert to Islamism and long after the death of both on a suit between third parties a question arose as to the effect of the conversion on their ownership of the family property. *Held*, that the son became entitled to all the properties, joint and self acquired of the father at once: that in any view, S. 9 of Act VII of 1832 not having touched the rules affecting the constitution and incidents of a joint Hindu family, the son became the absolute owner of his moiety of the joint family property, even though there was no

Bengal Acts-(Regulations of 1832) -*Concld.*

de facto partition 9 M I A 199 ref to
Gobind Krishna Narain v Abdul Quayum 1903 A W N 137=25 All 546.

Notes —Fol 4 A L J 273 F B Ref 4 A L J 365 29 All 491, W N (1907) 115, 5 A L J 425, 30 All 406=(1908) W N 160=5 A L J 423 Reversed 13 C W N 1117 P C

—IX of 1833

See (1) Act XIII of 1848 Case No (4) **10 Moore's I A 511**
(2) Jurisdiction of Civil Court — Survey Awards.
(3) Mortgage—Accounts
(4) Right of Suit—Awards, Suits concerning

—XIII of 1833

See (1) Jurisdiction of Civil Court—Registration of Tenures
(2) Right of Suit—Registration of Name

Bengal Regulation III of 1872.

1—III of 1872—Malraiyats—Partition—Trees and waste lands

As between two malraiyats with whom a settlement has been made under Regulation III of 1872 there may be a partition of the waste and jungle lands, though such partition cannot be binding upon the superior landlord, the ghatwal, and will only subsist during the currency of the settlement So far as the trees to which the superior landlord is exclusively entitled they cannot be the subject of partition but as the trees which belong to the *malraiyats* there may be a partition. **Doman Pandey v Panchu Kole. 5 C W N 185**

Bengal Rent Act X of 1859.

1 — Civil Procedure Code (Act XIV of 1882) S 373 applicability of The provisions of s 373 C P C have no application to suits instituted under Act X of 1859

Where a plaintiff to withdraw a suit for rent and the Court permitted such withdrawal but dismissed the suit and did not give distinct permission to bring a fresh suit upon the same cause of action

Held that a fresh suit was maintainable
Sheikh Bolam v Mahomad Sivendra Pada Banerjee 12 C W N 893=35 Cal 990

Bengal Rent (Act VI of 1862)

Notes —Supplemented Ben Act IV of 1867 S 5, SS 5 13 Rep In Pt Act VII of 1870 S 1 Rep SS 2,3,8,12,14 to 17,18,21 Schs A and B Rep In Pt S 14 Am Act I of 1903, rep (In Chota Nagpur Division, Except the Manbhum District) Ben Act I of 1879 (In the Manbhum District), Ben Act VI of 1908 when and where Notified (In Eastern Bengal and Locally in Bengal) Act VIII of 1885

Bengal Acts (Rent Act VIII of 1869 & X of 1859.)-*Concld.*

Act VIII of 1869

See (1) Limitation Act 1877, s 7
(2) Right of Occupancy—Loss or Forfeiture of Right
(3) Rent Suit for

—s 2 (Act X of 1859 s 2)

See Kabuliyat—Form of Kabuliyat

—ss 3 and 4 (Act X of 1859, ss 3 and 4,

See Cases under Enhancement of Rent- Exemption from Enhancement by uniform Payment of Rent, and Presumption.

—s 6 (Act X of 1859 s 6)

See Cases under (1) Right of occupancy
(2) Bengal Tenancy Act s 2 cl (4) s 116

—s 7 (Act X of 1859 s 7)

See (1) Right of Occupancy—— Mode of Acquistion
(2) Bengal Tenancy Act S 178 **33 Cal 136**

—s 10 (Act X of 1859 s 9).

See (1) Kabuliyat—Requisite Preliminaries to suit
(2) Kabuliyat—Requisites preliminary to Suit—Tender of Pottah.
(3) Bengal Tenancy Act s 2 cl (4)

Act s 11 (Act X of 1859 s 10)

See Small Cause Court, Mofussil—Jurisdiction—Contract

Act X of 1859

See (1) Limitation Act 1877 s 14
(2) Withdrawal of suit—Suits

2—Bengal Tenancy Ss 3 (10), 21-Occupancy, right of

A tenancy is found to have existed for at least 50 years in respect of a piece of land which was used for agricultural or horticultural purposes and which is situated within the limits of the Dacca Municipality *Held* that even if the Bengal Tenancy Act has no operation in urban areas, the tenant had acquired a right of occupancy before the passing of the Bengal Tenancy Act under the repealed Acts X of 1859 and VIII (B C) of 1869 *Semble*, The term 'village as defined in s 3 Sub 3, (10) is not confined to non-urban areas outside the town of Calcutta It has no operation as regards homestead lands whether situated in towns or outside towns

Syed Hassan Ali v Gobindalal Basak 9 C W N 141.

Bengal Acts-(Rent Act VIII of 1869 & X of 1859)-*Contd.*

1—Assam, Rent Law

The *Rent* Law, Act X of 1859, was held to be in force in Assam **Hootaboo Raoot v Loom Raoot 7 Cal 440 note**

Jullow Surma Patwaree v Madhub Ram Atoi Burha Bhukut. 16 W R 202.

Notes —*Ref:* 7 Cal 437, 9 Cal 925

2—3—Dehra Dhoon, District of.

The Rent Law, Act X of 1859, was held not to be in force in the Dehra Dhoon district. The Dhoon forms part of 'territories not subject to the General Regulations" **Dick v Heseltine 1 N W 196 Ed 1873, 280**

4—Pasture lands-Charramna holdings—Tenancy if permanent Occupancy right, acquisiton of, in—Using land for purposes of cultivation, if waste— Remedy of landlord—Forfeiture—Landlord and Tenant *Act* (X of 1859) S 6—Bengal Tenancy Act VIII of 1885 S 5 (2)—Notice-Service—Transfer of Propeity Act (IV of 1882) S 106, 108 (0), 111 (g).

The question being whether certain holdings situated in the tract known as *charramna* or pasture lands in Mouzah Basantpur in Zillah Purnea were permanent tenancies, it was proved that sales by private treaty and by auction through Court of such holdings were frequent, that cases of ejectment were uncommon, that such holdings frequently passed to the heirs of the deceased tenants and that mutation of names in the zemindar's *seerista* had been frequently allowed sometimes on payment of *nazarana* and sometimes without

Held, that the proper inference to be drawn from these circumstances was that the tenants had a parmanent right in the holdings and were not liable to ejectment on notice.

Per Dass, J—That assuming that the lands were settled with the tenants only for the purpose of grazing cattle the tenants had acpuired a right of occupancy in the lands before the Bengal Tenancy Act came into force under S 6 of Act X of 1859.

That it was not reasonable to hold that at the inception of tenancies, it was intended by the parties that the lands were never to be used for

II C C 17

Bengal Acts-(Rent Act VIII of 1869 & X of 1859) S. 6-*Contd.*

cultivation, and the tenants were raiyats within the meaning of S 5 Sub sec. (2) of the Bengal Tenancy Act

Per Richardson J—The tenants had failed to prove that the lands were left for purposes of cultivation, or that they had acquired occupancy rights therein

That by using the lands intended for grazing for purposes of cultivation the tenants did not incur forfeiture (11 W R 231 Fol)

Sheikh Latifar Rahaman v A H Forbes. 14 C W N 372=5 Ind Cas 783.

5—Occupancy rights non-payment of rent-Act VIII of 1869 s. 6

To enable a raiyat to acquire a right of occupancy under s. 6 of Act VIII of 1869 (B C) or under Act X of 1859, his possession must ordinarily be continuous for twelve years over the whole of the land in respect of which a right of occupancy is claimed 22 W R 228 ref to The fact that the plaintiff was in occupation of different areas of lands in different years, would not entitle him to a right of occupancy in the whole, unless it was proved that he had a right of occupancy in a portion and the parties intended that the additional land also should be impressed with the existing rights in respect of the original lands of the holding Under s. 6 of Act VIII of 1869, a raiyat retains his right of occupancy only so long as he pays rent. But although mere non-payment of rent might not be conclusive evidence of abandonment, nonpayment of rent taken with sub-mergence of land, is sufficient to indicate an extinguishment of the right of occupancy. 4 Cal 894 foll. 13 M I *A* 467 ref to, 18 All 290 distinguished An occupancy holding was diluviated at a time when Act VIII of 1869 was in force and the lands had continued under water for thirteen years before the present Bengal Tenancy Act was passed in 1885.

Held, that whatever right was acquired by the raiyat, was extinguished by non-payment of rent during the period of submergence before the Act of 1885 came into force, as he had subsisting rights in 1885 the provisions of the Act VIII of 1885 could create no new rights in his favour, nor revive those which had already been extinguished. **Saligram Augh v. Puluk pandey. 6 C L J 149.**

Bengal Acts-(Rent Act VIII of 1869 & X of 1859) S. 6-*Contd.*

6-8. 6-Chowkidari chakran land-Service tenure-Right of occupancy—Landlord and Tenant-Act (X of 1859)—(Act VIII of 1869), B C.—Bengal Tenancy Act (VIII of 1885), secs, 19 181. A raiyati tenancy was created under a chowkidar in *chowkidari chakran* land so far back as 1846, *Held*-That having regard to sec. 6 of Act X of 1859 as soon as the Act came into force the raiyat acquired a right of occupancy. That the right of occupancy acquired before 1859, would be maintained under the Act of 1859, as also under the provisions of sec 6 of Act VIII of 1869 B.C, and would continue to exist under sec 19, of the Bengal Tenancy Act. 21 All 129 Foll. **Ram Kumar Bhuttacharjee v. Ram Newaj Rajguru. 8 C W N 860=31 Cal 1021= 31 I A 17 P C**

Notes—Ref: 2 C L J 379.

6A—Sec 6—Act X of 1859—Occupancy holding, submergence—*Rent*, non-payment of-Extinguishment—Bengal Tenancy Act (VIII of 1885)

To enable a raiyat to acquire a right of occupancy under section 6 of Act VIII of 1869 (B C) or under Act X of 1859, his possession must ordinarily be continuous for twelve years over the whole of the land in respect of which a right of occupancy is claimed.

The fact that the plaintiff was in occupation of different areas of lands in different years, would not entitle him to a right of occupancy in the whole, unless it was proved that he had a right of occupancy in a portion, and the parties intended that the additional lands also should be impressed with the existing rights in respect of the original lands of the holding.

Under section 6 of Act VIII of 1869, a raiyat retains his right of occupancy only so long as he pays rent. But although mere non-payment of rent might not be conclusive evidence of abandonment, non-payment of rent taken with submergence of land, is sufficient to indicate an extinguishment of the right of occupancy.

An occupancy holding was diluviated at a time when Act VIII of 1869 was in force, and the land had continued under water for thirteen years before the present Bengal Tenancy Act was passed in 1885.

Bengal Acts-(Rent Act VIII of 1869 & X of 1859) S. 6-*Contd.*

Held,—Whatever right was acquired by the raiyat, was extinguished by non-payment of rent during the period of submergence before the Act of 1885 came into force; as he had no subsisting rights in 1885, the provisions of Act VIII of 1885 could create no new rights in his favour nor revive those which had already been existinguished.

Saligram Singh v Puluk Pandey 6 C L J 149.

6B—S. 6 Bengal Tenancy Act (VIII of 1885), S. 116—Kamat land -Right of occupancy Tenant holding over—Mokurari-

Where the rights of the parties were governed by Bengal Act VIII of 1869, lands which were *kamat* did not cease to be so by virtue of a *mokurari* settlement of the same.

A tenant of *kamat* lands does not acquire a right of occupancy by holding it over after the expiry of the lease. **Syed Khalilur Rahman v Rupan Mahton. 12 C W N 436.**

7—S. 6 "All costs of process"—Whether include costs of execution.—Sale in execution of rent decree—Some of costs entered in sale proclamation not really due. effect of—Unregistered purchaser—Title— Superiority — Purchaser, at rent sale.

The words 'All costs of process" in S. 6 of Act VIII B C of 1865 are quite wide enough to include costs of execution such for instance, as the fees, necessary for the issue of an attachment or a sale proclamation.

If the plaintff judgment-debtor in a suit to set aside a sale for arrears of rent, succeed in proving that some of the costs of process entered in the sale Proclamation was not really due from him, the sale which followed in perfect good faith on that sale-proclamation cannot be regarded as null and void.

An unregistered purchaser of a tenure cannot set up his title against a person purchasing at a sale of the tenure for arrears of rent, and cannot succeed in a suit for possession or for a declaration that the sale was collusive. 21 W R 94; 12 Cal 24 6 Ind Cas 605; 37 Cal 823; 14 C W N 905; 12 C L J 158; Foll; 6 W R Act X Rulings, p 59 *doubted*. **Kripa Sindhu Roy v Bancha Nidhi Mahanti. 10 Ind Cas 899.**

Bengal Acts-(Rent Act VIII of 1869 & X of 1859) S. 6-*Concld*

7A.—S.11-Acquisition of Chowkidary Chakran land—Service tenure—Landlord's Tenancy Act-Bengal Tenancy Act, Ss. 19 and 181.

A raiyati tenancy was created under a Chowkidari in Chowkidari Chakran land so far back as 1846. *Held*, that having regard to S. 6 of Act X of 1859 as soon as the Act came into force the raiyat acquired a right of occupancy. B. L R Sup , Vol. 202; 15 W R 231 Ref. to. That the right of occupancy acquired before 1859 would be maintained under the Act of 1859 as also under the provisions of S.6 of Act VIII of 1869 B. C., and would continue to exist under S. 19 of the Bengal Tenancy Act. 21 Cal 129 foll. **Ram Kumar Bhuttacharjee v Ram Newaj Rajguru. 8 C W N 860.**

8—S. 8 (Act X of 1859, s. 8—Tenant without right of occupancy.

If a raiyat has a right of occupancy and insists on that right he impliedly undertakes to give a kabuliat at fair and equitable rates if his landlord requires him to do so. But if the right of occupancy is absent, the raiyat can only remain on the land by the permission of the landlord, viz on such terms as may be agreed upon between the landlord and himself. **Sutto Churn Ghosaul v. Gouree Pershad Roy. 13 W R 117.**

9.—Right to pottah-Agreement fixing rent.

A tenant not having a right of occupancy is not entitled to a pottah under s. 8, Act X of 1859, unless there is an agreement with his landlord fixing the rate of rent. **Nubudeep Chunder Sircar v Laila Sheeb Lall. Marsh 325.**

10.—S. 10—Act VIII. B. C., of 1869 Resumption by Government and temporary resettlement with original proprietor—Previous grant of permanent gauti tenure—Right of lessees under the grant how effected by the settlement—Proceedings—Parties—Non-joinder.

In 1887 Raja B. executed a permanent lease in favour of the respondent of lands, parts of which, it was known were liable to resumption by Government. Respondent paid Rs. 7,500 as bonus for this grant and agreed to pay rent for the entire tenure at the rate of Rs. 2,300 per annum. A clause in the lease provided amongst other things that if by reason of any "law suit

Bengal Acts-(Rent Act VIII of 1869 & X of 1859) S.10-*Concld.*

with Government or with any other person," the proprietary right in the lands were lost by Raja B, "then the rent of the said land at the rate prevailing in the mehal for the *Jami-Jumma* thereof should be deducted from the aforesaid *Jumma* of Rs. 2,300". In 1882, Chuck Khatali, one of the chucks included in the lease, was resumed by Government formed into a separate estate and temporarily settled for 20 years with heirs of Raja B, at a rent of Rs. 850. In 1892, one of the heirs of Raja B, sold his interest in the permanent estate to one Kali Prosunno Ghose and his interest and chuck Khatali to the appellant. The appellant and the remaining heirs of Raja B. sued Respondent to recover from the chuck Khatali only rent with interest at the rate fixed in the settlement proceedings.

Held that the plaintiffs could not recover. The resumption of the chuck by Government could not abrogate the rights of the Respondent under the *pottah*, so long as Raja B. and his heirs were themselves in a position to let him have the lands, and these rights in no way conflicted with the operation of Sec. 10 of Bengal Act VIII of 1869 or the rights of the Government under it:

Held also-that the liability of the Defendants was not under the settlement but being as it was, for a lump sum of rent, they were necessary parties in any action for rent for chuck Khatali. That consequently, Kali Prosunno Ghose ought to have been joined as a party and the suit was bad without him.

Pria Nath Das v Ram Taran Chatterji. 7 C W N 601=30 Cal 811.

11.—S. 11—Damages for with-holding receipts for rent.

The damages mentioned in s. 10 of Act X of 1859 are not penalties invariably to be decreed against persons withholding receipts for rent, but they are to be ascertained by an actual enquiry into the circumstances of each particular case, and never to exceed double the amount for which receipts have been withheld.

Rashmonee Debea v Ramjoy Shaha. 2 Hay 516.

12.—S.11-Bengal Tenancy Act (VIII of 1885) Ss. 2, cl. (4), 74, 179—Act X of 1859, S. 10—Reg. V of 1812, Sec. 3.

Bengal Acts-(Rent Act VIII of 1869 & X of 1859) S. 11-*Contd.*

Where a permanent tenancy was created by a lease dated 1860, *i. e*, before the passing of the Bengal Tenancy Act, the provisions of section 179 of the Act would not apply to the case, and the landlord could not recover any *abwab* from the tenant.

Sec. 10 of Act X of 1859 or Sec. 3 of Reg. V of 1812 corresponding to Sec. 74 of the Bengal Tenancy Act made all impositions upon all classes of tenants, including a permanent tenure holder, in excess of the specified rent illegal.

An agreement by a permanent tenant to give a certain number of cocoanuts to the landlord as *bhet* and to perform certain services (*begar*) without any remuneration, in addition to the rent, was illegal under the law as prevailed before the passing of the Bengal Tenancy Act.

Under Sec. 2, cl. (4) of the Bengal Tenancy Act, the landlord cannot now recover the *abuab* which he could not recover under the old law.

Aparna Charan Ghose v Karam Ali (4) C L J 527=10 C W N 527

12.—S. 11—Suit for delivery of pottahs.

The Rent Act contemplates suits for delivery of pottahs by raiyats in possession only.

Bharut Chunder Sein v Oseemooddeen. 6 W R Act X 56.

13-14.—S. 11—Power to award damages.

Under s. 10, Act X of 1859, the power of a Judge to award damages for receipts withheld is discretionary only as to the amount to be awarded. The tenant being entitled by law to double the amount paid as rent, the Judge cannot refuse him costs on the ground that he had demanded double what was due to him. **Zoomeeroodunnissa Khanum v Phillipe. Sadut Ali Khan v Phillipe. 1 W R 290**

15.—S. 11—Money paid as rent.

Damages under s. 10, Act X of 1859, are recoverable only in respect of money actually paid as rent. **Sumeena Bebee v Koylash Chunder Roy. 6 W R Act X 79.**

16.—S. 11—Receipt.

A charlan bearing a mublukbundi or total in figures, and some mark, not a signature, of the tehsildar, is not a "receipt" within the meaning of s. 10, Act X of 1859. **Joheeroodeen Mahomed v Dabee Pershad Singh. 13 W R 22.**

Bengal Acts-(Rent Act VIII of 1869 & X of 1859) S. 13-*Contd.*

—S. 13 (Act X of 1859, s, 12)

See Parties—Parties to suits—Agents

17.—S. 13—Confirmation of sale without payment of landlord's fee—Sale, Validity of—Application for possession by auction-purchaser—Civil Procedure Code (Act XIV of 1882), secs. 244, 318—Appeal—Second appeal.

Where the sale of a permanent tenure was confirmed without previous payment of the landlord's fee in the manner required by sec. 13 of the Bengal Tenancy Act, and the judgment-debtor objected to the auction-purchaser's application for being put into possession under sec 318, C. P. C., on the ground that the sale was invalid: *Held*—That the question was one under sec. 244 C. P. C., and a second appeal lay. 19 Cal 683; 19 I A 166 (1892), relied upon. That the payment of the landlord's fee does not affect the position of the judgment-debtor but affects the right of the landlord to object to a transfer of a tenant's right without payment of the fee, the object of such payment being to issue notice to the landlord in a case of this description of the transfer of the tenant's right, and it was not competent to the judgment-debtor to raise an objection to the delivery of possession under sec. 318, C. P. C. 26 Cal 603 (1899), distinguished. **Mohim Chandra Bhuttacharjee v Ram Lochan Dey. 7 C W N 591.**

18—S. 13—Confirmation of sale—Subsequent payment of landlord's fee—Jurisdiction of Court.

An auction sale was confirmed by the Court overlooking through mistake the fact that no landlord's fee was paid under sec. 13 of the Bengal Tenancy Act. Subsequently on the discovery of the mistake the purchaser applied for the confirmation of the sale after payment of the landlord's fee, and the Court passed an order to that effect: *Held*—That the order was good and the Court had jurisdiction to pass such an order.

Mohesh Chunder Das v Hori Mohan Chakrabutty. 7 W N 388.

Bengal Acts-(Rent Act VIII of 1869 & X of 1859) S. 13-*Concld.*

19—S. 13—Sale, confirmation of——Deposit of landlord's fee——Sale certificate, application for—Limitation—Limitation Act XV of 1877), Sch. II, Art. 178—Civil Procedure Code (Act XIV of 1882), sec. 244—Appeal—Second appeal.

There is no limitation for an application to deposit landlord's fee as prescribed by the Bengal Tenancy Act, and for confirmation of the sale and the granting of the sale certificate. An order upon such an application may be regarded as one under sec. 244, cl. (*c*), C, P. C., and as such an appeal and a second appeal lie.

Krishna Chandra Dutt v Anukul Chandra Chuckerbutty. 6 C W N 190.

—S. 14 (Act X of 1859, s 13)

See (1) Enhancement of Rent——Notice of Enhancement.

(2) Lease—Construction

—S. 15 (Act X of 1859 s 14)

See Enhancement of Rent——Resistance to Enhancement.

—S. 16 (Act X of 1859 s 15)

See (1) Enhancement of *Rent*——Exemption from Enhancement by uniform Payment of Rent and Presumption—Generally.

(2) Enhancement of *Rent*—Liability to Enhancement——Dependent Talukdars

20.—Ss. 16 and 17 (Act X of 1859, ss. 15 and 16)—District to which permanent settlement has not been extended—Surborakari tenures in Cuttack—Transferable tenures.

The provisions of ss. 15 and 16 of Act X of 1859 apply to the whole of the Provinces of Bengal, Behar, Orissa, and Benares, and not only to such of the districts in those provinces to which the Permanent Settlement has been extended. Surborakari tenures in Cuttack are permanent, hereditary, and transferable.

Saddanundo Maiti v Nowrattam Maiti. 8 B L R 280: 16 W R 289.

—s. 17 (Act X of 1859, s. 16).

See (1) Enhancement of Rent—Exemption from Enhancement by uniform payment of Rent, and Presumption—Generally.

Bengal Acts-(Rent Act VIII of 1869 & X of 1859) S. 17-*Concld.*

(2) Enhancement of Rent—Exemption from Enhancement by uniform payment of rent, and Presumption—Proof of uniform payment.

—S. 18 (Act X of 1859, s. 17).

See Cases under Enhancement of Rent—Grounds of Enhancemont.

—S. 19 (Act X of 1859, s. 18).

See (1) Abatement of Rent. (Cases Nos. 19. 25, 41),

(2) Limitation Act, 1877, Art. 120.

—s. 20 (Act X of 1859, s. 19).

See Cases under Relinquishment of Tenure.

—s. 21 (Act X of 1859, s. 20).

See Cases under (1) Interest-Arrears of Rent.

(2) Right of suit—Survival of Right.

10 W R 59.

21-22—S. 21-"Established usage," meaning of.

S. 20, Act X of 1859, referred to the established usage in the pergunnah, and not to the established usage between the parties.

Chytunno Chunder Roy v Kedarnath Roy 14 W R 99.

—S. 22 (Act X of 1859 s 21).

See (1) Landlord and Tenant—Ejectment—Generally

(2) Right of Occupancy——Loss or Forfeiture of Right

—S. 23 (Act X of 1859 s 22).

See Receiver

23—S.22=S.23 (5)—Landlord and tenant—Ejectment—Notice to quit.

When land was let out to a tenant under a lease in 1876 in a District where Act X of 1859 prevails and a suit for ejectment is brought in 1896, the raiyat must be taken to have acquired rights of occupancy, and is liable to be ejected under Cl 5, s. 23 of Act X of 1859 on account of a breach of the conditions of his contract. In such a case a notice to quit must be served before the suit is brought and the institution of the suit cannot be regarded as a sufficient notice to quit. (25 W R 329; 2 Cal 146 Fol:) **Nabin Majhi v Raj Kumar Gouri Lal. 6 C W N 199.**

Bengal Acts-(Rent Act VIII of 1869 & X of 1859) S. 23 *Contd.*

24—Act X of 1859, Sec. 23—Refund of excess rents—Jurisdiction of Civil and Revenue Courts—Joinder of unwarrantable claims, effect of—Abatement.

In a suit brought by a putnidar for a declaration that he was entitled to an annual abatement of the putni rent, in consequence of some lands comprised in the putni having been acquired for the purposes of railway, and also for a refund of the excess rents which he had been compelled to pay for some years.

Held: per Mookerjee J.—That this was a claim for abatement of rent and for recovery of damages for illegal exaction of rent within the meaning of clauses (2) and (3). Sec. 23 of Act X of 1859 The proper course for the plaintiff, therefore, was to sue in the first instance for abatement of rent in the Revenue Court which was the only Court of competent jurisdiction for that purpose.

Per Harington J., *contra*, treating the case as though it were one of first impression:—Although under Sec. 23 of Act X of 1859, a Civil Court had no jurisdiction to entertain a suit for abatement of rent, still the suit, in so far as it related to a claim for refund of the excess rents paid by the putnidar, was properly cognizable by the Civil Court and should not be dismissed for want of jurisdiction, because, one of the steps which plaintiff should have to take in establishing his right to have the money repaid to him, would, if it had stood alone, have entitled him to a decree in the Revenue Court.

Per Mookerjee J.—The present suit is substantially one for abatement of rent and prayer for refund is ancillary to the prayer for abatement, because as soon as the amount of abatement is determined the amount of refund is deducible by simple arthmetical calculation. The Civil Court has no jurisdiction to allow a claim for abatment and is not competent to embark upon precisely the same enquiry for the purpose of allowing a refund.

Per Mookerjee J.—The following rules are deducible from a review of the authorities on the question.

(1) A suit for abatement of rent, properly so—called, is maintainable only in the Revenue Court.

Bengal Acts-(Rent Act VIII of 1869 & X of 1859) S. 23 *Concld.*

(2) A suit for adjustment of the rent, on the ground that the rent payable under a lease is less than the sum nominally inserted in it, is not a suit for abatement of rent, properly so called and is accordingly maintainable in the Civil Court.

(3) If the tenant is entitled to sue for abatement in the Revenue Court under Rule (1), the suit for refund lies in the same Court, but if the tenant is entitled to sue for adjustment in the Civil Court under Rule (2), the suit for refund lies in the same Court. The cases, which support the view that a suit for refund lies in the Civil Court, assume a prior determination of the amount of abatement by a Court of competent jurisdiction.

Per Mookerjee J. —A plaintiff cannot give jurisdiction to or take away jurisdiction from a Court by an unwarrantable addition to his claim and the jurisdiction of the Court ought to be determined with reference to the nature and value of his claim after the additional matter has been struck out. **Asutosh Roy v Harinarain Singh Deo. 3 C L J 143.**

—S. 26 (Act X of 1859 s 27)

See (1) Co sharers—General Rights in Joint Property

(2) Jurisdiction of Civil Court-Registration of Tenures

(3) Landlord and Tenant—Alteration of Conditions of Tenancy—Division of Tenure, etc.

(4) Res Judicata—Competent Court—Revenue Courts.

25.—S. 26—Registration of tenure.

A patnidar is not bound to split up a tenure and to record separately the jumma payable by the holder of a share. Instead, also, of the latter bringing a suit in the first instance to compel the patnidar to register his share, he should have made an application for registration to the patnidar under s. 27, Act X of 1859.

Bhooputtee Roy v Umbica Churn Banerjee. 17 W R 196.

Bengal Acts-(Rent Act VIII of 1869 & X of 1859) S 26-*Contd.*

26—S. 26—Registration of transfer

The purchaser of the rights and interests of a cultivator is not bound under s. 27 to notify his purchase to the zamindar. **Sutteeschunder Roy v Muddoosoodun Paul Chowdhry.** **W R 1864 Act X 91.**

27—S. 26—Non-registration of transfer-Knowledge by zamindar.

Mere cognizance or supposed cognizance by the zamindar of the fact of a party having purchased a tenure is not sufficient to cure the defect of non-registration of such tenure in the zamindar's sherista **Sarkies v Kali Coomar Roy.** **W R 1864 Act X 98.**

28—S. 26—Transfer of tenure—Registration of tenure.

The transferee of a tenure not in possession, instead of depositing the rents in Court under this section, should take steps under s 27, Act X of 1859, to register his transfer in the sherista of the zamindar, and to apply to the Collector in case of the refusal of the zamindar to do so.

Dulli Chand v Meher Chand Sahoo. **8 W R 138.**

Notes:—Fol: 8 W R 495 Ref: 11 W R 201 Affirm: 12 B L R 439 P C.

29—S. 26—Tenure not intermediate.

Where the tenure is not one "intermediate between the zamindar and the cultivator," s. 27, Act X of 1859, does not apply. **Uma Charan Sett v Hari Prosad Misry.** **1 B L R S N 7.**

Wooma Churn Sett v Huree Pershad Misree **10 W R 101.**

30—S. 26—Registration of transfer of tenure Intermediate tenures.

In determining whether a tenure is a permanent transferable interest within the meaning of s. 26, Bengal Act VIII of 1869, the issues should be so framed as to raise distinctly the question whether the tenure was an intermediate one between the landlord and the raiyat. **Shibchurun Sen v Jonardhon Dey.** **1 C L R 397.**

31—S. 26—Mortgagee who has obtained foreclosure.

When the mortgagee of a jote obtains a foreclosure decree, it is his duty under s. 26, Bengal

Bengal Acts-(Rent Act VIII of 1869 & X of 1859) S. 26-*Concld.*

Act VIII of 1869, to have his name registered in the lessor's sherista. **Watson v Gonesh Chunder Sahoo.** **3 C L R 240.**

—S 27. (Act X of 1859, s. 30).

See Bengal Tenancy Act, sch III, Art. 3.

32—S 27—Rent Recovery Act, X of 1859, Ss. 27, 108—Registration of name—Suit, right of.

The purchaser of a tenant's interest in execution of a money decree has under S. 27 of Act X of 1859 no *locus standi* to maintain a suit for possession of the tenure against a previous purchaser who purchased it at a sale in execution of a rent decree obtained by a co-sharer landlord under the Act, unless the former gets his name registered as a tenant in the sherista of one of the landlords.

Bichitrananda Roy v Behari Lal Pandit. **5 C L J 89.**

33—S 27—Act I of 1868.

In a suit under Bengal Act VIII of 1869 to recover possession of land, on allegation that the plaintiffs had acquired a right of occupancy, and had been dispossessed, the Court following the interpretation of 'year' given in Act 1 of 1868,—*Held* that the computation of the limitation must be according to the English calendar. **Khasro Mandar v Premlal** **9 B L R Ap 41; 18 W R 403**

Notes:—See 18 W R 403.

34—S. 27—Suit for illegal execution of rent.

The fact that incidentally the genuineness of a kabuliat has to be determined does not make a suit for illegal exaction of rent one not determinable under the Rent Act. **Kashee Ram v Gunga Pershad.** **2 N W 304.**

35-37—S 27—Suit for rent of a fisherory tank—Jurisdiction—Revenue and Civil Courts.

A suit for rent of a fishery or *julkur* tenure is maintainable in a Revenue Court under Act X of 1859. Where a lease transferred to the lessee a right to the tank and not merely an incorpororeal right:—*Held*, on a construction of the lease, specially having regard to the condition that the lessee was to continue liable for the rent even in case of drought and non-rearing of fish, that the lease was intended to be of the entire interest of

Bengal Acts-(Rent Act VIII of 1869 & X of 1859) S. 27-*Contd.*

the lessors in the tank and was something more than a grant of a mere right of fishery. That the suit for rent of such a tank was triable by a Civil Court and not by a Revenue Courr under Act X of 1859. The provisions of Act X of 1859 do not apply to a tank which does not appertain to an agricultural holding, but is used only for the preparation and rearing of fish. **Mahananda Chakravarti v Mangala Keotani. 8 C W N 804=31 Cal 937.**

38—S. 27-Suit for excess rent collected under lease.

A suit for excess rents collected under a lease under which the lessee was, in consideration of a certain sum of money to pay the Government revenue, and reimburse himself from the remainder of the assets, and which provided for an annual measurement and assessment, was held not cognizable under the Rent Act as a suit for illegal excess of rent. **Shorafut Ali v Ramzan. W R 1864 Act X 53. Prosunomoyee Dossee v Soonder Coomaree Debia. 2 W R Act X 30. Madhub Chunder Bidyarutton v Tara Soonderee Gooptanee 2 W R Act X 92 Nilmoney Singh Deo v Sharoda Pershad Mookerjee. 16 W R 173.**

39—S. 27—Suit to recover excess of rent—Act X of 1859, ss. 10 and 23, cl. 2—Exaction of sum in excess of rent.

Contemporaneously with the execution of a pottah, it was verbally agreed that the tenant should supply the Zamindar with a certain quantity of rice, and that a deduction should be made from the rent reserved in respect thereof. The Zamindar took proceedings against the tenant, under Regulation VIII of 1819, for the recovery of the entire amount of rent, notwithstanding the tenant had supplied the rice and was entitled to the reduction. The tenant, without contesting his liability, or demanding an investigation as to the amount due, paid the entire amount. *Held*, that this was not " an exaction from the raiyat of a sum in excess of the rent specified in the pottah " within the meaninig of s. 10, Act X of 1859 (Bengal Act VIII of 1869, s. 11), and that a suit was not maintainable in respect of it under the Rent Act. **Chundermonee Chowdrain v Debendernauth Roy Chowdry. Marsh 420; 2 Hay 519.**

Bengal Acts-(Rent Act VIII of 1869 & X of 1859) S. 27-*Contd.*

40—S 27—Suit against zamindar for excess rents collected under zur-i-peshgi lease.

A zamindar, after he had granted a zur-i-peshgi lease, collected the rent from the raiyats. *Held*, that the lessee was entitled to recover from the zamindar the amount of rents so received in excess of the rent due under the lease, and that a suit to recover such excess was properly instituted under the Rent Act. **Rampershad Vogut v Ramtohul Singh. Marsh 655.**

41—S. 27—Suit to contest notice of enhancement.

A suit under s. 14, Act X of 1859 (s. 15, Bengal Act VIII of 1869), to contest a notice of enhancement is properly instituted under the Rent Act, though *quære* whether it is a suit for illegal exaction of rent. **Soroop Chunder Paul v Durup De Dombal. 1 W R 72.**

Notes.—Ref: 6 N W P 19 F B.

42—S. 27—Suit by sub-lessee to recover from lessor malikana which he was compelled to pay.

A suit brought by a sub-lessee to recover from his lessor the amount of malikana which he was compelled to pay, and which was properly payable by his lessor, is not one for illegal exaction of rent, and should not be brought under the Rent Act. **Tarsanah v Kadharey Lal. 5 N W 1.**

43—S. 27—Suit for rent illegally exacted.

Plaintiff took from defendant a lease of a certain quantity of land at a stipulated rate. Finding, however, that the land fell short of the quantity specified in the lease, and that defendant notwithstanding realized the full rent from him, he obtained a decree for abatement under Act X of 1859. The present suit was brought for the excess rent levied from plaintiff between the date of taking possession and of the Act X decree. *Held* that, if the suit did lie at all, it would be a suit for an illegal exaction of rent, and should be brought under the Rent Act. **Surbo Chunder Doss v Woomanund Roy. 11 W R 412.**

Notes.—Fol: 14 W R 132. Ref: 14 W R 403.

44—S. 27—Suit to recover money deposited to pay rents.

A suit to recover money deposited with the defendants to be applied in payment of rents

Bengal Acts-(Rent Act VIII of 1869 & X of 1859) S. 27-*Contd.*

(the deposit having been unsuccessfully pleaded in a suit for rent) should not be brought under the Rent Act. **Dabee Golam Singh v Chunder Kant Mookerjee. 3 W R 109.**

45—Suit for money paid in excess of road cess—Limitation Act (XV of 1877), Sch. II, Art 96.

In a suit to recover money alleged to have been paid by the plaintiffs to the defendants in excess of the sum demandable by the latter from the former on account of road cess. *Held*, (reversing the decisions of the Courts below) that the suit was governed, not by the special law of limitation contained in s. 27, Bengal Act VIII of 1859, but by art 96, sch II of the Limitation Act, XV of 1877 . **Mathura Nath Kundu v Steel. 12 Calc 533.**

46—Suit for abatement of rent-Land. Diluviation of.

A suit for abatement of jumma and refund of excess rents paid on account of diluviated lands is cognizable under the Rent Act. **Barry v Ardool Ali W R 1864 Act X 64.**

47—Suit for abatement of rent.

So is a suit for abatement of rent by a patnidar. **Man Gurobime Dossee v Khettur Chunder Ghose 2 W R Act X 47.**

Prosunomoyee Dossee v Soondur Coomare Debia. 2 W R Act X 30.

Notes: - Reversed· 12 B L R 229 P C.

48—Suit for abatement of rent—Land sold with erroneous description.

Where A conveys to B an interest in land under a description as to title which turns out to be erroneous, a suit by B against A for diminution of rent on the ground of the erroneous description ought to be brought under the Rent Act. **Neelmoney Singh Deo v. Gordon Stuart & Co. I Ind Jur. N S 356 6 W R 152.**

49—Suit for abatement of rent—Eviction from part of tenure.

In a suit by tenants for abatement of rent in consequence of having been dispossessed of two mauzahs which were included in their lease, and for which separate rents were fixed, the land-

Bengal Acts-(Rent Act VIII of 1869 & X of 1859) S. 27-*Contd.*

lord pleaded limitation. *Held* that Bengal Act VIII of 1869, s. 27, did not apply to a case of this description. In such a case the eviction might either give the tenant a cause of action for damages or suspend the rent during the time it lasts. In the latter case the cause of of action would not arise until the landlord sought or threatened to recover rent. **Aitchison v Nilmonee Singh Deo. 20 W R 347.**

Notes.—Ap: 6 C L R 494. Fol: 12 C L R 43 Dist: 3 C L J 143.

50—Suit for abatement of rent—Suit for declaration of liability to pay less rent.—

A suit by a tenant against his original lessors for a declaration that he is not liable to pay them the whole rent payable under his pottah in consequence of a third person having, subsequently to the grant of such pottah, by suit established a right to a share of the rent, is not a suit for abatement under Bengal Act VIII of 1869, and therefore not subject to the rule of limitation prescribed by s. 27 of that Act. **Chand Moni Dasi v. Lokenath Chatterji, 6 C L R 494.**

Notes:—Dist: 3 C L J 143.

51—Ejectment, suit for.—

A suit by a patnidar to recover khas possession of land against a tenant who has sold his rights and interests to a third party may be brought under the Rent Act. **Kedar Monee Dossee v. Chunder Koomar Roy, 2 W R, Act X 75.**

Notes:—Dist: 4 W R Act X 16.

52—Suit for land with hut on it.—

If the land is the substantial thing let out, the mere fact of there being a hut on it will not prevent the suit to recover possession from the tenant being brought under the Rent Act.

Matunginee Dossee v. Haradhun Doss, 5 W R, Act X 60.

Notes:—Ex: 11 W R 539.

53—Suit for ejectment.—

Suit for ejectment cannot be brought under the Rent Act in the following cases:—

Suit for dispossession between raiyats.

Radhanath Mozoomdar v. Purikhit Bodrik, W R, 1864, Act X 60.

Kally Doss Banerjee v. Bonomalee Doss, W R, 1864, Act X 61.

Bengal Acts-(Rent Act VIII of 1869 & X of 1859) S. 27-*Contd.*

Obhoy Churn Newgee v. Sristidhur Bagdee, 1 W R 101.

Modhoo Soodun Chuckerbutty v. Nufur Bawul, 1 W R 196.

Bhuggobutty Churn Mookerjee v. Huromohun Mookerjee, 2 W R, Act X 55.

Teeluck Chunder Oswal v. Gourchunder Shaha, 2 W R, Act X 100.

54—Suit for ejectment of a raiyat who, the plaintiff alleges, possesses no right of occupancy. Budree Doss v. Hunwant Singh, 4 N W 69.

55—Suit where the tenant is a mere tenant-at-will. Goor Buksh v. Choonnoo Lall, 1 Agra Rev 70.

56—Suit for possession of land.

A suit to recover possession of lands which the plaintiff alleged he had leased to the defendant as manager of an indigo factory, and also of other lands over which he had given a zur-i-peshgi lease, should not be brought under the Rent Act. Macdonald v Rajaram Roy. 3 B L R Ap. 28: 11 W R 371.

57—Suit for possession of land.

Nor should a suit by a landlord to recover possession of land from a raiyat who had ceased to pay rents, but whom the landlord had omitted to sue when he first ceased payment, and set up an adverse title.

Shib Pershad Chuckerbutty v Muddun Mohun Chuckerbutty W R, 1864, Act X, 80.

See contra, Uma Kishoree Dassi v Huro Gobind Shaha 5 W R, Act X, 95.

58.— Suit for possession after establishing title.

A suit against a raiyat who sets up title as tenant to a hostile zamindar, against both of whom (as defendants) the plaintiff established his title to the land of which he sues to recover possession, is not a case that falls within the Act. Fakeer Rohoman v Bhabosoondery Dabea. 1 W R, 232

59.—Suit for possession against alleged trespasser who sets up a permanent raiyati tenure.

Nor is a suit which is brought to recover possession of lands with mesne profits from one who is alleged to be in possession as a trespasser, notwithstanding the defence set up is that in respect of part of the land the defendant has a permanent raiyati tenure. Hari Nath Das v Asmut Ali. 6 B L R Ap 118: 15 W R 171.

Bengal Acts (Rent Act VIII of 1869 & X of 1859) S. 27-*Contd*

60—Suit for possession against trespasser.

Where plaintiff alleged that defendant was a trespasser, and on the ground of that trespass sued for possession, the suit should not be brought under the Rent Act. Nobin Chunder Roy Chowdhry v. Bhowanee Pershad Doss W R, 1864, Act X, 52.

Gobind Chunder Mozoomdar v. Bissumbhuree Dossee 2 W R 5.

Banee Madhub Banerjee v. Joy Kishen Mookerjee 4 W R Act X 16.

61—Suit to eject raiyat.

A suit by a zamindar to eject a raiyat who holds on after the period of his lease is not cognizable under the Rent Act. Sadat Ali v. Sadattunissa 3 B L R Ap., 101= 12 W R 37.

62.—Suit against [illegible] transferee of tenure.

Nor is a suit for possession [illegible] against an occupant by transfer [illegible] the landlord does not recognize as his [illegible] Taram[illegible] gal Doonee Dossee v. Birressur [illegible] I W R 86.

Notes.—Ex: Lahar [illegible] W R Act X 4; 3 W R [illegible] suit for [illegible] and illegal

63—Suit for ejectment [illegible] and possession for forfeiture of lease.

Nor a suit by a proprietor for possession and ejectment of the lessee, on the allegation that, by cancelment of his lease, the lessee, after having resigned his lease, has forcibly taken possession of the demised property. Kafaetoollah Khan v. Futteh Ali 1 Agra, Rev, 28.

64.—Suit for ejectment for forfeiture by transfer of tenure.

Unless it be proved that by express contract or local custom an alienation by the tenant by way of sale or mortgage renders the holding liable to be forfeited, a suit for ejectment on such ground should not be brought under the Rent Act, but the remedy of the zamindar is by suit to have the transaction set aside. Ramdyal v. Jankey Dobey 3 Agra, 274.

Nuthoo v. Dan Suhai 2 Agra, 279.

Imam Buksh v Hoob Ali 3 Agra Rev 8

Bengal Acts-(Rent Act VIII of 1869 & X of 1859) S. 27-*Contd.*

65—Suit for ejectment for forfeiture by transfer of tenure.

A suit for ejectment against tenants who are alleged to have illegally alienated their tenant rights cannot be brought under the Rent Act against the vendor because he is alleged to be out of possession, nor against the vendee because he is not the plaintiff's tenant. **Chumman Shah v. Ishree Pershad Narain Singh 4 N W 175.**

66.—Suit for ejectment for nonpayment of arrears of rent.

Where a lessor sued to eject the lessees for non-payment of arrears of rent, and to the amount claimed joined a claim for arrears due at the commencement of the leases, the latter claim being based on a stipulation contained in the leases that the lessees would pay such arrears, or on failure would pay the expenses of servants of the lessors who might be sent to realize such arrears,—*Held* that the claim was not one cognizable under the Rent Act. **Gulabi Singh v. Rai Normal Chund 6 N W, 342.**

67.—Suit for ejectment—Act X of 1859, s 30.

In 1857 the plaintiff gave a lease of a garden to defendant, who agreed to plaint, within five years from the date thereof, 2,000 betel-nut trees. The defendant failed to do so. In 1867 the plaintiff brought the present suit for ejectment on account of the breach of the contract entered into by the defendant. *Held* that by S. 30 Act X of 1859, the suit was barred by limitation. **Kali Kamal Mazumdar v. Shib Suhai Sukul 3 B L R Ap 47; 11 W R, 452.**

68.—Suit to eject for breach of contract—Act X of 1859, s. 30.

Held, that a suit to eject a cultivator for a breach of contract by plainting a bagh must be brought within one year, under s. 30 of Act X of 1859, from the date of the first accruing of the cause of action. **Ruhmutoollah v Tuffuzzool Hoosein 1 Agra Rev, 67.**

69.—Act VIII (B C) of 1869 Section 27—Ejectment-Limitation Act XV of 1877 Sched II Art 120.

The limitation laid down by section 27 of Act VIII (B C) of 1869 applies only to such suits as could be brought under Act X of 1859. It does not apply to a suit by a landlord to compel a tenant to remove trees planted by him on his holding. The limitation applicable to such a suit is laid down by Art 120 of Sched II of Act XV of 1877. **Ganesh Doss v. Gondom Koormi 9 Cal 147=12 C L R 418.**

Notes:—Disap: 26 Cal 564 F B. Dist 24 Cal 160.

70.—Suit to eject raiyat for making a well—Act X of 1859, s. 30.

Held that the limitation of one year under s. 30, Act X of 1859, in a suit by a landlord to eject a cultivator for sinking a well, should be computed from the date when the building of the well has assumed such a form that there can be no doubt of purpose for which it was intended. **Heera Kooree v Noor Ali 3 Agra Rev 1.**

Notes -Ref: 2 Bom 19.

71—Suit for possession after refusal to give possession under award in arbitration, and the award being adverse to the defendant he refuses to give up possession, a new cause of action arises, and one of a different character from any mentioned in Bengal Act VIII of 1859 s. 27. **Raj Narain Roy v Modhoo Soodun Mookerjee 20 W R 19.**

72.—Suit to cancel lease and for arrears of rent.

A suit to cancel lease for breach of the conditions and for arrears of rent should be brought under the Rent Act. **Beharee Coomaree v. Soobrun Singh 2 W R Act X 12. Ram Chunder Dutt v Din Dayal Poramanick 2 W R Act X 16.**

73.—Suit to set aside lease—Act X of 1859, s. 23 cl 5.

A suit to set aside a lease as null and void is not cognizable under the Rent Act, even though plaintiff mentions that a balance of rent is due by defendant. **Tajeh Mahomed Purdhan v Jogendro Deb Roykut 8 W R 368.**

74.—Suit to cancel zur-i-peshgi lease.

A suit to cancel a zur-i-peshgi, by which the lessee was to receive the usufruct as interest for

Bengal Acts-(Rent Act VIII of 1869 & X of 1859) S. 27-*Contd.*

his advance, and to repay the principal by the rent reserved, is of the nature of an usufructuary mortgage, and as such cannot be brought under the Rent Act. **Rutton Singh v Greedharee Lall 8 W R, 310**

Mahomed Ali v Batosh Dao Narain Singh 1 W R 52.

Notes:—Fol: 9 W R 388.

75.—Suit to get release from tenancy on ground of fraud.

Where the tenant seeks to have himself released from a contract of tenancy on the ground of fraud, the suit is not one to be brought under the Rent Act. **Bholanath Khan v Ram Chunder Sircar 7 W R 62**

76.—Suit where lease is alleged to be forged.

Nor where the lease is said to be a forgery. **Mahmood Lushkur v Pakar Khan Marsh., 496.**

77.—Suit for possession after ejectment—Suit for possession on declaration of title.

The words " suits to recover the occupancy or possession of any land" in cl 6 of s. 23, Act X of 1859, (s. 27, Bengal Act VIII of 1869), refer only to possessory action against the person entitled to receive the rent and not to suits in which the plaintiff sets out his title and seeks to have his right declared and possession given him in pursuance of that title. **Gooroodoss Roy v Ramnarain Mitter. Gooroodoss Roy v Bishtoo Churn Bhuttacharjee B L R Sup Vol 628: 2 Ind Jur N S 112= 7 W R 186.**

Seraj Mundul v Bistoo Chunder Roy 7 W R 459

Gunga Gobind Roy v Kala Chand Surma Gangooly 20 W R 455

Lalljee Sahoo v. Bhugwan Doss 8 W R, 337

Contra, **Gooroo Churn Coomar v Khetter Mohun Roy W R 1864 Act X, 79**

and in Puddolabh Deo v Obhoyram Singh W R 1864, Act X, 30

it was held that a suit to try whether the tenant had been rightly evicted was properly tried under the Rent Act.

Notes:—See 7 W R 186.

Bengal Acts-(Rent Act VIII of 1869 & X of 1859) S. 27-*Contd.*

78—S. 27—" Land " " or the like " construction of—Rent suit on lease for purposes other than agricultural or horticultural.

The word "land" as used in s. 23 cl. 4 refers only to land granted for agricultural purposes, or horticultural purposes, and not to land granted for mining purposes and for purposes of building, making roads and so forth. (19 Cal 489, Fol). The words "or the like" in the same clause must be taken *ejusdem generis* with the rights spoken of in s. 23. The right of taking coal from the land demised, and such other rights are not covered by those words. A suit for rent upon a lease for mining purposes and for purpose of building, making roads, and so forth, the land not being demised for agricultural or horticultural purposes, is not a rent suit under Act X of 1859, and a Revenue Court cannot take cognizance of such a suit. **Rooke v Bengal Coal Company Ld. 28 Cal 485= 5 C W N 840.**

79—Act X of 1859, s. 23—Possessory suits——Limitation.

Following a Full Bench decision:—B L R Sup Vol 628 ; 7 W R 186, as to the proper interpretation of Act X of 1859, s. 23, it was held that the same words in Bengal Act VIII of 1869, s. 27, described only possessory actions against persons entitled to receive rent, and not suits setting out title, and seeking to have right declared and possession given in pursuance thereof; and that consequently the limitation prescribed by s. 27 applied only to simple cases of property action. **Nistarinee v Kalee Pershad Chowdhry. 21 W R 53.**

oo Pershad v Kashee Rawut. 21 W R 121

shor Rakhit v Bashi Mundul 21 W R 251

sman Singh v Abeedoddeen 23 W R 460

mjoy Mundul v Ram Sunder Mundul 2 C L R 4

80—Act VIII (B C) of 1869, section 27—Limitation—Possessory Suits.

The defendants having obtained a durputni of certain land dispossessed the plaintiff who was then in occupation. A suit having been brought by the plaintiff more than a year after such dispossession, the defendants pleaded that the suit

Bengal Acts-(Rent Act VIII of 1869 & X of 1859) S. 27-*Contd.*

was barred by section 27 oi Act VIII (B C) of 1869.

Held, that the defendants could not under the circumstances treat the plaintiff as having been their tenant and that accordingly the section relied upon did not apply,

Quære :—Whether s. 27 of Act VIII (B C) of 1869 does not apply merely to possessory suits. See (21 W R 53). **Nilmadhub Shaha v Sri-Nibash Kurkomur. 9 C L R 137=7 Cal 442.**

Notes:—Fol: 9 Cal 423.

81—Suit for possession after ejectment.

When the dispute between the parties was whether the plaintiffs, who, by themselves and their ancestors, had long held the land in dispute, could be lawfully dispossessed by the defendant, who claimed it under a pottah recently granted by the zamindar,—Held that the matter was not one for adjudication under the Rent Act, not being a question between landlord and tenant.
Afa Khan v Kishen Moonjoree Dossee.
W R 1864, Act X, 17.
Mofuzzel Hossein v Tussooduk Ali Khan.
W R 1864, Act X 89.
Ufsuroodeen v Akbur Ali.
2 W R Act X 77.

82—Suit by purchaser against raiyats and zamindar.

A suit by the purchaser of a mokurari tenure against the raiyats and the zamindar for illegal dispossession and for establishing permanent title to the property should not be brought under the Rent Act. **Nobbo Doorga Debee v. Kistareenee Dossee. 1 W R 48**
Kanaye Mollah v Debnath Roy.
3 W R Act X 161
Oomadhur Bhut v Mahomed Luteef.
1 W R 229
Gokool Pershad v Rajendur Kishore Singh.
W R 1864 Act X 4.

83—Suit for confirmation of title and possession.

A suit for confirmation of the plaintiff's title and possession as shikmi talukhdar under the defendant is not cognizable under the Rent Act.
Brojo Soondur Mitter v Ram Chunder Roy.
2 W R Act X 40.

Bengal Acts-(Rent Act VIII of 1869 & X of 1859) S. 27-*Contd.*

84—Suit for confirmation of possession by raiyat.

Suits by raiyats for confirmation of possession in a tenure which is threatened are not cognizable under the Rent Act. **Rittoo Raj Rae v Juggeshur Rae 1 N W Part 2. p. 40: Ed 1873, 98.**

85—Suit by transferee for declaration of title as tenant.

A suit by the purchaser of a permanent transferable tenure for a declaration of his title as tenant to possession is not cognizable under the Act.
Nobeen Kishen Mookerjee v Shib Pershad Pattuck. 8 W R 96.

Notes:—Doubt : 3 C L R 210. Appl: 8 W R 337. Con: 4 Cal 438. Ref: 12 Cal 24.

86—Suit where purchaser is opposed—Suit against zamindar by purchaser of transferable tenure.

A case where the zamindar opposes the entry of the purchaser of a transferable raiyat's tenure would come under the Rent Act.
Degumburee Debea v Shamasoonduree Debea. W R 1864, Act X 81.

87—Suit for land—Suit for declaration of right to share in produce of trees—Act X of 1859 s. 23, cl 6.

A suit for the declaration of the right of the plaintiff to a share in the produce of certain trees on the allegation that those trees were planted by a person whose rights had passed to the plaintiff by a bill of sale, is not cognizable under the Rent Act. **Ramzan Ali v Anwar Ali. 2 B L R Ap 19: 11 W R 52.**

88—Suit to establish right to use and cut trees.

Held, that a suit by a cultivator to establish his right to cut and make use of the trees situate on the borders of his holding was not a suit of the nature triable under the Rent Act.
Puchooa v Mahomed Tala Assud-oollah. 2 Agra 217.

89—Suit for maintaining possession.

There must have been ejection, therefore a suit for maintenance of possession in the holding

Bengal Acts-(Rent Act VIII of 1869 & X of 1859) S. 27-*Contd.*

from which the plaintiff was not actually ejected does not come within the Act. **Dowlat Rai v Gya Misser,** **2 Agra 95.**

90—Suit by holder of lease who has never been in possession.

Nor does a case where a plaintiff sued to recover possession of land of which he had never been in possession, but which he claimed under a pottah alleged to be valid on the allegation that he had been illegally ejected. **Jodoo Nath Ghose v Sookhmoye Dossee.** **1 W R 201**

Notes:—Fol. 2 Agra 181.

91—Suit by purchaser who has never obtained possession.

So with a purchaser of an under-tenure who has never obtained any real substantive possession. **Anund Nath Roy v Junmejoy Biswas.** **8 W R 240**

Notes:—Ap: 13 W R F B 21.

92—Ejectment of cultivator—Dispossession of former.

The disturbing or dispossessing the cultivators is tantamount to ejecting and disturbing, in the receipt of rent, the farmer to whom they pay rent. for which a suit will lie under the Rent Act. **Lungut Mahtoon v Rameshur Roy.** **W R 1864, Act X 54**

93—Mode of dispossession.

It matters not how the ejectment is brought about whether under colour of award of a Criminal Court or otherwise ; so long as it is between landlord and tenant, the suit to recover the possession can be brought under the Rent Act.

Muthooranath Koond v Sameeruddee Mollah. **1 W R 42.**

Umrit Lall Banerjee v Bhoobun Mohinee Dossee. **7 W R 24.**

94—Dispossession irregularly made—Act X of 1859, s. 23, cl. 6.

Where a zamindar pursues his right to eject in a manner which is not legal. possession will be restored, although, if the zamindar had proceeded legally, he could have ejected his raiyat ; such cases are contemplated by s. 23, cl. 6, of Act X of 1859, and Bengal Act VIII of 1859, s. 27. **Gunga Gobind Roy v Kala Chand Surma Gangooly.** **20 W R 455.**

Bengal Acts-(Rent Act VIII of 1869 & X of 1859) S. 27-*Contd.*

95—Suit to set aside illegal ejectment-Cause of action.—

Where a tenant was restored to his holding by a decree to set aside the auction sale of his right.—*Held*, that the cause of action for the tenant to sue under cl. 6, s. 23, Act X of 1859, arose on the zamindar's refusal to admit him into possession of his holding; and a suit brought within one year from the date of such refusal, which was practically an illegal ejectment by the zamindar, would not be barred under s. 30 of that enactment. **Luchmun Singh v. Mahomed Hossein,** **1 Agra, Rev 42.**

96—Suit by tenant—Suit by shikmi talukhdar for possession.—

A shikmi talukhdar may sue under the Rent Act to recover possession.

Raj Chunder Surma Gossain v. Ali Newaz Khan, **W R, 1864, Act X 133.**

Provided he sue the zamindar, and not only in respect to a portion of his tenure. **Hur Pershad v. Mata Buksh.** **3 Agra 225.**

97—Suit by lakhirajdar.—

A suit by a lakhirajdar does not come within the Act. **Gooroo Pershad Roy v. Nimaye Chand Pulshani,** **3 W R, Act X 5.**

98—Suit by patnidar.—

A suit by a patnidar against the zamindar may be brought under it.

Thakoor Doss Mozoomdar v. Radha Soondery Dossee, **2 W R, Act X 3.**

99—Suit by dar-maurasidar.—

Where a zamindar sold a maurasi tenure for arrears of rent, and purchased it himself, and then evicted the dar maurasidar,and made a fresh settlement for the tenure with a third party.—*Held*, that a suit for ejectment by the dar-maurasidar against the zamindar was cognizable under the Rent Act. **Wooma Sunkory v. Ally Ashruff,** **W R, 1864, Act X 96.**

100—Suit by tenant with right of occupancy.—

So is a suit to recover possession by a tenant with a right of occupancy, illegally ejected by the zamindar, with or without the assistance of the Collector. **Ram Bhujun Bhukut v. Ketaye Ram Chowdhry,** **6 W R, Act X 21.**

Taranath Bhuttacharjee v. Obhoy Churn Haldar, **7 W R, 471.**

Bengal Acts-(Rent Act VIII of 1869 &.X of 1859) S. 27-*Contd.*

Notes:—Diss: 12 W R 284.

101—Suit by tenant with right of occupancy.–

Where plaintiffs alleged themselves to be tenants with rights of occupancy. and as such not liable to ejectment by defendant, the owner of the land, under a religious grant as alleged by them (plaintiffs).—*Held*, that the suit was exclusively cognizable by the Revenue Court, under cl. 6, s. 23, Act X of 1859. **Sewak Ram v. Ram Bhawan Ojha, 1 Agra 212.**

102—Suit to recover possession as heir of occupancy raiyat.—

Where the plaintiff sues on the ground that having been in possession of, and cultivated, land of an occupancy raiyat during her lifetime. he is entitled to succeed to possession at her death, he might sue under the Rent Act, but when, never having been in possession, he claims as heir by Hindu law to succeed to the occupancy right, he should not. **Pem Kooer v. Upper Balee Singh, 2 N W 86.**

103—Suit by zamindar to establish his right against maafeedar and for possession—Act X of 1859, s 23, cl. 6.

Held, that the Rent Act, which refers to suits to recover occupancy in any land, farm, or tenure from which a raiyat, farmer, or tenant has been illegally ejected by a person entitled to receive the rent, does not apply to a suit brought by a zamindar against a maafeedar to establish his right as such, and to recover possession and malikana allowance secured to him at the time of settlement. **Radha Moonee v. Kishna, 2 Agra, Pt II 188.**

104—Bengal Tenancy Act (1869), Ss. 22, 27–Ejectment—Limitation.—

An occupancy raiyat, who is ejected in contravention to the proviso of s. 22 of the Act, has his remedy in a suit for illegal ejectment, within one year from the date of ejectment under S. 27. **Golabolee v. Kootosboollah Sircar, 4 Cal 527.**

105—Suit to recover possession after ejectment.—

Where a raiyat, having a mere right of occupancy in certain land, has been wrongfully dispossessed by the zamindar, his suit to recover possession must be brought, under s. 27 of Bengal Act VIII of 1869. within one year from the date of dispossession. **Brindabun Chunder Sirkar v. Dhununjoy Nushkur, 5 Cal 246; 4 C L R 442.**

Bengal Acts (Rent Act VIII of 1869 & X of 1859) S. 27-*Contd.*

Notes.—Ref: 7 C L R 103.

106—Possession under zur-i-peshgi mortgage —Landlord and tenant—Limitation.—

Where the plaintiff claimed a right to enjoy possession of certain land for a term of years on the footing of a mortgage transaction (zur-i-peshgi), it having been a part of his contract with the mortgagor-defendants that he should repay himself the money advanced by taking the rent reserved on the zur-i-peshgi lease during its pendency.—*Held*, that the relation between the parties was different from that of landlord and tenant contemplated in Bengal Act VIII of 1869, s. 27, and that the suit could not be governed by the limitation prescribed in that law. **Pariag Dutt Roy v Fekoo Roy, 19 W R 160.**

Notes:—Fol: 19 W R 431.

107—Ejectment by a suit against person entitled to rent.—

The only suits for recovery of possession that are cognizable under the Rent Act are suits by a tenant who has been illegally ejected by the person entitled to receive the rent of the land or tenure. **Raj Coomar Singh v. Rajbunsee Kooer, W R, 1864, Act X 108.**

Luckee Preea Dabea v. Juggodumba Dabea, 3 W R, Act X 8.

Hosseinee Khanum v. Rubia Khanum, 5 W R, Act X 14.

Debrani Dossi v. Shital Kareegur. Nilumber Sen v. Haranund Sooree, W R, 1864, Act X 10.

Gobind Moni v. Rajendro Kishore Chowdhry, 15 W R 18.

108-Suit against ijaradar-Act X of 1859,s.30.–

A suit on the ground of illegal ejectment can be brought where the defendant is the ijaradar entitled to the rents.—A case under s. 27, Bengal Act VIII of 1869, where it was held that "person entitled to receive the rent" means "all the persons" if there are more than one; and when the suit was brought against one ijaradar only out of

Bengal Acts-(Rent Act VIII of 1869 & X of 1859) S. 27-*Contd.*

several, it was held that the section would not apply. **Gobind Monee v. Rajendro Kishore Chowdhry,** 15 W R 18.

See Brojo Mohun De Sircar v. Dengu, 7 C L R 141.

109—Ejectment not directly by landlord.—

To bring a case of ejectment within the Rent Act, there must have been some direct act on the part of the person entitled to receive the rent towards ejecting the tenants, either personally or by his servants, or by joining with those who actually ejected them. **Joykissen Mookerjee v Mudoosoodun Kulliah, W R,1864,Act X 90.**

Wise v Huro Chunder Shaha, 6 W R, Act X 90.

Amjad Ali Khan v Gholam Hyder Khan, 1 W R 313.

Modhoosoodun Chuckerbutty v. Nufur Bawal, 1 W R 196.

110—Landlord and tenant—Limitation.—

Where a landlord does not himself directly take steps to interfere with the rights of cultivation of his tenants, but does so through other persons, whose acts he may if it so pleases him, afterwards ignore, he is not in a position to set up a special plea of limitation under the Rent Law (Bengal Act VIII of 1869, s. 27).

Kallida Pershad Dutt v. Ram Hari Chuckerbutty, 5 Cal 317.

111—Ejectment not by zamindar.—

A suit by plaintiff complaining of having been ejected by the defendants, who were not the zamindars of the land in dispute, or the persons entitled to collect rent from the plaintiff, cannot be entertained under the Rent Act. The mere allegation of the defendants that they were the zamindars, unless admitted to be true by the plaintiff, will not give jurisdiction under that Act.

Kishun Mohun Singh v. Toolsee Singh, 2 N W 102.

Ram Dehul Pandey v. Kashee Rawut, 14 W R 232.

Hurish Chunder Roy v Shonashee Dalal, 14 W R 466.

112—Suit by raiyat for possession against transferees of zamindari.—

The ownership of a zamindari having changed hands under a decree, a raiyat with a right of occupancy brought a suit on the ground of illegal dispossession by the new zamindars. *Held*, that the suit was maintainable under the Rent Act.

Sheo Prokash Misser v. Fukeer Roy. 13 W R 20.

113.—Suit after ejectment by purchaser from Government.—

The Government purchased the zamindari rights in a pergunnah, under Regulation XXI of 1822, at a sale for arrears of Government revenue and re-settled one of the talukhs in the pergunna which talukh, had been created subsequently to the Decennial Settlement, with the plaintiffs as talukhdars. Subsequently, and after the expiration of the terms for which they had re settled with the plaintiffs, the Government sold their zamindari rights to the defendant, who ejected the plaintiffs. In a suit by the plaintiffs for possession,—*Held* that it was properly brought under the Rent Act. **Assanoollah v Obhoy Churn Roy** 13 W R, P C, 24; 13 Moore's I A, 317.

114.—Suit against other than person entitled to rent.—

If a tenant in a suit to recover possession of land from which he has been ejected finds it necessary to implead a person other than the person entitled to receive the rent of the land, he should not bring his suit under the Rent Act.

Rittoo Raj Rae v Juggeshur Rae 1 N W Pt II, p 40, Ed 1873 98.

Nuffer Mytee v Mononhur Sirdar 13 W R 334.

Amirta v Nund Kishore 2 Agra 333.

Busheerooddeen v Dal Chund 3 Agra 236,

As for instance, a person alleged to be in collusion with the zamindar to eject. **Sowantee v Sewa Ram** 2 N W 35.

Mugnee Roy v Lall Khoonee Lal 6 W R Act X 19.

Madhub Chunder Dey v Ram Dyal Guho 8 W R 303.

Mahomed Jakee v Goppee Roy 10 W R 5.

Sreekant Roy Chowdhry v Kitabooddeen Sirdar 10 W R 49.

115.—Suit by shikmi raiyat against tenants.

A Suit by a shikmi cultivator, or under-tenant to recover possession of land from which he

Bengal Acts (Rent Act VIII of 1869 & X of 1859) S. 27-*Contd.*

has been illegally ejected by the defendants,themselves only tenants, and not zamindars, is cognizable under the Act **Jey Singh v Moorlee 2 N W 98, Agra, F B Ed 1874, 194.**

Notes:—Fol: 3 N W P 48

116—S 27-Suit for possession of land assigned as security for a loan—Act X of 1859 s 23 cl 6 and s 25.

Neither cl 6, s 23, nor s 25 of the Rent Act, applies to a suit for recovery of possession on expiry of assignment of land assigned over for a term of years as security for a loan and as the means for its repayment. **Khettur Mohun Paul v Ram Coomar Paul 5 W R Act X 2.**

117—S 27-Suit against person entitled to rent for wrongful ejectment—Act X of 1859, s 23 cl 6.

A, after the grant of a patni talukh to B, fraudulently, granted a pottah of the same land to his own daughter, and by means thereof she intervened in a suit by B against a raiyat for rent,and prevented B from recovering in the suit. *Held* that this was evidence to support a suit by B against A under Act X of 1859, s 23 cl 6, for illegally ejecting him from the tenure, and the pottah being a mere device. Notwithstanding the daughter was joined as a defendant in the suit, the suit could be entertained under the Rent Act.

Huree Dyal Chukee v Birjessuree Dossee Marsh 604.

Notes:—Ex: 6 W R Act X 19.

118.—S.27-Question of title—Ejectment-Limitation.—

S 27 of Bengal Act VIII of 1869 applies only to such suits for possession as the Court is asked to decide irrespectively of any title, but simply on the ground that the plaintiffs have been ousted otherwise than by legal means. **Forbes v Sree Lal Jha 8 Cal 365.**

Notes.—*Ref*: 17 Cal 926.

119—S 27-Suit for possession-Title-Limitation.

The limitation provisions of s 27, Bengal Act VIII of 1869, have no application to a case in which the plaintiff relies upon his title and seeks to recover possession upon the strength of that title and in which the defendant denies that title. B L R Sup Vol 628: 7 W R 186, 21 W R 53 and 7 Calc 442 referred to. **Joyunti Dasi v Mahomed Ally Khan 9 Calc 423.**

II C C. 19

Bengal Acts-(Rent Act VIII of 1869 & X of 1859) S. 27-*Contd.*

Notes:—Ref 17 Cal 926; 8 C W N 446; 31 Cal 647 F B.

120—S 27-Landlord and tenant-Dispossession by landlord-Suit for possession-Claim or declaration of Title.

The plaintiff having been dispossed by his landlord sued to recover possession. *Held*, that the insertion in the plaint of a claim for declaration of the plaintiff's title is not sufficient to prevent the application of the limitation prescribed by s 27 of the Bengal Act VIII of 1869. 25 W R 217, distinguished **Imam Buksh Mundul v Momin Mundul 9 Calc 280.**

Notes:—Fol: 12 Cal 606; Ref 17 Cal 926.

121.—S.27—Suit for possession on declaration of title—Limitation.

Where a suit was brought to recover possession of land of which plaintiff alleged that he was dispossessed by the zamindar in Jeyt 1281 and the zamindar rejoined that plaintiff had relinquished the greater portion of the land in suit in Bysack 1280, and was now barred by limitation. *Held* that, as this was a suit to recover possession by establishment of title, plaintiff was at liberty to bring it within twelve years, and was not barred by the lapse of one year. An objection of limitation is not most suitably sustained by evidence of relinquishment from a period the lapse of time from which exceeds the period of limitation. **Dhurjobutty Chowdrain v Chamroo Mundul 25 W R 217.**

Notes:—Dist: 9 Cal 280. Ref: 17 Cal 926.

122.—Bengal Rent Act VIII (1869) s. 27-Suit for possession and mesne profits—Defendants—Title.

A plaintiff brought a suit for possession of certain lands " by establishing his howla right " and for mesne profits, against a former talookdar, a shareholder of the talook in which the lands are situated and certain ryots who paid rent to the first defendant. *Held* that it is not a suit to recover the occupancy of the land from which the plaintiff has been illegally ejected by the person entitled to receive the rent within the meaning of s 27 of the Act and is not governed by the limitation provided by that section. **Ashanoollah v Ramdhone Bhuttacharjee 1 Calc 325**

Bengal Acts-(Rent Act VIII of 1869 & X of 1859) S. 27 *Contd.*

123—S.27-Question of title—Limitation.

In a suit to recover possession of certain land as the ancestral maurasi mokurari jote of the plaintiffs from which they had been dispossessed by the defendant, the latter denied the dispossession and alleged that the plaintiffs had themselves relinquished the land in question. It was found, although the alleged title was not proved that the plaintiffs had established an occupancy right, but had been dispossessed by the defendant. On appeal it was contended that the suit was barred under s. 27 of Bengal Act VIII of 1869 as not having been brought within one year from the date of the dispossession. *Held*, that the suit involved a question of the title, and that the limitation of a year prescribed by s 27 of the Rent Act therefore did not appply. **Tamizuddin Munshi v Huro Nath Pal** 9 C L R 253.

124.—S 27-Suit for possession—Question of title-Limitation.

Where the plaintiff alleged that he was the holder of a jote under the defendant by whom he had been forcibly dispossessed, and sued for declaration of his title and for restoration to possession; and the defendant did not question the plaintiff's tenure, nor his original title, but denied the forcible dispossession, and alleged that the plaintiff had relinquished the land,—*Held* that the suit was not one to try a question of title, but was governed by the one year's period of limitation prescribed by s.27, Bengal Act VIII of 1869. B L R Sup Vol., 1020: 9 W R 513, & 9 Cal 280, approved. **Srinath Bhattacharji v Ram Ratan De.** 12 Cal 606

Notes:—Dist: 14 Cal 624. Ref: 17 Cal 946.

125—S. 27-Limitation—Suit for possession—Question of title.

Where the plaintiff alleged that he was the holder of a jote under the defendant by whom he had been forcibly dispossessed, and sued for a declaration of his title and for recovery of possession claiming a right of occupancy, and the defendant, while admitting that the plaintiff had for one or two years been a tenant of a small portion of the land in suit, denied his title to the remainder, or that he had acquired a right of occupancy:—*Held* that the suit was one to try a *bona fide* question of title, and that it was not barred by one year's limitation under s. 27 of Bengal Act VIII of 1869, but was maintainable within 12 years from the date of the cause of action. 12 Cal 606, distinguished.

Basarut Ali v Altaf Hossain. 14 Cal. 624.

Notes:—Ref: 17 Cal 926; 8 C W N 446; 31 Cal 647 F B.

126,—Ss. 27,105, 108——Distinction between sales under S. 105 and 108.

S. 105 contemplates a decree for the entire rent due in respect of an under-tenure; and the consequence is, that what is brought to sale in execution under it is the tenure. While s. 108 contemplates a decree for money due on account of a share of rent by a share in a joint undivided estate, and what is sold is the right, title and interest of the judgment debtor in the under-tenure.

The purchaser in the latter case is entitled to sue in respect of trespass on the undertenure although his name has not been registered in the manner contemplated by S. 27.

The plaintiff purchased an under-tenure at a sale in execution of a money-decree against the holder of the under-tenure. Subsequently the under-tenure was again put up to sale in execution of a decree against the same defendant obtained by some of his landlords for their share of the rent, and the defendant No. 3 purchased at this sale. The plaintiff sued for recovery of possession.

Held, that the defendant No. 3 took nothing as against the plaintiff inasmuch as the decree was not a decree for rent, but a decree for money, and what was purchased was the right, title and interest of the holder of the under tenure which had been previously purchased by the plaintiff. 12 Cal 24; 13 B L R 146; 20 W R 380; 24 W R 407 (Note), Ref. **Niladari Mahanti v Bichitranand Roy.** 6 Ind Cas 605= 14 C W N 905=12 C L J 158= 37 Cal 823.

127.—Ss. 27 and 108.

There is a distinct provision in S. 27 of Act X of 1859 that the transferee of a transferable tenure shall have his name registered as tenant in the landlord's *Sherista*; and if he fails to comply

Bengal Acts (Rent Act VIII of 1869 & X of 1859) S. 27-*Contd.*

with the provision of the law, he or a person claiming through him cannot be allowed, in a subsequent suit, to contest the title of a *bona fide* purchaser for value of the same tenure, sold under S. 108 of the Act.

What passes at a sale under S. 108 of the Act is the tenure itself, and not merely the right, title and interest of the judgment-debtor in the tenure. (5 C L J 88; 27 Cal 789; 21 W R 94 Fol; 4 C L J 68; 12 Cal 24; 13 C W N 270; 15 W R 6; 17 W R 352 Dist.).

Niladri Mohanti v Bichitranund Roy, 1 Ind Cas 257.

128.—S. 27—Wrongful distraint—Suit for damages—Act X of 1859, s. 143.

A suit for recovery of damages, by reason of wrongful distraint, is cognizable under s. 143 of the Rent Act, X of 1859, s. 99 (Bengal Act VIII of 1869). **Ram Chandra Chowdry v Subal Patro. 3 B L R, Ap. 74: 11 W R, 539. Shumbhoonath Banerjee v Tarinee Churn Bose. 6 W R. Act X, 33.**

129.—S. 27—Wrongful distraint—Act X of 1859, ss. 139, 143, and 323.

A distrained the paddy of *B*, alleging that it belonged to *C*, who was *A*'s raiyat. It was found that there was no relation of landlord and tenant between *A* and *B*, and that *C* was acting in collusion with A. *B* attempted, under s. 139 Act X of 1859, to get possession of the distraint paddy from *D* and *E*, to whose custody it had been made over under s. 118 of Act X of 1859, but was unsuccessful. In a suit by *B* against *A*, *C*, *D*, and *E* for damages,—*Held* that the suit was one falling either under s. 139 or s. 143 of Act X of 1859, and came under s. 23 of that Act, and was cognizable under the Rent Act. All suits which are specially provided for by Act X of 1859, and which arise out of the exercise of the power of distraint, or out of any acts done under colour of the exercise of the said power, are within the provisions of s. 23 of that Act. **Joy Lall Sheikh v Brojonath Paul Chowdhry. 9 W R 162.**

Notes.—Ref: 8 Cal 238.

130.—S. 27—Wrongful distraint—Suit for damages by under-tenant.

A suit for damages for an illegal distraint upon an under-tenant who has paid his rent, for rent due from his lessor to the superior landlord, lies under the Rent Act. **Gholam Ally v Nundaya. Marsh, 264: 2 Hay, 108.**

131.—S. 27-Wrongful distraint—Suit to set aside collusive decree for rent—Question of title.

A suit by *A* to set aside an alleged collusive decree for rent obtained by *B* against *C*, under which decree *A* was ejected from his lands and his crops seized, is distinguishable from a case of illegal distraint by a landlord. Such a suit raises a question of title; and should not be brought under the Rent Act. **Goopenath Dutt v Preonath Sircar. 6 W R, Act X, 7.**

132.—S. 27—Wrongful distraint—Suit for property illegally distrained.

A suit by a raiyat for the recovery of the value of his property illegally distrained as the property of another raiyat is one which should be brought under the Rent Act. **Ram Bhisto Acharjee v Cheyt Lall Tewary. 15 W R, 451**

133.—S. 27—Wrongful distraint—Illegal distraint of crops—Suit for damages.

Certain sub-lessees sued the zemindar and others employed by him for the value of crops seized and carried away under a certificate as was alleged by the defendants, granted to them by the Collector, but which they failed to produce. *Held* the suit was properly brought under the Rent Act. **Radha Mohan Naskar v Jadu Nath Das. 3 B L R. A C, 261: 12 W R 68.**

134.—S. 27—Wrongful distraint—Misappropriation of distrained crops.

The Rent Act makes no provision for a case where, before the sale of the distrained property because the defaulter paid the debt demanded by the landlord, the crops distrained and alleged by the plaintiff to be his were made over to the raiyat, who, the plaintiff stated, had misappropriated them. In such a case a suit for damages cannot be brought under that Act. **Gureeboollah v Syefoollah. 7 W R. 41.**

135.—S. 28 (Act X of 1859, s. 31)—Suit to determine rate of rent—Offer to give pottah—Conditional offer.

Bengal Acts-(Rent Act VIII of 1869 & X of 1859) S. 28-*Concld*

A suit under s. 28, Bengal Act VIII of 1869, asking the Court to determine the rate of rent which plaintiff is entitled to receive, and offering to execute a pottah at that rate, must be accompanied by an unconditional offer by the plaintiff to execute a pottah at the rate directed by the Court. The omission of such an offer is fatal to the claim, and plaintiff has no right to make it a condition to the execution of such a pottah that all previous arrears should be paid at the rates to be so fixed. **Relly v Judoo Nath Ghuttuck. 25 W R,175.**

136.—S. 28-Suit by co-parcener to assess sir land—Act X of 1859, s. 23, cl. 1.

Held that a suit by plaintiff, a co-parcener in the land in question, against another co-parcener holding as his sir land, to assess the same, was not one cognizable under the Rent Act.

Jodha Singh v Omaid Singh. 2 Agra, Rev, 5.

137.—S. 28—Resumption, effect of—Creditor of tenancy.

In a suit in a Civil Court a decree was obtained in 1863, declaring the land of the defendant " to be resumed and subject to assessment of revenue, the amount to be fixed by the Collector, "—*Held* that the decree was conclusive, that the lands were not considered mal at the time of the settlement in 1790; and, further, that their resumption in 1863 did not create a tenancy, and that therefore s. 28 of Act VIII of 1869 did not apply. **Forbes v Bhujloo Roy. 6 C L R 301.**

138.—S. 29—Suit for rent.

The limitation in a suit for arrears of rent brought under the Rent Act, X of 1859, was that provided by s. 32 of that Act, and not that provided by Act XIV of 1859. **Unnoda Persaud Mookeriee v Kristo Coomar Moitro. 15 B L R, P C, 60 note; 19 W R 5. Poulson v Modhusudan Pal Chowdhry. B L R Sup Vol 101: 2 W R Act X 21.**

Notes:—See 19 W R 5.

139.—Special period of limitation.

The period of limitation specified in Act X of 1859 has reference exclusively to suits brought under that Act. **Prosonno Coomar Pal Chowdhry v Muddun Mohun Pal Chowdhry 11 B L R Ap., 31 note: 13 W R 390.**

Bengal Acts-(Rent Act VIII of 1869 & X of 1859) S. 29-*Concld*

Surbessur Dey v Mahomed Sircar. 7 W R 243.

Notee.—See 13 W *R* 390.

140.—S. 29-Computation of time according to English calendar.

Held, in accordance with former decisions of the High Court, that, for the purpose of computing the period of limitation prescribed by s 29 of Bengal Act VIII of 1869, the calculation is to be made according to the English calendar.

Mahomed Elahee Buksh v Brojokishore Sen. 4 Cal 497: 3 C L R 398.

And "month" means a calendar month.

Luchmeeput Singh Bahadoor v Rajcoomaree Dabea. 23 W R 275.

Kashee Pershad Sen Neogee v Jamir Paikar. 2 C L R 265.

Saroda Pershad Ganguli v Patiali Mahanti. 10 Cal 913.

Notes.—Fol: 10 Cal 913. Ref. 27 Mad 424; 14 M L J 69; 11 Bom L R 926.

141.— S. 29-Act X of 1859, s. 32—Construction of "after passing of the Act."

The words in Act X of 1859, s. 32, limiting suits for arrears of rent due at the passing of the Act to a period of "three years after the passing of the Act" refer to the date when the Act passed, and not to the subsequent date fixed for its coming into operation. **Peary Mohun Doss v Mc Arthur. Marsh 637.**

Moran v Bindubasinee Debia. W R 1864, Act X, 5.

Watson v Rutnokant Roy. W R, 1864, Act X 19.

142.—S. 29-Act X of 1859, s. 32—Suit brought for—Period preceding Act.

When a suit was brought within three years from the passing of Act X of 1859, for arrears of rent of 1266 to 1269, and three months of 1269—*Held* that the suit was not barred by limitation under s. 42 and that the claim for the arrears of 1266 which were not due till 1267, was in time though that was a period preceding the passing of the Act. **Mashishuree Dossee v. Ram Sagur Singh. W R 1864, Act X, 69.**

143—S. 29-Act X of 1859 s. 32 and s. 30—suit for arrears of rent after enhancement.

Bengal Acts-(Rent Act VIII of 1869 & X of 1859) S. 29-*Contd.*

A landlord having obtained a decree for enhancement against his tenant sued him for arrears of rent. *Held*, (with reference to ss. 30 and 32 of Act X of 1859) that the suit might be brought within one year from the date of the final decree fixing the rent in the suit for enhancement or within three years from the end of the month of Jeyt of the Fusli or Villayati year for which such rent was claimed. **Joymonee Dasee v. Hurronath Roy.** **2 W R, Act X, 51.**

See Hurronath Roy v. Gooroo Doss Biswas **3 W R, Act X, 19.**

Notes—Fol. 2 W R Act X 82. Ref. 3 W R Act X 19; 6 W R Act X 77.

144.—S. 29=Act X of 1859 s. 32—Suit for arrears of rent—Cause of action.

An arrear of rent is not due within the meaning of s, 32 Act X of 1859, until the rent itself has been determined. **Comul Lochun Roy v. Moran 2 W R Act X 82.**

145—S. 29=Act X of 1859, s 32—Suit for arrears of rent.

Act X of 1859 does not authorize the recovery of only three years' rent. Thus, where a suit was commenced within three years from the end of the Bengal year 1268, the plaintiff was held entitled to recover the whole of that year's rent. **Doorga Doss Chattrjee v. Nobin Mohun Ghosal** **6 W R Act X 63**

146—S. 29=Act X of 1859, s. 32—Suit for arrears of rent.

S. 32 Act X of 1859 does not authorize the recovery of only three years' rent, but requires suits for the recovery of rents to be instituted within three years from the end of the Bengali or Fusli year as the case may be. **Gossain Umur Narain Pooree v Arurut Lall** *alias* **Baboo** **Jan. 7 W R, 301.**

147—S. 29=Act X of 1859 s. 32—Suit for arrears of rent.

Under s. 32 Act X of 1859 the rent of any portion of one year (1273) is recoverable at any time up to the last day of the third year (1276) after its close. **Bykunt Roy v. Shurfoonissa Begum 15 W R 523.**

148—S 29=Award of damages in former suit —Cause of action.

Where rents are not sued for within three years from the end of the year for which they are alleged to be due the fact that damages were awarded against the plaintiff in a former suit for that year will not create a cause of action.

Huro Pershad Roy Chowdry v. Wooma Tara Debee **15 W R 194.**

149-S 29—Suit to contest enhancement of rent.

Where a raiyat's suit contesting a notice of enhancement was dismissed, and the dismissal confirmed in special appeal in the month of May the landlord's suit brought in December of the same year for rent at an enhanced rate according to notice, was held to be barred by s. 32 Act X of 1859. **Huree Kishore Ghose v. Komodinee Kant Banerjee. 10 W R 41=1 B L R F B 93.**

Notes:—Dist: 11 W R Cr 17. Ref. 12 W R 215; 213, 3 C L J 144.

150.—S. 29—Suit for arrears of rent.

The words of s. 29 Bengal Act VIII of 1859 are intended to apply specially and exclusively of Act XIV of 1859 to the same class of cases as those to which s. 32 Act X of 1859 applied though that class cannot now be defined, as it formerly could by reference to the jurisdiction of the Court in which the cases fall to be entertained. The class is limited to suits for arrears of rent simply as 'arrears of rent" are defined in s.21 Bengal Act VIII of 1869. **Gobind Coomar Chowdhry v Manson** **15 B L R 56; 23 W R, 152.**

151—S.29—Suit for arrears at enhanced rates-Limitation.

The intention of s. 29 of Bengal Act VIII of 1869 is that a suit for arrears at enhanced rates should not be deferred beyond the third month after the year for which enhancement is claimed. **Glasscott v. Rajchunder Moochy Mundul.** **25 W R 381.**

152.—S. 29—Suit for compensation for land.

A suit to make the defendant liable for compensation in the shape of rent for the land which he held in the name of his servant is not a suit for rent to which s. 29 of Bengal Act VIII of 1869 applies. **Kishenbutty Misrain v. Roberts** **16 W R 287.**

153—S. 29-Suit for arrears of rent—Act XIV of 1859, s. 1 cl.16—Pro forma defendants—Limitation.

Bengal Acts-(Rent Act VIII of 1869 & X of 1859) S. 29-*Cont'd.*

The plaintiffs sued the defendants who were jardars of the property in which they were co shareers for arrears of rent extending over a period of six years. The suit was first brought in the Revenue Court as their co shares had not joined in the suit, the plaintiffs made them defendants and their being defendants preventing the plaintiffs from continuing the suit in the Revenue Court they instituted it afresh in the Civil Court after Bengal Act VIII of 1869 came into operation The defendants objected that under the limitation provided by s 29 of that Act no more than three years rent could be recovered but the Judge held affirming the decision of the Munsif, that the case was governed by clause 8, Act VIII of 1869 and that six years rent could be decreed *Held*, on special appeal to the High Court that the fact of the co shareers having made *pro forma* defendants did not alter the character of the suit which was to recover arrears of rent, and that, therefore the provisions of s 29, Act VIII of 1869 were applicable and a decree for three years rent only was given

Gunga Gobind Sen v Gobind Chunder Dass 11 B L R Ap 31 19 W R 347

154—S 29—Act VIII (B C) of 1869 S 2—Limitation, Computation of period of—Arrears of rent, suit for

In suits brought to recover arrears of rent the period of limitation of three years provided by section 29 of Act VIII (B C) of 1869 is to be calculated from the last day of the Bengal year following that for which the arrears claimed are alleged to be due 1 Cal 791 **Woomesh Chunder Bose v Surjee Kantoo Roy Chowdhry 5 Cal 713 6 C L R 49**

Notes: Over C Cal 325 F B

155—S 29—Act VIII (B C) of 1869, s 29—Limitation, Computation of period of—Arrears of rent, suit for

The last day on which a suit for recovery of arrears of rent, payable at the close of the year to which it relates, can be instituted under sec 29 of Act VIII (B C) of 1869, is the last day of the third year from the close of the year in which the rent became payable 5 Cal 713, 6 C L R 49 overruled. **Kasikant Bhuttacharji v Rohinikant Bhuttacharji. 6 Cal 325; 7 C L R 342**

Notes:—Ref: 7 C L J 106.

Bengal Act (Rent Act VIII of 1869 & X of 1859) S. 29 *Cont'd.*

156—S 29—Suit for arrears of rent—Suit against registered tenant

A suit brought in 1884 for arrears of rent for the years 1281 83 against a lessee as the widow and heir of the former jardar who died in 1281 B S that she was not the representative of her husband as in 1276 she had adopted a son who up to 1288 more than three years from the time the rent of 1281 became due, was made a defendant It appeared that in the time between husband's death she had allowed her own name to remain on the sherista of the plaintiffs and that the plaintiff had no notice of the adoption *Held* reversing the decree of the Lower Appellate Court, that the claim for the rent for the year 1281 was not barred and the tenure but that no decree could be against the son in respect of Dar **Dwarkanath Mitter v Nobongo 7 C L R 233**

157—S 29 Suit for arrears of a former case for the amount claimed against defendants for rent Suit for arrears of rent decreed upon a liability arising out of matters in the course of a Revenue Court, not barred by special limitation prescribed by s 31 Act X of 1859, but by the ordinary law of limitation Act XIV of 1859,—*Held* that the amount claimed present claim of a precisely similar nature against the same parties in respect of the year 1272 was not barred by the special limitation prescribed by s 29 Bengal Act VIII of 1869 corresponding to s 31 Act X of 1859

Prosunno Coomar Pal Chowdhry v Ramdhun Chatterjee 18 W R 8.

158—S 29 Suit for arrears of rent Limitation

Certain suits brought in the Collector's Court for rent of 1270 and subsequent years, having been dismissed in consequence of the defendant's plea that the whole of the estate had been resumed, and that there was no distinct land for which plaintiff was entitled to any separate rent, plaintiff was obliged to bring a civil suit to establish his right to recover those rents. Having obtained a decree, he brought a suit for arrears of rent from 1271 to 1279, but obtained a decree for the rents of three years only, the cause of action for the years previous to 1277 having been considered to be barred. *Held* that this

Bengal Acts-(Rent Act VIII of 1869 & X of 1859) S 29-*Cont'd*

decision was right as there was nothing to prevent the plaintiff from including in the civil suit which he brought or any previous suit a claim for rent as well as for declaration of right

Buroda Kant Roy v Chunder Coomar Roy
24 W R 381

159 S 29=Act X of 1859 s 32—suit for recovery of rent in cash and kind with declaration of plaintiff's right

A suit to recover rent in cash and kind which comprehended a claim to have a portion in kind of the rent declared as the property of the plaintiff was held to be one which a Collector acting under Act X of 1859 would have power to entertain and therefore to be governed by the limitation prescribed by section XII Act XIV of 1869 s 29 but by the ordinary law of limitation

Heera Singh v Mahar Allur Ali
2 W R 5

160—S 29=Act X of 1859, s 32—Period of limitation of suit for enhancement—Limitation

The three years limitation provided by s 32 Act X of 1859 is a general term and does not admit of any exceptions over the period for a suit for enhancement for 1267 which is within limitation in respect to the rent for 1266

Nobokanth Dey v Boro Jakanth Roy
1 W R 100

Dakhina Dabea v Romesh Chunder Dutt
1 W R 142

Notes—Ind 7 B L R App x 26

161—S 29 Grant of perwannah Contingency

When a person lets land under a kabuliyat and subsequently grants a perwannah undertaking not to ask for rent till a certain contingency occurs the perwannah will not alter the original agreement so far as to prevent limitation applying to a suit for rent

Bebee v Mahomed Ghonsi,
1 Ind Jur N S 31

162—S 29=Act X of 1859 s 32 Cause of action—Suit for enhancement of arrears of rent

A suit for arrears of rent at an enhanced rate brought more than three years after the rent had accrued due, was held to be barred by lapse of time under s 32 of Act X of 1859 notwithstanding that it was commenced within one year from the date of a decree made in a suit brought in the Civil Court declaring that the plaintiff was entitled to enhance The cause of action was the non payment of the rent at the enhanced rate, and not the declaration of the Civil Court that the plaintiff had a right to enhance **Doyamoyee Chowdranee v Bholanath Ghose.**
B L R Sup Vol 592 6 W R Act X 77.

Bengal Acts-(Rent Act VIII of 1869 & X of 1859) S. 29-*Contd.*

163—S 29=Act X of 1859, s 32—Suit for arrears of rent

The plaintiff had sued the defendant at the end of the year 1272 to recover arrears of rent for 1271 and to eject him for non payment. The litigation lasted till 1276 when the plaintiff obtained a decree which, however was not executed as the defendant paid the amount and costs within fifteen days In 1276 the plaintiff brought the suit to recover the rents of 1272 and of subsequent years *Held* that the plaintiff's claim for the rents of 1272 was not barred by the lapse of three years under s 32, Act X of 1859

Dindyal Paramanik v Radha Kishori Debi
8 B L R 536 17 W R 415.

Ishan Chandra Roy v Khaja Ashanulla
8 B L R 537 note 16 W R 79

Contra, **Madhub Chunder Ghose v Radhika Chowdhrain.** **7 W R 405**

Rejecting review of same case in
6 W R Act X 42

Huronath Roy Chowdhry v Golucknath Chowdhry **19 W R 18**

Notes—See 17 W R 415

164—S 29=Act X of 1859 s 32—Sale for arrears of rent—Sale afterwards set aside—Subsequent suit for arrears of rent

A zamindar, sold the rights of B his patnidar, for arrears of rent under Regulation VIII of 1819 This sale was subsequently set aside at the suit of B for irregularity A then sued B for the arrears under Act X of 1859, and B raised the defence that the suit was barred, more than three years having elapsed from the close of the year in which the arrears became due. *Held*, (reversing the decision of the High Court) that, upon the setting aside of the patni sale, the patnidar took back the estate subject to the objection to pay the rent and that the particular arrears of rent claimed must be taken to have become due in the year in which that restoration to possession took place, and plaintiff could sue within

Bengal Acts-(Rent Act VIII of 1869 & X of 1859) S. 29-*Contd.*

three years from the close of that year.

Swarnamayi v Shashi Mukhi Baramani.
2 B L R P C 10 : 11 W R, P C, 5 : 12 Moore's I A 244.

165—S 29-Suit for arrears of rent-Allowance of time occupied by suit for ejectment.

Where limitation is pleaded in a suit for arrears of rent, deduction must be allowed to the landlord for the time he was suing to eject defendants as trespassers. **Eshan Chunder Roy v Khajah Assanoollah 16 W R 79.**

Notes—Dist: 3 Cal 6. Ref: 17 W R 415; 19 W R 18; 3 Cal 817, 23 Cal 205, 6 C L J 273 F B, 11 C W N 983 F B : 35 Cal 34 F B.

166—S. 29 = Act X of 1859, s.32-Suit for arrears of rent—Assignment of rent in payment of bond.

Plaintiff, a zamindar, being indebted on a bond, gave the bond holder an assignment on the patnidars for the greater portion of the patni rent to be paid to the bond-holder until the debt was liquidated. The bond-holder, not receiving his money sued the zamindar in the Small Cause Court, whereupon the zamindar brought this suit against the patnidars for the rent due. The lower Appellate Court, reversing the decision of the first Court, held that the claim for the rent of 1273 was not barred by limitation, because brought within three years from the time that plaintiff knew of the non-payment of the rent by defendants. *Held* upon the principle of the decision of the Privy Council in 2 B L R P C 10 : 11 W R P C 5, that plaintiff was entitled to recover the rent of 1273. **Mohesh Chunder Chakladar v Gungamonee Dossee. 18 W R 59.**

Notes:—Dist: 3 Cal 817. Fol. 6 M L J 14.

167—S.29-Suit delayed pending final decision as to rent.

A previous suit was brought in 1859 which was not finally decided in appeal by the High Court until December 1855, the effect of which decision was to take the talukh then in dispute out of the class of those protected by s. 51, Regulation VIII 1793, and to make it liable to enhancement. *Held* that the plaintiff's cause of action for rent did not accrue until ascertainment of the rent by that decision, and that her present suit for about five years' rent from 1st July 1859, having been brought within one year from the date of that decision could be maintained.

Madhub Chunder Ghose v Radhika Chowdhrain 6 W R, Act X, 42

Bengal Acts (Rent Act VIII of 1869 & X of 1859) S. 29-*Contd*

168—S. 29 = Act X of 1859, s. 32-Suit for arrears of rent—Deduction of time when *bona fide* suing defendant as a trespasser.

A landlord can be allowed a deduction in respect of limitation for the time he is suing a tenant as a trespasser, only when he is acting under a *bona fide* belief that the tenant is a trespasser, and not in suits when, from the circumstances of the case, he must have known of the defendant's right to hold as a tenant. **Huronath Roy Chowdhry v Gulucknath Chowdhry 19 W R 18.**

169.—Bengal Rent Act 1869, s. 29—Tenancy in abeyance—Res judicata—Limitation—Obligation to payment-A patni lease granted to B by a zamindar A was assigned by him to C and D. C and D applied to be registered as the assignees of B after his death. The zemindar objected to the registration and brought an ejectment suit against the present defendants, which suit was finally decided against the zemindar by the Privy Council in 1874 While this suit was pending A sued to recover the rent for 1868 not upon the basis of the lease but against C & D as mere trespassers This suit was dismissed on the ground that A ought to have sued on the lease. The zemindar again sued in 1875 for rent of 868 on the basis of the lease. The defendants raised the plea of *res judicata* and limitation. The contention of the plaintiff was that the suit was within time on the ground that the right to recover the rent was in suspense while the suit regarding the lease was pending. *Held* that the suit though *res judicata* was barred under s. 29 of Bengal Act VIII of 1869. 2 B L R P C, 10 distinguished. **Watson & Co v Dhonendra Chunder Mookerjee 3 Calc 6.**

Notes:—Appr 3 Cal 817, Con 16 Bom 141.

170—S.29—Deduction of time whilst another suit was pending—Limitation.

A sued for enhancement of rent of certain lands for a specified year. On the dismissal of this suit, A, more than five years after the rent fell due, sued for arrears of rent for the same year. *Held* that A was not entitled to deduct the time occupied in the conduct of his enhancement suit from the period which elapsed since the rent first fell due in order to bring his case within the

Bengal Acts-(Rent Act VIII of 1869 & X of 1859) S. 29 -*Contd.*

period of limitation prescribed for such last-mentioned suits by s 29 of Bengal Act VIII of 1869.

Brojendro Roy v Rakhal Chunder Roy
3 Calc 791

171.—S. 29–Suits for Arrears of Rent—Limitation Rent Act VIII (B C) of 1869, section 29 Act IX of 1891, Sch II Art 110.

Notwithstanding that rent suits are now triable by the Civil Courts and not by the Revenue Courts, and that a limitation for suits for arrears of rent is provided by Act IX of 1871, Sch II Art 110, yet the general law of limitation is not extended to suits for arrears of rent and in regard to these there is no provision relaxing the term within which they are to be under section 29 Act VIII (B C) of 1869.

On the last day allowed by Act VIII (B C) of 1869 section 29 for filing the plaint in a suit for arrears of rent, the courts were closed, bacause it was a holiday and the plaint was presented on the next day. *Held* that suit was barred by limitation.

Poulson v Modhu Sudun Paul 2 W R 21
Act X of Ruling, cited
Purran Chundar Ghose v Mutty Lall Ghose Jahira 4 Cal 50=2 C L R 543.

Notes:—Diss 7 Cal 690 Ref 20 Bom 543.

172.—S. 29—Limitation—Suit for arrears of rent.

After the expiration of the period prescribed by s 29 of Bengal Act VIII of 1869, a plaintiff suing for arrears of rent cannot insist on the pendency of another suit brought by him for possession of the land, as preventing limitation from running, where there has been no time during which such rent could not have been recovered if he had acted on his right of suing for it. In 12 Moore's I A 244: 2 B L R P C 10, the claimant of rent was, until the setting aside of the sale that had taken place, in the position of a person whose claim had been satisfied. The right to sue in that case had been suspended and it was therefore distinguishable from the present. The plaintiff's ancestor purchased a talukh from the government, subject to an ijara therein held by the defendants, which expired in 1866. A suit brought by the plaintiff in 1874 for possession was dismissed

Bengal Acts (Rent Act VIII of 1869 & X of 1859) S 29 *Concl'd.*

finally in 1876, the defendant's claim to remain in possession under another tenure being allowed. The plaintiff in 1876 sued the defendants for arrears of rent for the years 1866–1872. *Held* that the suit was barred under s 29, notwithstanding the proceedings of 1874.

Huro Pershad Roy v Gopal Das Dutt.
9 Calc 255=12 C L R., 129=9 I A 82.

Affirming the decision of the High Court in

Huro Prosad Roy v Gopal Doss Dutt.
3 Calc 817=2 C L R 450.

Notes:— Fol 11 Cal 745; 12 Cal 258; 17 Cal 251. Ref: 23 Cal 191; 205; 7 C W N 720; 10 C L J 517.

173—S. 29–Limitation–Suit for arrears of rent.

The defendant held a patni in respect of a share in a zamindari, which share was held and the patni granted by a Hindu widow, who died in Pous 1281. The plaintiffs were the heirs who succeeded to the zamindari on the death of the widow. In Pous 1284 they brought a suit against the defendant for the purpose of setting aside the patni, and on the 16th Pous 1285 obtained a decree declaring the patni invalid, and giving them khas possession with mesne profits. This decree was however, reversed on appeal on the 6th Srabun 1288, and their suit was dismissed. In a suit for arrears of rent from 1282 to 1288,–*Held* that the plaintiff was not protected from the operation of the law of limitation during the pendency of his suit to set aside the patni, and that his suit was barred except as to the arrears accruing within three years preceding the suit. 9 Calc., 255, followed. 2 B. L. R., P. C., 10, distinguished. **Sheriff v Dina Nath Mookerjee**
12 Calc 258.

Notes—Fol: 17 Cal. 251.

174—175—S. 30—Agent, suit against—Suit for papers in possession of sadar amlahs.

It was held that a suit for papers in the possession of sadar amlahs employed in keeping the books of the office, and in performing the other duties incidental to the office of sadar amlahs, and not mofussil amlahs, was not one cognizable under the former Act. **Mohendronarain**

Bengal Acts-(Rent Act VIII of 1869 & X of 1859) S. 30-*Contd.*

Singh v Lalla Ruttun. Marsh 239; 2 Hay 278 Oodoy Narain Sircar v Kristo Chunder Roy Chowdhry 13 W R 433.

Notes—Dist: 2 M H C R 88. Ref. 9 W R 250 F B.

176—S. 30—Agent, suit against—Tehsildar.

A suit to recover from defendant rent collected by him for the plaintiffs as their tehsildar, for the due performance of which office he had bound himself by agreement under security, was held to be maintainable under the Rent Act, 1859. **Grant v Ram Tonoo Bhoomick 10 W R 83. Shristeedhur Bose v Shama Churn Ghose 14 W R 53**

177—S. 30—Agent, suit against—Tehsildar.

A claim for moneys collected by the defendant as plaintiff's tehsildar was held to be one cognizable under the Rent Act, and the fact that the matter was referred to arbitration and an award made was held to make no difference. **Shoshee Mohan Shaha v Sheer Sircar 5 W R Act X 13**

178—S. 30—Agent, Suit against—Naib or gomashta.

The suit of a zamindar against a naib or a gomashta for papers, accounts, and moneys collected, is cognizable under the Rent Act. **Kalee Nath Ghosal v Chundee Churn Sircar 10 W R 51**

See, however, **Kadumbinee Dossee v Bhugobutty Churn Ghose. 10 W R 7**

Notes—See 12 M I A 112.

179—S. 30—Agent, suit against—General manager.

Where an agent was employed as the manager of a trading business and as a general manager, and in that capacity received rents collected by sub-agents employed by the zamindar, *Held* that a suit for rendition of accounts against such agent was not cognizable under the Rent Act. **Butas Koonwar v Jankee Pershad 3 Agra 292.**

180—Agent, suit against—Agent and sureties.

A suit by a zamindar against an agent and his sureties for money received by the agent in of the rents collection of the zamindari should be brought under the Rent Act. **Woozeer Ali v Doorga Churn Roy 5 W R Act X 79.**

181—Agent, suit against-Suit for accounts from heir of agent,—

Bengal Acts-(Rent Act VIII of 1869 & X of 1859) S. 30-*Contd.*

Semble.—A suit for the delivery of accounts under the Rent Act, X of 1859, lay against the heir of an agent, the Act being intended to facilitate the recovery of accounts by zamindars, and to make the heir of an agent equally responsible with the agent. **Gowhar Hossein v Ram Coomar Chowdhry 8 W R 481.**

182—S. 30—Agent, Suit against—Suit against agent for rent received and misappropriated.

An agent may be sued under the Rent Act for rents received by him, whether or not he has committed, with respect to such rents, an offence under the Penal Code. **Skinner v Rujub ali Khan 2 W R Act X 105.**

183—S. 30=Act X of 1859, s. 33-Agent, Suit against—Accounts.

S. 33 Act X of 1859, gives the benefit of the extended period of limitation to a man who shows reasonable diligence, but not to one who, having the means of knowledge, carelessly neglects to investigate the accounts. **Dhanput Singh Dogar v Rahman Mandal 2 B L R A C 269: 11 W R 163.**

S. C. before remand **2 B L R A C 270 note: 9 W R 329.**

184—S. 30—Fraud, Discovery of—Suit for an account and for money misappropriated by an agent—Agency—

In a Suit for an account and money misappropriated by an agent, the plaintiff's allegation was that he came to know of the fraud of the agent on a certain date and that the suit was brought within one year from such date and within three years from the termination of the agency. *Held*, that the suit is not barred by limitation and that it falls within the proviso of S. 33 of Act X of 1859. In suits for money misappropriated the plaintiff gets an extended period of limitation of one year, running according to S. 33 of Act X of 1859, from the time when the fraud is first known to him In any particular case, the Court, having regard to the nature of the fraud, the facility with which it may be known, and the likelihood of attention being called to it, may infer such knowledge when the means of knowledge first come, or have for a reasonable time been, within the plaintiff's reach, or in other words may hold the plaintiff fixed with constructive knowledge of the fraud. The

Bengal Acts-(Rent Act VIII of 1869 & X of 1859) S. 30-*Contd.*

Court must, therefore, in every such case, ascertain when the plaintiff had first knowledge, actual or constructive, of the fraud. 8 W *R* Act X 121, 11 W *R* 163 and 9 W *R* 329 and 5 W R Act X 63 referred to. **Nilmoni Singh Deo v Nilu Naik 20 Calc 425.**

185—S. 30=Act X of 1859, s. 33—Suit on account stated—Agent.—

By s. 33 of Act X of 1859, "suits for the recovery of money in the hands of an agent, or for the delivery of accounts or papers by an agent, may be brought at any time during the agency, or within one year after the determination of the agency of such agent". *Held*, where an agent was dismissed, and after such dismissal rendered an account showing a balance due to the landholder, that a suit for such money might be maintained, notwithstanding the lapse of more than a year from the dismissal of the agent before the suit was commenced, because a cause of action arose out of the admitted balance of account. *Semble*—That a suit may be maintained upon such account stated, in which the period of limitation would be regulated, not by Act X of 1859, but by Act XIV of 1859. *Semble* If the account so rendered were fraudulent, then the latter clause of s 33 of Act X of 1859, that "if any fraudulent account shall have been rendered by the agent, the suit may be brought within one year from the time when the fraud shall have been first known to such person." would apply to extend the time. **Chowdhry Chatterpal Singh v Foujdar Roy Marsh 405; 2 Hay 509.**

See Pearee Mohun Ghose v Jardine Skinner & Co 22 W R 333.

Notes:—Ap 22 W R 338. Dist 20 W R 386.

186.—S. 33-Act X of 1859, s. 33—Suspension of agent—Determination of agency.

If a principal suspends an agent, the agency must be held to have been determined within the meaning of s. 33, Act X of 1859.

Muddun Mohun Roy v Gopee Mohun Roy W R 1864, Act X 8.

Mahatab Chand v Judoo Mohun Mitter. 5 W R, Act X 91.

187.—S. 30=Act X of 1859, s. 33—Suit against agent and surety of agent.

A suit by a zamindar against his agent and the agent's surety for money improperly and

Bengal Acts-(Rent Act VIII of 1869 & X of 1859) S. 30-*Contd.*

fraudulently charged by the agent in his accounts is barred if not brought within one year from the rendering of the accounts, which is the time of the accruing of the plaintiff's cause of action, he then having the means of knowing the fraud. **Mackintosh v Woomesh Chunder Bose. 3 W R Act X, 121.**

Huro Churn Narain Singh v Roochee Dobey. 6 W R Act X 30.

188.—S. 30=Act X of 1859, s. 33—Suit against surety of agent for losses occasioned by embezzlement.

A suit under Act X of 1859 against the surety of an agent employed in the collection of rents, for losses occasioned by the embezzlement of his principal, is not governed by the period of limitation prescribed by s. 33 of the Act, but by that prescribed by s. 30, namely, "one year from the date of the accruing of the cause of action."

Beelasmonee v Nusseeboolah. Marsh, 410 :2 Hay 510.

189.—S. 30=Act X of 1859, s. 33—Admission of amount by agent—Cause of action.

The principal acquires no fresh cause of action against the agent from the date on which the agent admitted the amount which was due from him, and executed an agreement to pay it. **Mahatab Chand v Judoo Mohun Mitter. 5 W R, Act X, 91.**

190.—S. 30=Act X of 1859, s. 33—Fraud preventing knowledge of rights.

In a suit against an agent under s. 33, Act X of 1859, where fraud is alleged, before applying the limitation prescribed by that section, the plaintiff should have an opportunity of proving that by the fraud of the defendant he was kept from a knowledge of his rights. **Ram Kant Chowdhry v Brojo Mohun Mozoomdar 6 W R, Act, X 20.**

Notes.—*Ap*: 10 W R 5.

191.—S. 30=Act X of 1859, s. 33—Cause of action—Suspension of agent.

In a suit for the recovery of money in the hands of an agent, the limitation prescribed by s. 33, Act X of 1859, counts from the date of the suspension of the agent. **Radhika Pershad Chatterjee v Ramdhun Pooroheet. 6 W R, Act X, 27.**

Bengal Acts (Rent Act VIII of 1869 & X of 1859) S. 30-*Contd.*

192.-S.30=Act X of 1859, ss.30 and 33-Claim against sureties of deceased agent for misappropriation for money.

S. 30, and not s. 33, Act X of 1859, is applicable to the case of sureties of a deceased agent against whom a claim is made for moneys appropriated by him, and the cause of action accrues from the time when the plaintiff had means of knowing what was the amount due to him from the deceased agent,—*i. e.*, from the date on which his accounts were put in by his sureties, and not from the date of his death.

Puree Soondery Debia v Bholanath Roodro 8 W R 159.

193.—S. 30=Act X of 1859, s. 33—Fraud—Cause of action.

In a suit against an agent for moneys received on plaintiff's account, in which defendant set up a plea of limitation, plaintiff sought to extend the period of limitation on the ground that fraudulent accounts were delivered. *Held* that the Judge should have found specifically when the fraud was first known to the plaintiff; limitation in such a case running from the date of knowledge of the fraud, not merely from that of suspicion of the fraud, or of delivery of accounts.

Dhunput Singh Doogur v Ruhman Mundul. 9 W R 329: 2 B L R A C., 270 note.

Huree Mohun Goohoo v Anund Chunder Mookerjee. 5 W R, Act X, 63.

Notes.—Con: 20 Cal 425.

194.-S. 30=Act X of 1859, s. 33-Suit against surety of deceased agent.

In a suit by the manager of a factory to recover from a surety certain sums collected as rent by a deceased patwari, in which suit the defendant pleaded limitation,—*Held* that plaintiff was not entitled to reckon the year which the law gave him to bring the suit from the date on which he acquired from the surety information of the state of his accounts. If a person's ignorance of the state of his accounts is owing to his own negligence, he can claim no benefit under s. 33, Act X of 1859. **Biddell v Chutterdharee Lall.** 12 W R, 116.

195.—S. 30—Suit against agent for accounts.

A suit under s. 30, Bengal Act VIII of 1869, against a gomashta to obtain accounts after the agency has determined, must be brought within a year from such determination. The proviso in that section refers to suits for money, and under that proviso, where a fraudulent account has been given in by the agent, concealing the fact of the receipt of certain moneys, the zemindar has one year from the discovery of the fraud to bring his suit for such money. **Jan Ali Chowdhry v Ishan Chunder Sein.** 16 W R 149.

Bengal Acts-(Rent Act VIII of 1869 & X of 1859) S. 30-*Contd.*

196.—S. 30—Suit to contest an account against gomashta.

In a suit to contest an account brought against a gomashta under Bengal Act VIII of 1869, the only ground on which the plaintiff can claim an allowance of time beyond the period of limitation provided in s, 30 is by showing that there was fraud in the case, and that he came to the knowledge of it within a year before the date of his action. **Radha Kishore Roy v Ameer Chunder Mookhoty.** 20 W R, 386.

197.-S. 30—Suit against agent—Delay after discovery of fraud of agent.

A suit against an agent for the recovery of money under Bengal Act VIII of 1869, s. 30, though brought within three years after the termination of the agency, was held to have been barred as not having been brought within a reasonable time from the date of the discovery of the fraud alleged against the agent.

Jan Ali Chowdhry v Tarini Churn Rukheet 21 W R, 107.

198.—S. 30—Suit against zamindari agent.

There is no limitation but that prescribed by s. 30, Bengal Act VIII of 1869, to the bringing of a suit against an agent with regard to zamindari matters (e. g., tahsildar and collector of rents) for the recovery of money or the delivery of accounts and papers. **Ram Bhurosa Chowdhry v Hunooman Singh.** 21 W R, 240.

199.—S. 30—Suit for account—Subsequent suit for amount falsely entered—Resjudicata.

Plaintiff brought a suit for collection papers against the defendant, his agent, and got a decree. Having received and inspected the papers he brought another suit for moneys which he

Bengal Acts-(Rent Act VIII of 1869 & X of 1859) S. 30-*Contd.*

alleged, the defendant had falsely entered as expended. *Held* that the suit was barred. *Quære*-Whether the Rent Act, s. 30, contemplates the bringing of two successive suits,—one for an account, and the other for the amount due on that account. **Goloke Nath Sen Biswas v Ram Kant Dey Sircar. 3 C L R 444.**

200.-S. 30=Act X of 1859, s.33—Suit against agent—Change of employment.

A suit against an agent, under Act X of 1859, s. 24, was resisted on the ground that the defendant's employment as tahsildar had terminated by the plaintiff having employed him as a moonshee, and the defendant relied for proof on the fact of his subsequent re-appointment as tahsildar. The lower Appellate Court construed s 33 as applicable to the case. *Held* that this was not a correct interpretation of the section, and that, so long as the defendant continued to be employed in the plaintiff's service, his agency had not terminated. **Nilmoni Singh Deo v Ram Golam Bundopadhya. 21 W R, 154.**

201.—S 30—Suit against agent.

The fact of an agent furnishing his principal with an account under his signature with a letter upon which a balance appeared due is a cause of action irrespective of Act X of 1859, s 33, and the principal is applicable to cases decided under the present law. **Pearee Mohun Ghose v Jardiner Skinner & Co. 22 W R, 338.**

See Chowdhry Chatterpaul Singh v Foujdar Roy. Marsh 405: 2 Hay 509.

202.—S. 30—Fraud of agent, Evidence of—Not flying accounts in proper time.

In a suit by a zamindar against a gomashta, where fraud is not alleged, the Court cannot assume it merely on the ground that the accounts were not filed till the close of the year of the determination of the agency **Koonjo Lal Mundul v Dabee Pershad Tewaree. 22 W R 398.**

203.—S.30—Suit for an account against an agent—Limitation.

A suit for the recovery of money in the hands of the agent must be brought within one year from the time of termination of agency. Notwithstanding s. 19 of the Limitation Act of 1877,

Bengal Acts (Rent Act VIII of 1869 & X of 1859) S. 30-*Contd.*

which gives a fresh start of limitation on the acknowledgment of liability, a suit cannot be brought upon an acknowledgment or account stated, signed by a person who has been an agent to collect rents, if his signature was not procured till more than a year after the determination of his agency. **Parbutinath Roy v Tejomoy Banerji. 5 Cal 303.**

Golap Chand Nowlucka v Kristo Chunder Dass Biswas. 5 Cal 314.

Notes.—Ref: 8 Cal 716.

204.—S. 30=Act VIII (B C) of 1869, -Account, Suit against agent for--Limitation-Agent, suit for account against.

On the termination of the agency which took place on the 16th July 1875, a zamindar sued his agent who was employed in the management of his zamindaries for delivery of the accounts and papers in his hands as such agent, and obtained a decree. In execution of that decree the defendant filed his accounts, but not until the 2nd February 1878. On the 10th September of the same year, the zamindar brought a suit to recover the amount which he claimed to be due on the taking of the accounts.

Held, that inasmuch as this suit was filed more than 3 years from the termination of the agency it was barred by limitation under section 30 of Act VIII (B C) of 1869. **Shoshi Bhooshun Pal v Guru Churn Mookhopadhya. 7 Cal 89: 8 C L R 285.**

205—S. 30=Act VIII (B C) of 1869—Limitation-Special agreement—Agent of zamindar—Tahsildar—Suit to recover money of papers from zamindari Agent.

A Tehsildar having been dismissed on the 9th Bhadro 1285 submitted his account to the zamindar and to this account exception was taken and at the request of the tehsildar time was allowed to enable him to prove the correctness of the account upon the enquiry which it was agreed should be made. Pending the enquiry he executed an ekar on 23 Cheit 1287 that Rs. 1,870 were due.

In a suit instituted on the 12th, Kartick 1288 to recover that amount it was held, that the special agreement of the parties took the case out of

Bengal Acts-(Rent Act VIII of 1869 & X of 1859) S. 30-*Concl'd.*

section 30 of Act VIII (B. C.) of 1869 and that the suit was therefore not barred.

Beerchunde Maniky v Huro Chunde Burman. 9 Cal 211; 12 C L R 329.

206.—S. 30—Suit against administrator of deceased agent for sums misappropriated.

In April 1875, *A* entered into an agreement in writing with *B*, whereby he agreed to act as the manager of *B*'s zamindaris and other landed properties for three years, on certain terms therein mentioned. The agreement was duly registered. On the 15th of June 1882, *B* sued the Administrator General of Bengal as administrator of *A*'s estate, to recover certain sums of money set forth in detail in the plaint as having been received by *A* and not accounted for, stating that they had been misappropriated by *A*. *Held* that in respect of such sums as were received by *A* in virtue of his position as manager under the registered agreement, the limitation of six years applied; but that in respect of the sums received by him in the course of transactions which did not come within the scope of the registered agreement, the limitation of three years applied. *Held*, also, that the suit was not such as is contemplated by Bengal Act VIII of 1869, s. 30.

Harender Kishore Singh v Administrator General of Bengal. 12 Cal 357.

207.—S. 30—Forest Mehal-Accounts, suit for "Agent" under Act VIII of 1869.

Act VIII of 1869 applies to suits between landlords and tenants. The term "agent" in S. 30 means a man who is employed as such by a landlord as a landlord, that is, a person employed to assist a landlord in his dealings with the tenants. A person employed to sell timber in a Forest Mehal and credit the proceeds to his employer is not an "agent" within the Act, and to a suit against him. Act VIII of 1869 does not apply. **Nabin Chandra Barua v Chandra Madhub Barua.** 10 C L J 106= 2 Ind Cas 205.

—s. 31 (Bengal Act VI of 1882, s. 6).

See (1) Bengal Rent Act, 1869, s. 47.
(2) Limitation Act, 1877, s. 5.
(3) Parties—Parties to Suit—Rent, Suits for, and Intervenors in, such Suits.

208.—S. 31—Bengal Act VI of 1862, s. 6—Suit for enhancement of rent.

Bengal Acts-(Rent Act VIII of 1869 & X of 1859) S 31-*Contd.*

The limitation of six months prescribed by s. 6, Bengal Act VI of 1862, applies to deposits made, after rents have become due, and does not interfere with the limitation for suits for enhanced rent, as prescribed by s 52, Act X of 1859.

Taramonee Koonwaree v Jeebun Mundar. 6 W R Act X. 98.

Notes.—Ref: 13 W R F B 3; 4 Cal 714.

209—S. 31 = Bengal Act VI of 1862, s. 6—Applicability of Act—Deposit of rent.

Bengal Act VI of 1862 applies to cases where the amount which the raiyat thinks due is deposited by him, and the landlord may either accept it or sue for whatever he himself may deem due to him for the same period for which the deposit is made; but not to suits for rent for the year preceding that for which the deposit is made. **Mahomed Shuhuroolah Chowdhry v Roomya Bibee.** 7 W R 487.

210-S. 31 = Bengal Act VI of 1862, s. 6-Suits for enhanced rent after notice.

Bengal Act VI of 1862, s.6, refers to the period within which suits on account of rent which has accrued prior to the date of the deposit under s. 5 may be brought, and not to suits for rent at an enhanced rate after notice. **Ahmed Hossein v Keramut.** 8 W R 353.

211.—S. 31—Notice of payment or deposit in Court—Suit for arrears of rent—Limitation.

There was a conviction in a lease to the following effect. The lands uncultivated at the time of the lease, should commence to bear rent at the expiration of seven years from their being put under cultivation. Rent becoming due under the condition the lessee made a deposit in Court, as the entire rent payable in respect of the talukh, the same amount as he had paid in previous years. A suit was brought after a year from the time when the lessor had notice of such deposit. *Held* that the suit was time-barred under s. 31 of Bengal Act VIII of 1869, having been brought more than six months after the service of notice of such deposit.

Ram Sunker Sanapatty v Bir Chunder Manikya. 4 Cal 714.

212.—S. 31—Central Provinces Tenancy Act, s. 41—Use of Act X of 1859, in interpretation.

Bengal Acts-(Rent Act VIII of 1869 & X of 1859) S. 31-*Concld.*

Act X of 1859 has no bearing in interpreting s. 41, C, P. Tenancy Act, **Vishnu Pundit v Kanyalall.** **8 C P L R 36.**

213.—S. 31 and Ss 46, 47—Limitation.

In order to bring into operation the special limitation provided by s. 31 of Bengal Act VIII of 1869, the deposit made under s. 46, should be a deposit effectively made of rent that had accrued due before the date of such deposit.

Surja Kant Acharjya v Hemanta Kumari. **20 Cal 498: 20 I A 23.**

—s. 32 (Act X of 1859, s. 69).

See Parties—Parties to Suits—Agents.

—ss. 33 and 34.

See Bengal Rent Act, 1869, s. 102.

—s. 34.

See Execution of Decree—Decrees under Rent Law.

214.—S. 34 —Suits for rent—C P. C. Act VIII of 1859, s. 119

S. 119 of the Civil Procedure Code (Act VIII of 1859) was made applicable to rent suits under Bengal Act VIII of 1869 by the provisions of s. 34 of the latter Act. **Drabamayi Guptia v Taracharan Sen** **7 B L R 207. 16 W R 17**

-s 37 (Bengal Act VI of 1862, s. 9).

See Appeal—Measurement of Lands. Case No. 717. **6 B L R 1.**

(2) Execution of Decree—Decrees under Rent Law.

(3) Measurement of Lands.

—s. 38 (Bengal Act VI of 1862, s 10).

See (1) Appeal—Measurement of Lands. Case No. (719). **24 W R 171**

(2) Cases under Measurement of Lands.

(3) Res Judicata—Competent Court—Revenue Courts.

—s. 41 (Bengal Act VI of 1862, s. 11).

See Measurement of Lands.

—s. 44 (Bengal Act VI of 1862, s. 2).

See Damages, Suit for—Rent suits.

215.—s. 46 (Bengal Act VI of 1862, s. 4)—Patni talukhdars—"Under-tenants,"

Bengal Acts-(Rent Act VIII of 1869 & X of 1859) S. 46-*Contd.*

Bengal Act VIII of 1869, s. 46, applies to patni talukhdars, the term "under-tenant" being wide enough to include them. **Thakoor Dass Gossain v Pearee Mohun Mookerjee.** **22 W R 431.**

216.—S 46—Bengal Act VI of 1862, s. 4—Deposit of arrears-Tender—Registration of transfer-Act X of 1859, s. 27.

O S purchased from the former raiyat his jotedari right and entered into possession of the land. *H M*, the talukhdar, had notice of this; but while *O S* was in possession, he sued the former tenant and obtained a decree against him for arrears of rent, under which he sold the tenure in execution. *O S* had deposited the amount of the arrears, but by mistake as payable to "D (the wife of *H M*'s brother) of Lodi Syudpore," instead of to "*H M* of Lodi Culpo." *H M* was aware the amount had been deposited. *Held* the deposit was a sufficient tenure under s. 4, Bengal Act VI of 1862, and that registration of the transfer of the raiyati tenure was not necessary, inasmuch as s. 27 of Act X of 1859 did not apply, the tenure not being one 'intermediate between the zamindar and the cultivator.' **Umacharan Sett v Hariprosad Misry.** **1 B L R S N 7.**

S C Wooma Churn Sett v Huree Pershad Misser. **10 W R 101.**

Notes:—Ref: 11 C W N 983 F B; 6 C L J 273 F B, 35 Cal 34 F B.

217.—S 46=Bengal Act VI of 1862, s. 4—Tender of payment of rent.

A raiyat's tender of payment to be valid must be made at the proper place and to a person authorized to receive the same. **Eshan Chunder Roy v Khajah Assanoollah.** **16 W R 79.**

Notes:—Dist: 3 Cal 6. *Ref:* 17 W R 415: 19 W R 18; 3 Cal 817; 23 Cal 205; 6 C L J 273 F B; 11 C W N 983 F B; 35 Cal 34 F B.

218.—S.46=Bengal Act VI of 1862, s. 4—Tender not followed by deposit or payment-Power to award interest.

Act VI of 1862 does not forbid the Court to advert or give effect to a tender not followed by a deposit or payment into Court of the money, nor does it alter or affect the discretionary power of

Bengal Acts-(Rent Act VIII of 1869 & X of 1859) S. 46-*Concld.*

the Court to award interest or costs in a decree for arrears. **Bissonath Dey v Hurro Pershad Chowdhry.** 2 W R, Act X, 88.

Notes:—Ref: 11 C W N 983 F B. 6 C L J 273 F B; 35 Cal 34 F B.

219—S. 46=Bengal Act VI of 1862, s. 4—Transfer of tenure—Act X of 1859, s. 27—Registration of transfer.

S. 4, Bengal Act VI of 1862, applies only to under-tenants and raiyats of whose possession there can be no doubt. **Dulli Chand v Meher Chand Sahoo.** 8 W R 138.

Notes:—Ref. 8 W R 495. Ref: 11 W R 201 Affirm: 12 B L R 439 P C.

220—S. 46=Bengal Act VI of 1862, s. 4—Set-off—Deposit of arrears of rent.

In a suit for rent, where defendant claimed credit for a sum which he had deposited under the provisions of s. 4, Bengal Act VI of 1862, in the Deputy Collectorate of the subdivision within which plaintiff's mal-kacheri was situated giving notice to plaintiff under s. 5—*Held* that defendant was entitled to a set-off. **Grish Chunder Sen v Eastern Bengal Jute Manufacturing Company.** 10 W R 492.

221—S. 46=Bengal Act VI of 1862, s. 4—Deposit of arrears of rent—Omission to tender.

A party is not entitled to benefit from a deposit under Act VI (Bengal) of 1862, if it was paid in without a tender to, and refusal by, the opposite party. **Kristo Protibar v Alladinee Das see.** 15 W R 4.

222—s. 47 (Beng Act VI of 1862, s. 5) and s. 31—Notice of deposit on account of rent—Form of notice.

The omission of the words "you must institute a suit in Court for the establishment of such claim or demand within six calendar months from this date, otherwise your claim will be for ever barred," from the notice referred to in s. 47 when a deposit is made under s. 31, Act VIII of 1869, was held fatal to the defendant's claim to the benefit of his having paid his rent into the Collectorate. **Kanchun Malla Dossia v Rajendro Chunder Roy Chowdhry.** 18 W R 126

223—S. 47=Bengal Act VI of 1862, s. 5 Limitation—Suit for accrued rent.

Bengal Acts-(Rent Act VIII of 1869 & X of 1859) S. 47-*Concld.*

S 5, Bengal Act VI of 1862, refers to deposits by tenants of the rent which they consider to be the full amount of rent due from them, and s. 6 refers to the period within which suits on account of rent which has accrued prior to the date of the deposit under s 5 may be brought, not to suits for rent at an enhanced rate after notice.

Ahmed Hossein v Keramut, 18 W R 353.

– s. 52 (Act X of 1859, s. 78).

See (1) Landlord and Tenant—Ejectment—Generally.
(2) Receiver.

224—S. 52—"Reversed," Meaning of.

The word "reversed," in Bengal Act VIII of 1869, ss. 52 and 54, means reversed in respect of that part of the arrears which is contested in the Appellate Court. **Pattary Sircar v Surno Moyee** 24 W R 185.

225—S. 52—Act X of 1859, s 78—Suit for cancellation of lease—Condition for forfeiture.

S. 78. Act X of 1859, applies to all cases of suits for the ejectment of a raiyat or the cancelment of a lease for non payment of rent, whether such ejectment or cancelment be sought under the provision of ss. 21 and 22, respectively, or under an express stipulation in that behalf contained in the engagement between the parties. **Jan Ali Chowdhury v Nittyanund Bose** B L R Sup Vol 972: 10 W R F B 12.

226—S. 52=Act X of 1859, s. 78—Ejectment for non-payment of rent.

S. 71 of Act X of 1859 authorizes the joinder of a claim for rent in an ejectment for non-payment of rent. *Held* that the section does not empower a landlord to eject his tenant for non-payment of rent due, in the middle of the Bengali year, but that an ejectment for such default is maintainable only for arrears due at the end of the year under s. 21. **Savi v Chand Sickdar** Marsh 348: 2 Hay 438.

Sriram Biswas v Juggernath Doss. 1 Ind Jur N S 187: 5 W R Act X 45.

227—Act X of 1859, s. 78—Breach of condition for forfeiture.

Where in a perpetual lease there was a condition that, on default being made in payment of a

Bengal Acts-(Rent Act VIII of 1869 & X of 1859) S. 52-*Contd.*

certain number of instalments of rent, the lease should be void,—*Held* that in a suit under cl. 5, s. 23 of Act X of 1859, for cancellation of the lease on account of a breach of the condition, the lessee was entitled to the benefit of s. 78, even though the defence set up was false in fact

Duli Chand v Meher Chand Sahu. 12 B L R P C 439.

Affirming decision of High Court in **Dulli Chand v Meher Chand Sahoo 8 W R 138**

See Ameer Koolee Khan v Russick Lall Singh. 8 W R 495.

228—S 52=Act X of 1859, s. 78-Suit for ejectment of raiyat for non-payment of rent.

The provisions of the last clause of s. 78, Act X of 1859, apply to every suit in which ejectment of a raiyat is sought on the ground that he has failed to pay rents. **Mahomed Hossein Khan v Khushroo Fakeer 1 N W 44 Ed 1873 41.**

229—S.52=Act X of 1859, s. 78 and s 22—Suit for ejectment after realizing arrears.

A landlord cannot sue for cancelment of lease and ejectment under s. 22, Act X of 1859, after he has sued for and realized the arrears of rent due. **Woomesh Chunder Chatterjee v Kumuroodeen Luskur. 7 W R 20.**

Notes:—Ap: 12 W R 50.

230-S. 52=Act X of 1859. s 78-Receipt of rent after decree for ejectment.

A landlord cannot execute his decree for ejectment obtained under s 78. Act X of 1859, if he has accepted the rent from the tenant. **Nubo Kishen Mookerjee v Hurish Chunder Banerjee 7 W R 142.**

231—S 52=Act X of 1859, s 78-Cancelment of lease—Ejectment,

S. 78, Act X of 1859, applies equally whether the raiyat's liability to be ejected arises under s. 21 of that Act or under special stipulation in the contract between him and his landlord. **Mahomed Hossein v Boodnun Singh alias Roopnarain Singh. 7 W R 374.**

Notes:—Fol: 8 W R 138 Ref: 9 W R 552; 11 W R 201.

232—S.52 Act X of 1859, s 78—Forfeiture for default in payment of rent.

Bengal Acts-(Rent Act VIII of 1869 & X of 1859) S. 52-*Contd.*

Plaintiff sued defendant under cl. 5, s. 23, Act X of 1859, for direct or khas possession of a farm (for which the latter had paid a bonus), stating that the contract between them was that, on default in payment of the farming rent as per kistbundi, a suit was to be instituted for the arrears, and in execution of the decree the lease was to be forfeited, and the plaintiff, the lessor, entitled to enter upon khas possession, unless the amount was paid within 15 days. It was further urged that defendants, the lessees, had defaulted; that plaintiff had obtained decrees; and that defendants, having failed to pay within fifteen days, had violated the lease and were liable to be ejected. *Held*, that the terms of the contract were in strict accordance with the provisions of s. 78, Act X of 1859, and the plaintiff ought to have brought his suit under that section, and obtained a decree for ejectment. From the date of such decree, specifying the amount of arrear, the leassor would have fifteen days for payment. **Rughoo Mohinee Dossee v. Kasheenath Roy Chowdhry. Kasheenath Roy Chowdhry v Sobitree Soonderee Dossia. 10 W R 156.**

233—S. 52=Act X of 1859, s. 78 and s. 22-Erroneous decree—Effect of.

Held by Norman, J., that a Deputy Collector's decree for rent cancelling a mokurari tenure, with reference to s.22 Act X of 1859., as not creating a permanent or transferable interest, though erroneous, cannot be treated as a nullity or as passed without jurisdiction. The tenure, however, is not cancelled as long as the decree is not executed. **Lalla Sham Soondur v Sooraj Lall. 13 W R 441.**

234—S 52=Act X of 1859. s 78-Failure to rely on s. 78.

Where a judgment-debtor fails to invoke the protection of s. 78. Act X of 1859, against a decree-holder, he cannot afterwards in special appeal claim the fifteen days' time allowed under that section **Choonee Mundur v Choonee Lall Dass. 14 W R 178.**

Notes:—Ap: 7 Cal 703 F B Fol: 17 W R 509 Dist: 7 Cal 703 E B; 717.

235,236-S 52=Act X of 1859 s, 78-Decree for ejectment—Effect of erroneous decree—Suit to question its validity.—

Bengal Acts-(Rent Act VIII of 1869 & X of 1859) S. 52-*Contd.*

Where in a suit for arrears of rent of a transferable tenure to which a person claiming as mortgage was no party, a decree for ejectment, under s, 78 Act X of 1859 was made instead of a decree for sale.—*Held*, that the decree for ejectment could not confer upon the decree holder (the purchaser in execution of a decree against the mortgagor) the right to avoid the mortgage by the ejectment of the mortgagor, and was no bar under s. 2 Act VIII of 1859, to a suit by the mortgagee to question the validity of that decree and to show that the Collector had no power under Act X of 1859 to make a decree for ejectment. **Tirbhobun Singh v. Jhono Lal.** 18 W R. 206

237—S.52=Act X of 1859, s 7c—Term of grace—Condition in lease.—

The fifteen days' grace allowed to a lessee prior to ejectment cannot be negatived by any condition in the lease. **Madhub Chunder Adit Chowdhry v. Ram KaLoo Baparee** 16 W R 151.

238–S. 52=Act X of 1859 s.78- Suit for ejectment of raiyat and for arrears of rent—Person paying rent in position of subordinate proprietor.

In a suit under s. 78 Act X of 1859 to eject the defendant from certain land, and to recover arrears of rent, the defendant was in the habit of receiving the rents of his tenants, and was bound only to pay a certain sum on account of Government revenue and village expenses. He was also competent to sell or mortgage his rights. *Held*, that he was not a tenant but a subordinate proprietor, and that, therefore, the suit could not be brought under the above section **Batool Bebee v. Jagut Narain** 4 N W 172.

239—S. 52=Act X of 1859 s 78-Execution of decree for arrears of rent against purchaser at an execution sale.—

A zamindar, in execution of a decree, sold the rights and interests of his tenant. He subsequently ejected the purchaser at that sale under a decree (dating prior to the above sale) for arrears of rent and ejectment under s. 78 Act X of 1859, which latter decree became complete on the expiry of fifteen days without deposit of the arrears due. *Held*, that until the purchaser adopted means to have his name registered in the zamindar's serista, the latter was not bound to give him notice to pay the arrears due on the tenure which

Bengal Acts (Rent Act VIII of 1869 & X of 1859) S. 52-*Contd.*

he purchased before proceeding to give effect to the decree. **Bhubo Tarinee Dosia v Prosonomoyee Dossia** 10 W R 304.

Reversed on Review in Prosunnomyee Dossia v. Bhubo Tarinee Dossia 10 W R 494

240–S.52=Act X of 1859 s. 78–Cancelment of lease for breach of stipulation in payment of rent.

The property in suit had been sublet to defendant on the stipulation that, if the rent was in arrear for three kists, the lease would be liable to cancelment. Plaintiff sued to eject the lessee on the allegation that the lease was forfeited. *Held*, that as the only ground given for cancelment was non payment of arrears of rent, the case fell under s. 78 Act X of 1859, and as the amount due had been paid into Court, defendant was entitled to the protection afforded by the latter portion of that section. **Kumla Sahoy v. Ramruttun Neogy** 11 W R 201.

241 S 52-Act X of 1859 s 78-Ejectment for forfeiture of lease by breach of its conditions—Suit for cancelment of lease.

M granted a lease of certain lands to *R* for a term of thirteen years on the 25 th of November 1870. One of the conditions of the lease was that rent was to be paid harvest by harvest, otherwise the lessee would be liable to ejectment. On the 12th of September 1873, M obtained a decree against R for arrears of rent which became due in May. On the day following, M instituted a suit under cl 5 s. 23 Act X of 1859, for the cancelment of the lease and the ejectment of *R* on account of the non-payment of rent when due, according to the terms of the lease. *R* paid into Court the amount of the arrear on the 18 th of September *i e* within fifteen days from the date of the decree, and in the course of the suit under s 23 cl 5. In special appeal the suit was dismissed, it being held that the circumstances of the case brought it within the operation of the provisions of ss 21 and 78 of Act X of 1859, which were applicable in deciding it. **Ramdyal v Mushtak Ahmad.** 6 N W 326.

242–S.52=Act X of 1859 s 78 Modification of decree in review—Date from which time for payment runs.

A decree in a suit for ejectment of a raiyat for non-payment of rent was modified upon review by reducing the amount of arre-

Bengal Acts-(Rent Act VIII of 1869 & X of 1859) S. 52-*Contd.*

ars awarded to the plaintiff. *Held* that the amended decree was the final decree in the suit, and that the raiyat was entitled, under s. 78; Act X of 1859, to fifteen days from its date for payment of the arrears with costs and interests. **Radha Mohun Mundle v. Ruckshee Begum Marsh. 471; 2 Hay 595**

Notes:—Fol 18 W R 477.

243:—S.52=Act X of 1859 s 78—Suit for ejectment—Stay of execution.

The latter part of Act X of 1859 s 78 which enacts that " in all cases of suits for the ejectment of raiyat, or cancelment of a lease the decree shall specify the amount of arrears and if such amount,together with interest and cost of suit be paid into Court within fifteen days from the date of the decree, execution shall be-stayed" applies not only to suits for ejectment of the raiyat or cancelment of the lease on account of the non-payment of arrears of rent but to all suits for ejectment brought by the lessor on account of a breach of the conditions of his lease by the defendant. **Fitzpatbrick v Gowan 1 Ind Jur N 420, 6 W R Act S 64.**

244.—S.52=Act X of 1859, s.78-Omission to specify previous unsatisfied decree.

Where in a suit for the rent of the current year and for ejectment under s 78, Act X of 1859, supported by a previous unsatisfied decree, a decree was passed for the rent of the current year without including the amount claimed under the previous unsatisfied decree, and the plaintiff neither applied to the lower Court to amend its decree nor appealed against that part of it,—*Held* that the defendant, having paid the amount of arrear specified in the decree, had saved himself from ejectment. **Savi v Mohesh Chunder Bose W R 1864, Act X 29.**

245.—S.52=Act X of 1859, s 78-Computation of time.—

In calculating the fifteen days allowed for payment of arrears of rent by s 78 of Act X of 1859, the day on which the decree was passed should be excluded from the computation.

Sheopalaul Singh v Nabee Ashruf Khan 3 N W 342.

Bengal Acts-(Rent Act VIII of 1869 & X of 1859) S. 52-*Contd.*

246-S 52=Act X of 1859,s.78-Stay of execution.

It is not necessary to declare in a decree given under s 78 of Act X of 1859 that fifteen days' time should be allowed to the tenant. But the decree must specify the amount of the arrear, and payment of this, with costs and interest as decree, within fifteen days, *ipso facto* stays execution. **Seetul Singh v Thakoor Tewary 1 N W Part 2 p 31; Ed 1873, 89. Ali Hossein v. Nandar Khan 2 N W 62.**

247—S 52=Act X of 1859 s. 78—Interest on deposit

When a tenant is sued for arrears of rent even though he should deposit the rent in Court during the pendency of the suit, he is still liable to have the decree passed against him, as the arrear was admittedly due when the suit was brought. Interest to date of deposit in Court and costs of suits being paid within fifteen days, execution would be avoided. **Sheo Nath Singh v Ram Thul Rae. 1 N W Part 2 p 39: Ed 1873, 97.**

248-S.52=Act X of 1859 s.78-Stay of execution —Private agreements—Suits to enforce.

S. 78 of Act X of 1859 contains a positive direction of law by which the Revenue Courts are required in all suits for ejectment for non—payment of rent, clearly to specify in the decree the amount of rent default in payment of which has conferred a right of re-entry on the landlord, and to stay execution of their decrees if the amount found due, with interest and costs, be paid into Court within the time therein specified. This overrides all private agreements to the contrary or rather renders their enforcement by suit in the Revenue Court impossible **Lulloo Singh v Thakoor Pershad 2 N W 249.**

249-S.78=Act X of 1859 s.78-Stay of execution of decree.—

The Court has discretion to stay execution on other grounds than those on which it is bound to do so under s 52 of Bengal Act VIII of 1869.

Rao Baneeram v Ramnath Shah 10 B L R Ap 2:18 W R 412.

Nubokisto Mookerjee v Ramessur Goopto 18 W R 412 note.

Notes.—Ap 6 Cal 530.

Bengal Acts-(Rent Act VIII of 1869 & X of 1859) S. 52-*Contd.*

250.—S.52=Act X of 1859, s 78-Stay of execution-Payment of arrears by purchaser.—

Execution may be stayed on a decree for arrears of rent by payment of the amount, under s 78 Act X of 1859, by a purchaser from the tenant of his interest in the terms, **Sarodapersad Roy Chowdhry v Nobinchand Dutt** Marsh 417; 2 Hay 527.

251.—S. 52=Payment into Court Liability to ejectment.

Payment into Court by a judgment—debtor, within fifteen days from the date of decree, of rent, interest, and costs, with a protest as to the sum improperly charged against him as interest, is a sufficient payment under s. 52, Bengal Act VIII of 1869, to save him from liability to be ejected from his tenure.

Shreesteedhur Dey v Doorga Narain Nag. 17 W R 462.

252-S.52=Act X of 1659, s 78-Stay of execution as to part of decree-Extension of time for payment.

The Court, whose duty it is to execute a decree, is bound to execute it in the shape in which the decree comes before it, and has no authority to permanently stay the execution of any portion thereof,—e g., where a decree is for money and for ejectment in the event of non-payment within fifteen days, the Court executing is not competent to extend the period for payment in order to save the judgment-debtor from the alternative consequence.

Sunkur Singh v Huree Mohun Thakoor 22 W R 460

253.-S.52-Practice—Act VIII (*B* C) of 1869, section 52—Limitation-Courts, closing of.

In a suit under section 52 of Act VIII (B C) of 1869, a decree was obtained for arrears of rent on the 23rd September 1878. The Court was legally closed from the 26th September to the 28th of October, and on the day it opened, the dependent deposited in Court the amount of the decree with interest and costs, and asked to have execution stayed. *Held*, that the defendant was entitled under the above section to 15 clear days for making the payment, and that under the circumstances, he was entitled to a stay of execution.

Hossein Ally v Donzelle 5 Calc 906= 6 C L R 239.

Notes:—Fol: 18 Cal 631; 7 Cal 690.

254-S 52-Forfeiture of tenure-Act VIII (B C) of 1869, Section 52—Equitable relief against forfeiture—Ejectment.

The plaintiffs sued to recover possession of certain land held by the defendants under a mokurari lease on the ground of forfeiture by reason of breach of the covenant therein contained "In case of non-payment of one year's rent and its falling into arrear, the mokurrari settlement will be cancelled, and in that case we, the declarents, the mokurraridars, shall have no claim to the nazarana money."

Held, that on payment of the arrears due and the costs of the proceedings within a time fixed by the Court the defendants were entitled in equity to relief against forfeiture. 4 C L R 469 followed. **Maoomed Ameer v Peryag Singh** 7 Calc 566=9 C L R 185.

255——Section 52-Act VIII (B C) of 1869, —Cancellation of Lease—Equity—Forfeiture of lease.—

Section 52 of Act VIII (B C) of 1869 applies to any suit for the cancellation of a lease whether or not the right of cancellation arise under that Act itself or under the covenants in the lease 12 B L R 439. See 9 C L R 185.

Duli Chand v. Rajkissore, 9 Cal 88= 11 C L R 326.

256—S. 52-Ejectment—Right of occupancy-Forfeiture-Landlord and tenant.

The mere omission to pay rent for five years does not of itself amount to forfeiture of a raiyat's right of occupancy, and will not be sufficient to sustain an action by the landlord for the recovery of the raiyat's holding. A raiyat having a right of occupancy cannot be legally ejected unless under an order regularly obtained under s. 52 of the Rent Law,—— that is, under a decree for arrears of rent unsatisfied within fifteen days from the passing of the decree. 9 Cal 88; 11 C L R 326, followed.

Musyatu ulla v. Noorzahan, 9 Cal 808.

S. C. Brojendro Kumar Roy Chowdhry v. Bungo Chunder Mundol. 12 C L R 389.

Bengal Acts-(Rent Act VIII of 1869 & X of 1859) S. 52-*Contd.*

257-S.52-Covenant, breach of Occupancy right -Forfeiture—Raiyat unauthorized to transfer his holding—Usufructuary mortgage, if a transfer:—

By creating an usufructuary mortgage an occupancy raiyat not authorized to transfer his holding makes himself liable to ejectment by the landlord. **Krishna Chandra Datta Chowdhury v. Krishna Bajania, 10 C W N 499.**

Notes:—Fol: 33 Cal 1091=10 C W N 719= 4 C L J 306, Ref: 13 C W N 242; 10 C L J 610; 12 C W N 878.

258 S.52-Ejectment proviso in lease for forfeiture—Release from effect of forfeiture.—

A se-patni was granted to B by A, who held a dar-patni containing the following conditions, *viz.*: "I shall pay rent month by month; should I fail in that, I shall pay interest on instalments overdue at 1 per cent per month. I shall pay the rent in full by the close of every year; should I neglect to make the payments, you will, of your own authority, take over possession of the said dar-patni talukh after the expiration of one month of the next succeeding year, and I shall have no complaint against your doing so". Upon non-payment of rent for the year 1281, a suit for khas possession of the lands was brought against A and B. The defendants claimed an equitable right to prevent forfeiture by paying all arrears according to the terms of the dar-patni, together with all costs. *Held*, that, whether or not the provisions of the Rent Law actually applied to the case, the Court was bound by the analogy of that law to apply in favour of the defendants an equity similar to the equity there given, and accordingly a decree was passed, that if the defendants should pay the whole of the rent due up to date, with interest according to the conditions of the dar-patni, together with the costs in the High Court and Courts below, they should be released from the effect of the forfeiture.

Mothoor Mohun Pal Chowdhry v. Ram Lal Bose, 4 C L R 469.

Notes:—Fol: 7 Cal 566.

259-S.52-Suit for ejectment from land assigned under a contract for building.—

The only suits for ejectment contemplated by Bengal Act VIII of 1869 are those consequent on the non-payment of arrears of rent, but not a suit for ejectment from land assigned for building purposes brought upon a contract (a kabuliat) by which the defendant had bound himself to give up the land when required by the plaintiff to do so on receipt of a year's rent and the cost of carrying away the building materials

Ramnarain Mitter v. Nobin Chunder Moordafarash, 18 W R 208.

260—S. 52-Suit for ejectment—Tenant with right of occupancy.

Where tenants have obtained a right of occupancy under Bengal Act VIII of 1869, s. 6, a suit for ejectment against them can only be brought under that Act. **Jowad Hossein v. Mohabeer Sahee, 23 W R 412.**

Notes:—Ref: 9 Cal 315; 24 Bom 183.

261—S.52-Talukhdar with power of transfer-Ejectment.—

Bengal Act VIII of 1869, s. 52, does not apply to the case of a talukhdar who has power to transfer his land, and is liable, under the terms of his kabuliat, to immediate ejectment in the event of default. The question whether a talukhdar is liable to ejectment must be determined by the provisions of his lease. **Mumtaz Bibee v. Grish Chunder Chowdhry, 22 W R 376.**

Notes:—Ref: 4 C L R 169; 7 Cal 566.

262-S. 52-Suit for arrears of rent and for ejectment-Payment into Court-Suit to cancel lease.—

Where a suit is brought both to recover arrears of rent and to eject the raiyat, it falls under the purview of Bengal Act VIII of 1869, s. 52, and not within s. 22; and if decreed, the defendant is entitled to pay into Court, within fifteen days from the date of decree, the arrear with interest and costs. Where the lower Court's decree was altered to this effect by a decision of the High Court, the fifteen days were held to date from the later decision. Bengal Act VIII of 1869, s. 52 (as answering to Act X of 1859, s. 78), applies to cases in which it is sought to cancel a lease for non-payment of rent, as well as to all suits for ejectment. **Abdur Ruhman v. Digamburee Dossee, 18 W R 477= 10 B L R 183**

Notes:—Fol: 20 W R 170, Ref: 25 W R 255; 17 Cal 33; 1 Bom 262; 12 Bom 122.

263-S. 52-Decree for arrears of rent and ejectment.-

A party who is under an obligation by the

Bengal Acts-(Rent Act VIII of 1869 & X of 1859) S. 52-*Con d.*

terms of a decree not only to pay arrears of rent, but also to give up possession, is allowed by Bengal Act VIII of 1869, s. 52, relief from the operation of the latter portion of the decree if he pays the money decreed within fifteen days of the date of the decree. **Gokhlanund v. Lalljee Sahoo, 21 W R 11.**

Notes:—Con: 23 W R 50.

264—S.52=Act X of 1859, s. 78-Execution of decree for ejectment for arrears of rent.

Where a Munsif gave, under Act X of 1859, s. 78, a decree for ejectment and for the recovery of a certain amount of rent, and the decree was not modified in review, it was held that the lower Appellate Court was right in holding that, inasmuch as the tenant did not deposit the money within fifteen days from the date of the decree, execution should issue to recover possession of the property. **Puresh Nath Ghose Mundul v. Krishto Lall Dutt, 23 W R 50.**

Notes:—Dist: 13 Cal 13. Ref: 26 Cal 639.

265—S.52-Decree for rent, execution of-Appellate Court, decree of. Effect of — Liability to ejectment.

A decree under s. 52, Bengal Act VIII of 1869, provided that, unless the amount due was paid within fifteen days from the date thereof, the tenant (judgment-debtor) would be liable to ejectment. That decree was confirmed in appeal, no step to execute it having been taken in the meantime. The tenant paid the decretal amount into Court within fifteen days of the appellate decree. *Held*, that, inasmuch as the appellate decree must be presumed to incorporate the terms of the original decree, and was the only decree of which execution could be taken, the tenant (judgment-debtor), having paid the decretal amount within fifteen days of that decree, was protected from ejectment. **Noor Ali Chowdhuri v. Koni Meah, 13 Cal 13.**

Notes:—Appl: 11 All 346; 13 All 189, F B; 13 All 376 F B; 11 Bom 172. Fol: 22 Cal 407; 15 Mad 170. Dist: 5 Cal 311. Ex: 1 C W N 671. Ref: 18 Mad 214 F B; 15 Bom 370; 16 Bom 243; 22 Bom 500; 11 All 267 F B; 18 All 223; 458 N; 17 M L J 495; 31 Mad 28; 6 A L J 493; 31 All 379. Rel: 13 C W N 1060.

266—S.52-Liability of ejectment-Payment of amount of decree, but not amount due.

Bengal Acts-(Rent Act VIII of 1869 & X of 1859) S. 52-*Contd.*

Where a judgment-debtor complied with the terms of a rent-decree, as he found them in the certified copy issued to him, he was held to be protected from ejectment, even though the amount paid (owing to an error in the copy) was less than the amount really due.

Runnco Roy v. Kadoo Lall, 25 W R 58.

267-S.52-Suit for ejectment for arrears of rent —Bhaoli tenure.

Under the provisions of Bengal Act VIII of 1869, a suit in ejectment will lie for arrears of rent due on a bhaoli tenure. A suit which is in reality a claim for compensation for use and occupation of lands cannot be described as a suit for arrears of rent under s. 52 of Bengal Act VIII of 1869. **Kishen Gopal Mawar v. Barnes, 2 Cal 374.**

268-S.52-Ejectment-Decree for arrears of rent, ejectment, and damages.

A decree which gave damages in addition to a decree for arrears of rent and ejectment in default of payment upheld, as being a decree which conformed substantially to s. 52 of the Rent Act, though it was doubtful whether the Court exercised a wise discretion in adding damages to the decree. In the spirit of the Rent Law, a decree for ejectment operates as an award of damages.

Heeramun Roy v. Jhuboo Singh, 22 W R 511.

269—S. 52—Decree for ejectment if arrears of rent not paid within 15 days-Appeal, payment of amount pending — Dismissal of appeal with costs — Failure to pay costs within 15 days, if entails ejectment—Appellate Decree.—

Where a decree was passed under S. 52 of Act VIII (B C) of 1869 for arrears of rent and for ejectment if the arrears were not paid within 15 days, and an appeal by the judgment-debtor, during the pendency of which the decretal amount was paid, was dismissed with costs; but these costs were not paid within 15 days of the appellate decree.

Held, that the Munsif did not act without jurisdiction in making an order for the attachment of the judgment-debtor's moveable property in execution of the decree for costs and for his ejectment from the land.

Bengal Acts-(Rent Act VIII of 1869 & X of 1859) S. 52-*Concld*

The appellate decree must be presumed to have incorporated the terms of the original decree.

(13 Cal 13 rel:). **Thamal Marap v. Rani Abhoyessuri Debi, 13 C W N 1060.**

—S. 53.

See Landlord and tenant——Ejectment-Generally. **5 Cal 135.**

-S. 58 (Act X of 1859, s. 92 and Bengal Act VI of 1862 s. 17).

270—S.58-Act X of 1859, s. 92, Construction of—"Issued"—Execution of decree.

The word "issued" in the sentence, 'no process of execution of any description whatever shall be issued," at the commencement of s. 92 of Act X of 1859, is to be interpreted to mean "sued out" or "applied for with success"; that is, no application for a process of execution shall be successful unless the application for it is made or it is sued out within the fixed time. **Rhidoy Krishna Ghose v Kailas Chandra Bose. 4 B L R F B 82 : 13 W R F B 3**

Heralall Seal v Poran Matteah. 6 W R Act X. 84

Hossein Ali. 13 W R 295.

271-S. 58=Act X of 1859, s,92—Judgment—Value of stamps.

In considering whether a "judgment" under this section is under Rs 500 or not, the value of the stamps necessary in taking out execution is to be included in the judgment on the priciple of ss. 187 and 188 of Act VIII of 1859. **Campbell v Abdool Huq. 6 W R Act X, 8.**

272—S. 58—Calculation of amount of judgment—Interest.

In ascertaining the amount of a judgment with a view to the applicability or otherwise of Bengal Act VIII of 1869, s. 58,the interest which accrues subsequently to the date of the decree is not to be included. **Brindabun Dutt v Beharee Mohun Sen. 24 W R 442.**

273—S. 58-Division of joint decree to bring case within s. 58.

A joint decree against two defendants for a sum exceeding Rs 500 cannot be divided so as to fall within the scope of Bengal Act VIII of 1869, s. 58. **Syefoollah Khan v Forbes. 25 W R 55.**

Bengal Acts-(Rent Act VIII of 1869 & X of 1859) S. 58-*Contd.*

274—S. 58-Execution of decree—Attachment—Limitation.

A decree in a suit instituted under Bengal Act VIII of 1869 was passed on the 13th of March 1873. Application for execution was made on the 18th of February 1876, but no process of attachment or sale was issued until the 2nd of April 1876. *Held* that the attachment was valid and not void as barred by limitation, under s 58, Bengal Act VIII of 1869. 6 W R Act X. 84, 4 B L R F B 82 : 13 W R F B 3, and 20 W R 395, cited. **Deodhary Singh v Dowlut Ram. 3 C L R 189**

Notes:—Dist: 6 Cal 551.

275 -S. 58—Delay in executing decree—Limitation.

The holder of a rent decree having made application for attachment and sale within three years from the 3rd September 1868, the date of decree,attachment was effected and an order passed fixing 21st November 1871 as the date for sale. On consent of parties and part payment, postponement of sale was allowed for three months. After the lapse of this period, the judgment-debtor delayed two months longer and then applied for sale. The application was refused. *Held* that the judgment of the lower Court was right, proceedings having been barred by Bengal Act VIII of 1869, s. 58. *Quære*—Had the Court any power, on consent of parties or otherwise to extend the period of time prescribed by the statute of limitation ? **Lalla Ram Sahoy v Dodraj Mahto 20 W R 395.**

Notes:—Ap: 6 Cal 554. Con : 3 Cal 547. Ref: 3 C L R 189.

276—S.58—Release of property from attachment-Decree in suit to set aside order releasing it.

Where property has been released from attachment in execution of a decree and in a subsequent suit brought for the purpose, a decree is obtained declaring it liable to be attached and sold in execution of the former decree, the effect of the decree in the latter suit is to set aside the order which released the property from attachment, thus leaving matters as they were before that

Bengal Acts-(Rent Act VIII of 1869 & X of 1859) S. 58-*Contd.*

order was passed, and therefore, it being unnecessary to issue further process of execution, the execution in proceedings are not barred under s. 58 of Bengal Act VIII of 1869. **Wooma Churn Chatterjee v Kadambini Dabee. 3 C L R 146**

277—S.58—Failure to carry out order for execution—Limitation.

On a decree for rent dated 18th July 1870, execution process was taken out on 21st April 1873. On 24th October following, an order was passed for talabana to be deposited within seven days, but before that time expired (i. e., on 27th October),the case was struck off by an order which was not appealed against. The next execution process was taken out on the 6th December 1873. *Held* that, as the last process, being for a set-off, was not of the same nature as the first,which was for attachment of property, it could not be considered to be a carrying out of the former ; and as the order of 27th October 1873 remained uncancelled, the decree was barred under the Rent Law, s. 58. **Arkam Shere v Laljee Singh. 24 W R 16**

278—Limitation under Act VIII (B C) of 1869, Section 58—Act VIII (B C) section 30—Judgment date of—Civil Procedure Code. Act X of 1877, section 210.

In a suit under section 30 of Act VIII (B C) of 1869 a decree was on the 24th January 1876 made by consent for Rs. 100 payable by seven instalments, the first commencing in January 1876, and the last in August 1879 the whole amount to become due on default in payment of any two consecutive instalments. None of the instalments were paid. On the 5th April 1879 an application was made for execution of the decree.

Held by Garth, C J. and Marris, J Prinsep ; J dissentiente,that the application was not barred. Per Garth, C J.:—The reasonable construction of section 58 of Act VIII (B C) of 1869, and section 210 of Act X of 1877 taken together is this, that the words "from the date of such judgment," in section 58 of the former Act should be read as if they were "from the date when the rent is adjudged to be payable."

Per Prinsep, J :—The date of a judgment is the date on which it is delivered.

Gureebullah Sirkar v Mohun Lall Shaha 7 Cal 127=8 C L R 409.

Notes.—Dist: 9 Cal 711 F B.

Bengal Acts (Rent Act VIII of 1869 & X of 1859) S. 58-*Contd.*

279—Section 58—Act VIII (B C) of 1869.—Execution of Rent Decree for less than Rs. 50

Where a rent decree has been passed for a sum less than Rs. 500, Section 58 Act VIII (B C) of 1869, is a bar to the issue of any process for execution after three years from the date of the decree notwithstanding that a prior step in execution shall have been taken within 3 years. **Bholanath Roy v Nurendro Nath Roy. 9 Cal 380; 12 C L R 58.**

280—Section 58-Act VIII (B C) of 1869—Limitation Judgment, Date of decree,—Date of-Rent decree for less than Rs. 500 payable by instalment.

A decree for less than Rs. 500 as rent having been made under Act VIII of 1869 on the 10th July 1878 payable by two instalments on 4th June and 13th October 1879, an application was, on the 18th July 1881 made for execution.

Held by Mc Donell, Prinsep and Wilson JJ., (Garth. C J and Mitter J dissenting) that the application was barred by section 58 of Act VIII (B C) of 1869, the limitation provided by that section running from the date on which the decree was passed and not from the date on which the same adjudged was made payable. 8 C L R 409. s. c. 7 Cal 127 overruled **Mamtazul Huq v Nisbai Singh. 9 Cal 711=12 C L R 318.**

Notes.—Ref: 22 Cal 611.

281—S. 58—Application for execution of decree for arrears of rent—Proper application—Civil Procedure Code (Act XIV of 1882), ss. 235, 237, 245—Limitation.

Within the period of three years from the date of a decree for arrears of rent under Rs. 500, the judgment-debtor applied for execution of his decree without giving a list of the properties which he sought to attach, but stating that a list was filed with a previous application, and praying that that application might be put up with the present one. Subsequently, upon an order made by the Court, a fresh list was filed after the period of a year had elapsed. *Held*, that, though the application was not in strict accordance with the provisions of s. 237 of the Civil Procedure Code, it was still an application under s. 235, and that execution of the decree was not barred, but that it must be limited to the property specified in the previous application. 12 C L R 279, followed. **Hurry Churn Bose v. Subayder Sheikh, 12 Cal 161.**

Bengal Acts-(Rent Act VIII of 1869 & X of 1859) S. 58-*Contd.*

Notes:—Dist: 14 Cal 124. Ref: 17 Cal 631, F B.

282—S. 58-Bengal Rent Act VIII of 1869,(X 1859)—Rent Decree for less than 500 rupees——Limitation—Application for Execution—Fresh application.

The true construction of Act VIII (B C) of 1869 S. 58 is that execution shall not issue unless a proper application for execution is made within three years from the date of the judgment. (13 W R F B 3 Fol: 20 W R 395 Dist. from. Circular order of the 10th of July 1874 Diss')

Sreemutty Goluck Mony Debia v. Mohesh Chandra Mosa, 1 C L R 149=3 Cal 547.

283—Act VIII (B C) of 1869, Sections 58, 5,27,28,29,30,—Limitation—Execution of Decrees in Rent suits.

Application having been made in December 1877, for the sale of moveable property of the judgment-debtor which had been attached in execution of a decree passed in June 1876 in a rent suit under Act VIII (B C) of 1869, it was, on the 13th March 1878, directed that the judgment-creditor should proceed against the tenure in respect of which the decree had been made, and on the 15th March the attachment was withdrawn. Although the amount of the decree and the costs were under Rs. 500, the judgment-creditor, on the 19th August 1879, again applied for execution treating the decree as for an account exceeding Rs. 500, that costs of an appeal being added to the costs originally directed by the decree. *Held*, distinguishing the cases of 3 C L R 189, and 3 C L R 261, that the application was barred under Act VIII (B C) of 1869, Section 58, the attachment and execution proceedings not having been allowed to subsist. *Held*, further, that the costs of appeal could not be added to the costs under the original decree so as to bring the case within the latter portion of Section 58 of that Act. **Kadumbini Babya v. Koylash Chender Pal Chowdhry, 6 Cal 554= 8 C L R 19.**

284—S.58—Execution of decree-Suit for rent not brought under Bengal Act VIII of 1869—Decree of Court of Foreign State-Civil Procedure Code, 1882, S. 434—Limitation.—

The law of limitation applicable to the execution of a decree of the Civil Court of Cooch Behar, for rent for a sum under Rs. 500 in a suit not brought under the Rent Act, is by s. 434 of the Civil Procedure Code which gives the Courts in British India power to execute decrees passed by the Courts of a Foreign State, s. 58 of Bengal Act VIII of 1869. That section is not confined to suits brought under that Act. **Hukum Chand Aswal v. Gyanender Chunder Lahiri, 14 Cal 570.**

Reviewing S. C. **13 Cal 95.**

Bengal Acts-(Rent Act VIII of 1869 & X of 1859) S. 58-*Concld.*

285—S. 58—Rent Recovery Act, Section 92—Execution, application for—Struck off—Second application, 3 years after the date of judgment—Continuation.—

The petitioner brought a suit against his tenant, the opposite party for rent under the provisions of Act X of 1859 and obtained a decree on the 22nd January 1903. On the 28th August 1905, he made an application for execution of the decree, paying for the attachment of both moveable and immoveable property. The Deputy Collector struck off the execution case on the ground that it was more than 6 months old. On the 22nd February 1906, the decree holder put in another application which was dismissed on the 9th April as barred under the provision of section 92 of Act X of 1859.

Held, The application of the 22nd February 1906, is one in continuation or furtherance of the former application of the 28th August 1905 and hence the execution proceedings are not barred.

The word "issued" in section 92 of Act X of 1859 should not have a strict legal interpretation put upon it. It means " sued out " or " applied for" with success that is, that no application for a process of execution shall be successful unless the application for it is made or it is sued out, within a fixed time.

It is sufficient to save limitation under section 92 of Act X of 1859, if the application for execution was made within 3 years from the date of the judgment. (13 W R 3 F B; 3 Cal 547; 1 C L R 149 Fol) **Rajah Shyam Chandra Madra Rajhari Chand and Raja of Nilgiri v. Inkailu Ram Prosad Bhuyan, 5 C L J 146.**

—Ss. 59, 60 (Bengal Act VIII of 1865, ss. 4 and 5).

See (1) Sale for Arrears of Rent — Incumbrances.

Bengal Acts-(Rent Act VIII of 1869 & X of 1859) S. 59-*Concld.*

(2) Sale for Arrears of Rent—Portion of Under-tenure, Sale of.

(3) Sale for Arrears of Rent — Under-tenure, Sale of.

—Ss. 59, 60, 66.

See Onus of Proof—Sale for Arrears of Rent.

—Ss. 59-61 (Act X of 1859, s 105).

See (1) Execution of Decree—Decrees under Rent Law.

(2) Sale for Arrears of Rent-Incumbrances.

(3) Sale for Arrears of Rent—Under-tenure, Sale of.

—Ss. 59, 61, 65.

See Execution of Decree — Decrees under Rent Law.

286—S. 59-Sale—Irregularity—Unregistered tenant-Locus standi-No attachment-No publication—Irregularity.

A private purchaser of a tenure who has not registered his name in the landlord's *sherista* (office) and has not been recognised by him, has no *locus standi* to bring and maintain an action to set aside a sale held in execution of a decree for arrears of rent obtained against the registered tenant. The non-attachment and non-proof of publication of the sale proclamation is no ground for setting aside a sale under Act X of 1859.

Palit Shahu v. Hari Mahanti, 5 C W N 126.

287—S. 59—Bengal Act VIII of 1869.—Decree-Execution-Sale-Practice and Procedure.—

At a sale in execution of an ordinary money decree only the right, title and interest of the judgment-debtor passes. To make the tenure itself of the judgment debtor liable to sale, under Bengal Act VIII of 1869, the special procedure required by the Act would be necessary, and all the co-sharers would have to be made parties to the suit. **Jiban Krishna Roy v. Brojo Lal Sen, 5 Bom L R 428=30 Cal 550=30 I A 81=7 C W N 425**

—S. 62 (Bengal Act VIII of 1865, s. 6).

See Set off—General Cases.

—Ss. 63 (Act X of 1859, s. 106).

See Right of Suit-Orders, Suits to set aside.

Bengal Acts-(Rent Act VIII of 1869 & X of 1859) S. 63-*Concld.*

288—S. 63=Act X of 1859, s. 106—Sale of undertenure—Suit to establish proprietary right.

Ss. 106 and 107, Act X of 1859, apply only to cases in which the existence of the under-tenure and the decree holder's right as landlord are admitted, not where they are denied and an adverse proprietary title is set up by the claimant as owner of the land. The remedy open to the owner of the land in such a case is under s. 77 before the decree is made, but after he allows it to be made, he cannot have it set aside in execution.

Golam Chunder Dey v. Nuddiar Chand Adheekaree, 16 W R 1.

289—S. 63=Act X of 1859, s. 106—Suit by purchaser for possession of under-tenure.—

A suit by an auction-purchaser to obtain khas possession of an under-tenure which had been sold under Bengal Act VIII of 1865 was dismissed on the ground that the suit in which the zamindar had obtained the decree was a fraudulent one and the purchaser knew that it had been against the wrong party. In special appeal, Act X of 1859, s. 106, was pleaded in justification of the zamindar. *Held*, that the zamindar could not bring such a suit as he had brought against a person other than the one whom he knew to be the proprietor of the under-tenure, and from whom for a series of years he had been receiving rent. **Nobin Chunder Sen Chowdhry v. Nobin Chunder Chuckerbutty, 22 W R 46. Wooma Churn Chatterjee v. Kadombini Dabee, 3 C L R 146.**

Notes:—Ref: 3 C L R 146.

—S. 64 (Act X of 1859, S. 108).

See Sale for Arrears of Rent—Portion of Under-tenure, Sale of.

—S. 66 (Bengal Act VIII of 1865. S. 16).

See Cases under Sale for Arrears of Rent—Incumbrances.

290—S. 66—Previous holder—Default.—

The expression "previous holder" as used in S 66 of the Bengal Act, VIII of 1869, must include a person beneficially interested in a tenure who is in a position to protect his interest by paying the rent into Court and yet omits to do so with the result that the tenure is brought to sale by the superior landlord.

Bengal Acts-(Rent Act VIII of 1869 & X of 1859) S. 66-*Concld.*

Default which prevents the section from applying does not necessarily imply any moral obliquity or any breach of contractual obligation. It simply means non-payment, failure or omission to pay. **Fakir Chunder v. Ram Kumar, 6 Bom L R 741=8 C W N 721=1 A L J 420=31 Cal 901=31 I A 195 P C.**

291—S. 66 —Avoidance of encumbrance by defaulter purchaser:—

One of several tenure holders for whose default in the payment of rent the tenure was sold cannot by purchase of the tenure at a sale for its own arrears claim the advantageous position which has been set out in S. 66 of Act VIII of 1869 (B C) and as such cannot avoid an encumbrance. The last para of S. 66 does not make any exception in favour of a shareholder defaulter.

Syed Nawab Ali Chowdry v. Hemanta Kumari Debi, 8 C W N 117.

—S. 68 (Act X of 1859, s. 112).
See Distress.

—Ss. 71, 74 (Act X of 1859, ss. 115, 118).
See Distress.

—Ss. 72, 74, 76 (Act X of 1859, ss. 116, 118, 120).
See Criminal Trespass.

—S. 80 (Act X of 1859, S. 124).
See Distress.

—S. 98 (Act X of 1859, s. 142).
See (1) Distress.
(2) Wrongful Distraint.

292—S. 98-Suit for value of crops—Distraint—Jurisdiction—Small Cause Court.

The plaintiff made a complaint to the Magistrate against the defendant, his landlord, for forcibly carrying away his crops; whereupon the defendant was tried, convicted of theft, and punished. The plaintiff then instituted a suit against the defendant in the Munsif's Court, apparently under s. 95 of Bengal Act VIII of 1869, and obtained a decree declaring the distraint to be illegal, and directing the crops to be given up to him. The defendant offered to give up a smaller quantity than was mentioned in the decree. The plaintiff refused to take the same, and brought a suit in the Small Cause Court to recover the value of the quantity he had claimed before the Munsif and something additional. *Held*, that the Small Cause Court had no jurisdiction, and that the suit ought to have been brought under s. 98 of Bengal Act VIII of 1869. **Hyder Ali v. Jafar Ali, 1 Cal 183=24 W R 222.**

Bengal Acts-(Rent Act VIII of 1869 & X of 1859) S. 98-*Concld.*

—s 99 (Act X of 1859, s. 143).

See Wrongful Distraint.

293.—S. 100 (Act X of 1859, s. 144)—Cause of action—Suit for wrongful distraint—Limitation.

The time limited by Act X of 1859, s. 144, for suing in respect of distraints for rent, "namely, three months from the date of the occurrence of the cause of action," was to be reckoned, in the case of a suit for a wrongful distress afterwards abandoned, from the abandonment of the distress, and not merely from the date of the original seizure. **Thukree Roy v Heeramun Singh, Marsh 470: 2 Hay 597.**

Tarinee Churn Bose v Shumbhoonath Panday. 3 W R Act X, 139.

294.—S.101-Act X of 1859, ss. 145 and 160—Complaint—Suit.

A complaint under s. 145 of Act X of 1859 is not a suit, and did not fall within the description of the suits in which, under s. 160, an appeal was given to the Zilla Judge. **Amanatulla. 6 B L R 569: 15 W R 136.**

294A.—S. 102—"Suit"—Appeal in execution proceedings.

The word "suit" in Bengal Act VIII of 1869, s. 102, is intended to cover all proceedings prior to decree and subsequent ones in execution.

Kristo Coomar Chuckerbutty v Anund Coomar Dutt. 19 W R 307.

Kedarnath Biswas v Huro Pershad Roy Chowdhry. 23 W R 207.

Notes—Fol: 23 W R 207.

295.—S. 102—Intention of section—Effect of decree under.

S. 102 of Bengal Act VIII of 1869 was enacted in order to protect parties in the position of raiyat-defendants, and to prevent their being

Bengal Acts-(Rent Act VIII of 1869 & X of 1859) S. 102-*Contd.*

dragged up to the High Court in cases where the decree or demand is under Rs. 100. In such cases the decree is intended to have the same effect as that of a Small Cause Court.

Doorga Narain Sen v Ram Lall Chhutar 7 Cal 330.

S. C. Durga Narain Misser v Goburdhun Ghose. 9 C L R 86.

296.-S.102—Special appeal-Power of Bengal Legislature.

Bengal Act VIII of 1869 (ss. 33, 34) gives jurisdiction to Civil Courts to try suits brought for any cause of action arising under that Act; but it is a jurisdiction to try them according to the Code of Civil Procedure except where it is otherwise provided by the Act; and s. 102 modifies the effect of s. 34, and provides that there shall be no special appeal in rent suits for an amount under Rs. 100 except in certain circumstances. *Quære*—Has the Bengal Legislative Council power to give to the High Court any appeallate jurisdiction not conferred by the Charter? **Poorno Chunder Roy v Kristo Chunder Singh.** 23 W R 171.

Notes.—Ap: 1 C L R 39 F B; 3 Cal 151, F B.

297.—Ss. 102 and 52-Act VIII (B C) of 1869—Fractional share-holder—Ejectment—Second appeal.

In a suit by a fractional owner of an estate for the recovery of Rs. 16-1-3 for rent and for the ejectment of the defendant, the lower Courts held that the plaintiff was entitled to a decree for ejectment. It did not appear whether the value of the property did not exceed Rs. 100.

Held under the circumstances, that the right of the second appeal was not taken away by section 102 of Act VIII (B. C.) of 1869. 5 Cal 594 (s. c.) 5 C L R 513, overruled. A fractional share holder is not entitled under section 52 of Act VIII (B C) of 1869 to maintain a suit for ejectment. **Tulsi Pandya v Buchu Lal.** 9 Cal 596=12 C L R 223.

Notes.—Ref: 15 Cal 40.

298.—S. 102—Special appeal—Sale in execution of decree for rent.

Bengal Acts-(Rent Act VIII of 1869 & X of 1859) S. 102 *Contd.*

No appeal lies under s. 102, Bengal Act VIII of 1869, from the order of a District Judge on an application connected with the sale of a tenure in execution of a decree for arrears of rent below Rs. 100. **Deb Coomaree Dassee v Gungadhur Dutt.** 17 W R 189.

299.—S. 102—Special appeal.

In suits for recovery of rent below Rs 100, a special appeal lies to the High Court from the decision in appeal by a Subordinate Judge.

Mahomed Munoor Mea v Jybunee. 10 B L R Ap 29: 19 W R 200.

300.—S. 102—Special appeal.

In a suit for arrears of rent below Rs. 100, an appeal lies to the High Court from a decree passed in appeal by an Additional Judge.

Nobokisto Koondoo v Mahomed Sheikh. 10 B L R Ap 30: 19 W R 202.

301.—S. 102—Special appeal—Suit for rent under Rs. 100—Civil Procedure Code, 1859, s. 372.

Held by the Court (Jackson, J., dissenting) that no appeal lies to the High Court from the decision of a District Judge in a suit for rent under Rs. 100. when no question of right to enhance or vary the rent of a raiyat or tenant, nor any question relating to a title to land or to some interest in land as between parties having conflicting claims thereto, has been determined by the judgment. **Lungessur Kooer v Sookha Ojha. Radhay Kishan v Kali Misser.** 3 Cal 151. **Lakhessur Koer v Sookha Ojha.** 1 C L R 39.

302.—S. 102-Act VIII (B.C.) of 1869, Appeal-Section 52, suit under—Suit for arrears of rent and ejectment of tenant—Act VIII (B. C.) of 1869 section 102—Jurisdiction-Execution proceedings.

Where a suit is brought under section 52 of the Rent Law, Act VIII (B. C.) of 1869 for the recovery of arrears of rent and for ejectment of the tenant in default of payment of such arrears, and amount claimed is under Rs. 100, an appeal is barred under section 102 of that Act.

The proceedings in execution of the decree in such a suit are to be treated as part of the suit and subject to the same rule as regards jurisdiction as the suit itself. **Parbutty Churn Sen v Mondari.** 5 Cal 594=5 C L R 513.

Bengal Acts-(Rent Act VIII of 1869 & X of 1859) S. 102-*Contd.*

Notes.—Dist: 11 C L R 480; 10 Cal 89.

302. A – S. 102–Special appeal–District Judge–Subordinate Judge—Act XVI of 1868—Bengal Civil Courts Act (VI of 1871).

The words "District Judge" in s. 102 of Bengal Act VIII of 1869 do not include a Subordinate Judge, to whom, under Act XVI of 1868 or Act VI of 1871, the District Judge may make over appeals filed in his Court. **Doyal Chand Sahoy v Nabin Chandra Adhikari. 8 B L R 180: 16 W R 235.**

303.–S. 102–Special appeal–Additional Judge–District Judge—Bengal Civil Courts Act VI of 1871—Appeal.

Held (Jackson, J., dissenting) that an additional Judge invested with the powers given to him by Act VI of 1871 is a District Judge within the meaning of s. 102 of Bengal Act VIII of 1869, and no appeal lies from his decision in suits of the nature described in that section.

Brojo Misser v Ahladi Misran. 13 B L R F B, 376: 21 W R 320. Ishan Chunder Ghose v Nobin Pal. 13 B L R 377 note,

Notes.—See 21 W R 320.

304.–S.102–Special appeal–Right to enhance or vary the rent.

The question in a suit for arrears of rent as to a right to convert the money-rent into a rent payable in kind is a question which, if determined, renders the suit appealable.

Elahee Buksh v Jaffur Aly. 1 N W 109: Ed. 1873, 157.

305.–S. 102 Special appeal–Right to enhance or vary rent.

A special appeal was held to lie to the High Court under s. 102, Bengal Act VIII of 1869 in a suit for rent below Rs. 100 in which the question of right to enhance had been determined.

Watson & Co. v Ram Dhun Ghose. 17 W R 495.

306.–S. 102–Special appeal—Question of title.

In this case the Judge dismissed plaintiff's suit on the ground that no notice had been served on defendant, the nature of the suit being not one for enhancement, but to recover rent at rates previously settled, and no notice being therefore required. The value of the suit was under Rs. 100, and the High Court held that the Judge had not decided any right to vary or enhance the rent, and therefore they could not interfere, there being no appeal under Bengal Act VIII of 1869, s. 102. **Goluck Chunder Dutt v Meah Raja Mijee. 17 W R 119.**

Notes.—Fol: 3 Cal 224. Ref: 1 Bom 286; 592; 25 All 35.

307.—S. 102—Special appeal—Question between parties having conflicting claims.

In a suit for rent less than Rs.100, the decision turned upon whether, in a former suit against the plaintiff by a third party, a decree had been recovered for possession of a portion of the land now in dispute. *Held* that, as neither the land nor the rent of such portion was claimed by the defendant, the question as to title was not decided between parties having "conflicting claims" thereto; consequently there was no right of appeal. **Reedoynath Dooripa v Puddo Lochun Chuckerbutty. 22 W R 205.**

308.—S. 102 Special appeal–Question of title.

The issue whether or not there has been a binding enhancement of rent, and whether or not the tenant has paid at the enhanced rate, involves no question of title or of right to enhance or vary the rent, and the appeal in such a suit properly lies to the Collector. **Bahadur Singh v Hura. 3 N W 73. Ager Singh v Boojhawun. 4 N W 61.**

309.—S. 102—Special appeal—Decision as to varying rent.

In a suit for arrears of rent on the basis of a shironamah, where the raiyat denied that he had executed that document, and produced evidence to show that the rates mentioned in it were not correct,—*Held* that there was no question of right to vary the rent, and that the case therefore did not come under Bengal Act VIII of 1869, s. 102. **Nitressur Singh v Jhotee Tely. 23 W R 343.**

310—S. 102—Special appeal—Decision as to varying rent.

Where the amount of jumma is not disputed

Bengal Acts (Rent Act VIII of 1869 & X of 1859) S. 102-*Contd.*

but there is a question as to whether it is payable by instalments or in a lump sum, the decision cannot be said to involve a question of "right to enhance or vary the rent." **Peari Mohun Mookhopadhya v Madhub Chunder Baboo. 23 W R 385.**

311.—S. 102—Special appeal—Question of fact—Question of nature of rent.

In a suit for arrears of rent, where the question was whether the defendants were holding on payment of nugdi rents or as bhouli tenants.—*Held* that the decision was a finding of fact. *Held*, further, that, as the suit was for an amount under Rs 100, and as no question to vary the rate was determined, nor any question of title as between parties having conflicting claims thereto, there was no special appeal.

Shumbul Singh v Toondun Singh. 24 W R 469.

312.—S. 102-Special appeal—"Right to vary rent."

A suit for rent under Rs.100 is not taken out of the purview of Bengal Act VIII of 1869, s. 102 by the fact of the rate of rent having been varied by the decision of the Court, unless the Judge determined "the right to vary the rent."

Watson & Co. v Mohendro Nauth Paul. 23 W R 436.

Sreenath Roy v Ainooddeen Shaha. 25 W R 103.

Notes.—Fol: 25 W R 103.

313.—S. 102—Special appeal—Question as to whether rent has varied.

Bengal Act VIII of 1869, s. 102, does not apply where the point decided is simply whether the rent fixed by a previous decision has been subsequently altered and a new arrangement come to. **Nurubdessur Pershad Roy v Jungole. 24 W R 49.**

314—S. 102-Special appeal—Question as to variation of rent.

In a suit for arrears of rent under Rs.100 in which the question was whether the landlord had the right to raise and had raised the rent, and the Judge decided that there had been no alteration in the rent,—*Held* no appeal lay to the High Court. **Roy Jung Bahadoor v Jugdeo Roy. 25 W R 247.**

Bengal Acts-(Rent Act VIII of 1869 & X of 1859) S. 102-*Contd.*

315.-S. 102—Special appeal-Question of title.

Where the Judge practically came to no determination at all, on the erroneous supposition that a review had been wrongly admitted by the Munsif, a special appeal was held to be not barred.

Goor Dyal Roy v Deka Noonya. 22 W R 446.

316—S. 102—Special appeal-Co-sharer—Suit for rent.

The plaintiff, one of several co-sharers of a talukh, sued to recover her share of rent, making her co-sharers, who resisted her claim, defendants. The first Court raised and tried questions of title, between the plaintiff, her co-sharers, and the raiyat, and decided in favour of the plaintiff. The lower Appellate Court, without expressing any opinion on the rights of the parties, dismissed the suit on the ground that it was not maintainable. On special appeal it was contended that no appeal would lie, as the amount of the claim was less than R100, and no question of title was determined by the judgment; but this objection was overruled on the ground that the decree of the lower Appellate Court, dismissing the suit, had the effect of deciding the question of title against the plaintiff. On appeal under cl 15 of the Letters Patent,-*Held* that the judgment, rather than the decree, is to be looked at in applying s. 102, Bengal Act VIII of 1869. No appeal lay from the judgment of the lower Appellate Court, inasmuch as that judgment showed not only that no question of title was determined, but that the Judge did not even consider it. **Karim Sheikh v Mukhoda Soondery Dassee 15 B L R 111: 23 W R 268**

Reversing decision in **Mokhoda Sonderee Dossee v Kureem Sheikh. 23 W R 11.**

Notes:—See 23 W R 268.

317—S. 102-Special appeal-Question of title.

Where in a suit under Bengal Act VIII of 1869, s. 83, to contest the demand of the distrainer, a question as to area was raised merely as subordinate to the issue as to the amount of rent due without any dispute as to the relationship of landlord and tenant, the case was held not to come within the provisions of s. 102. **Huro Pershad Chuckerbutty v Sreedam Chunder Chowdhry. 20 W R 15.**

Hurish Chunder Chuckerbutty v Hurree Bewah. 20 W R 16.

Bengal Acts-(Rent Act VIII of 1869 & X of 1859) S. 102-*Contd.*

Notes:—Ap: 15 Cal 388. Dist: 10 Bom 193. Ref. 21 Mad 551.

318—S 102—Special appeal—Question of title.

Where in a suit for rent the Judge simply upholds as against an intervenor the possession of the party found to have succeeded on the death of the last owner to the quiet possession of his estate under a show of title and gives him a decree for rent, he does not determine a question of title so as to admit an appeal under s. 102, Bengal Act VIII of 1869. **Kally Churn Bannerjee v Gopal Chunder Banerjee. 26 W R 100**

319—S 102-Special appeal—Question of title.

In a suit for rent under Rs.50, in which no question to enhance or very the rate was decided and in which, although the first Court were into the question of title, the lower Appellate Court came to no decision on the point,—*Held* that the case fell within the purview of Bengal Act VIII of 1869, s. 102, and no special appeal lay.

Bhugwan Dutt Misser v Nowneedh Lall. 25 W R 153.

320—S. 102—Special appeal—Decision on genuineness of document in order to decide as to amount of rent.

Where a suit for rent of certain years, not exceeding Rs.100, based upon a kabulat and jummabundi, was dismissed in appeal on the ground that those documents were forged, and the lower Appellate Court, in order to arrive at a decision as to the amount of rent due, enquired into, and decided upon, the genuineness of the mokurari pottah set up by the defendant,—*Held* that Bengal Act VIII of 1869, s. 102, precluded any special appeal in the case. **Mahomed Toque v Fouzdar Roy. 25 W R 14.**

321—S.102-Special appeal—Question of title.

In a suit for rent, in which the sum claimed was less than Rs. 100, the defendant pleaded that the plaintiff had ceased to have any interest in the land, and the suit was dismissed. There was no finding as between the plaintiff and any other person claiming title to the land, *Held* that a special appeal to the High Court was barred by s. 102 Bengal Act VIII of 1869. 23 W R 227, and 21 W R 26, cited and followed. **Donzelli v Tekan Nodaf. 2 C L R 558.**

Bengal Acts-(Rent Act VIII of 1869 & X of 1859) S 102-*Contd.*

322—S 102—Special appeal-Question of title.

In a suit for ejectment valued under Rs.100, the defendants, who were sued as yearly tenants, replied that their tenure was a maurasi gujasta tenure, and in proof of their allegation adduced evidence which was not displaced by the plaintiffs. The lower Court considered that the defendants' allegation was well founded. *Held* that, although the value of the suit was under Rs. 100, an appeal was not barred by the provisions of s. 102 of Bengal Act VIII of 1869, as the lower Court had determined a question of law as to whether the tenure was gujasta. **Bijjo Nath Sahoo v Ramdour Roy. 7 C L R 369.**

Notes:—Ref: 8 C W N 437.

323—S. 102—Special appeal-Question of title.

Separate suits for rent by *A* and *B* having been instituted against the tenants of certain land to which both laid claim, a suit was filed by *A* to establish his title against *B*, and pending that suit the rent suits which were each for a sum under Rs. 100, and which had been appealed to the District Judge, were stayed. The suit between *A* and *B* having been decided against *A*, the District Judge dismissed his suits against the tenants. *Held*, on appeal, that no question of title could be said to have been decided in such suits, and that consequently no second appeal lay. **Durga Narain Misser v Goburdhun Ghose. 9 C L R 86.**

324—S. 102—Special appeal—Parties having conflicting claims.

Where there was a question of title raised between the plaintiff and an intervenor, and the Judge dismissed the suit for want of proof of relationship of landlord and tenant between them,—*Held* that, the suit being for less than Rs. 100, no special appeal lay to the High Court.

Hurry Mohun Mozoomdar v Dwarkanath Sein. 18 W R 42.
Dilbur v Issur Chunder Roy. 21 W R 36.
Nankoo Koeree v Nund Coomar Paurey. 22 W R 326.
Kashee Ram Doss v Sham Mohinee. 23 W R 227.
Kripamoyee Debia v Dropudee Chowdhrain 24 W R 213.

Notes:—Ap: 8 Cal 712. Fol: 24 W R 213.

Bengal Acts-(Rent Act VIII of 1869 & X of 1859) S. 102-*Contd.*

325—S. 102—Special appeal—Suit for arrears of rent.

D C S, the zamindar, brought a suit against B, a raiyat, for recovery of arrears of rent valued below Rs.100, to which N C A, who claimed under a mokurari title, was made a party under s. 73 Act VIII of 1859. The Munsif passed a decree in favour of the plaintiff. On appeal by N C A, which was heard and decided by the Subordinate Judge, on reference by the District Judge, the decree of the first Court was reversed, and the suit dismissed. *Held* a special appeal lay to the High Court. **Dayal Chand Sahoy v Nabin Chandra. 8 B L R 180 note: 16 W R 235. Iswar Chundra Sen v Behari Ray. 8 B L R 188, 16 W R 132.**

Notes:—See 16 W R 235.

326—Ss 190, 110, 151—Decree for rent of non-saleable tenure—Sale of other immoveable property without attempt to recover from person and moveables, if ultra vires—Application to set aside sale by deposit under C P C (Act XIV of 1882), s. 310-A, if lies—Act X of 1859 "complete Code" in what sense—Revision by High Court—Charter Act (24 and 25 Vic., Cap. 104), s. 15.

In execution of a decree obtained in a suit valued at over Rs. 100 for recovery of arrears of rent due in respect of a non-saleable tenure, the decree-holder applied for sale of some other immoveable property of the judgment-debtor, without making any attempt to execute the decree against the person or the moveable property of the judgment-debtor as required by s. 109 of Act X of 1859 and had it sold, and it was purchased by a third party. The judgment-debtor thereupon deposited the decretal amount with costs and the 5 per cent payable to the auction-purchaser under s. 310-A of the C P C, 1882, and asked for the cancelment of the sale. The Deputy Collector *held* that s. 310-A, C P C., did not apply to sales under Act X of 1859, and that there was no provision in law for setting aside the sale, and he rejected the judgment-debtor's application; his decision was upheld on appeal by the Collector; *Held*, on an application in revision to set aside the Deputy Collector's order, that the proceeding before the Deputy Collector was amenable to the revisional jurisdiction of the High Court, and not to an appeal to the

Bengal Acts-(Rent Act VIII of 1869 & X of 1859) S. 102-*Contd.*

District Judge, the purchaser at the sale being a third party and the sale being moreover impeached as *ultra vires* and illegal; that the High Court had power to interfere with the order under s. 15 of the Charter Act; that the sale being in contravention of the provisions of ss. 109 and 110 of Act X of 1859 was *ultra vires;* that the provisions of s. 310-A of the C P C., 1882, applied and the Deputy Collector failed to exercise a lawful jurisdiction vested in him in rejecting the judgment-debtor's application; the decision to the contrary in (2 C W N 127, Ref.) is opposed to *ratio decidendi* of (9 Cal 295, Ref.), *viz.*, that, except upon points expressly provided for by Act X of 1859, the procedure of the Revenue Courts when trying questions arising under that Act must be governed by the Civ Pro Code. (21 Cal 428, Commented on.).

Chaitan Patjosi Mohapatra v Kunja Behary Patnaik. 15 C W N 863.

327—S. 102=Act X of 1859 S. 153—Final order of Collector-Appellate order—High Court's power to interfere in revision.

S. 153 of the Act does not preclude revision by the High Court of an order of a Collector, which is final within the meaning of that section.

Mohant Gobind Ramanuja Das v Lakhum Pardia. 11 C W N 112=8 C L J 43.

328—S. 102=Act X of 1859, S. 153—High Court, power of—Civil Procedure Code (Act XIV of 1882), Sec 622—Charter Act (24 and 25 Vict Cal 104), Sec 15-Revision where appeal lies.

The High Court has power, notwithstanding section 153 of Act X of 1859, to revise the orders of lower Courts where they have not acted correctly according to law under section 622 of the Civil Procedure Code or under section 15 of the Charter Act.

Where the application is not merely to set aside the order of a Deputy Collector, but also the appellate order of a Collector, the Court can properly interfere under section 622. Civil Procedure Code. (12 C L R 449 Dist:) **Mohunt Gobinda Ramanuj Das v Lakhun Parida. 8 C L J 43=11 C W N 112.**

Bengal Acts-(Rent Act VIII of 1869 & X of 1859) S. 102-*Contd.*

329—S. 102—Special appeal—Decision of varying rent.

Where a Judge found in a rent suit that, although Rs. 30 6-6 had for a great number of years been paid by the tenant, Rs. 29-15 only was paid as rent, the remainder being a kind of cess or fee for testing the coin paid,—*Held* that he did not determine any question which amounted to a varying of the rent of the tenant.

Dwarkanath Singh Roy v. Nubo Coomar Bose. 20 W R., 270.

330.—S. 102—Special appeal—Claims by plaintiff as zamindar and defendant as mortgagee, to rent.

In a suit in which plaintiff claims rent as zamindar, and defendant, admitting his own tenancy, claims it as mortgagee, there cannot be said to be conflicting claims to a title to, or some interest in, land within the meaning of Bengal Act VIII of 1869, s. 103. **Rajkishen Mookerjee v Pearee Mohun Mookerjee 24 W R 114.**

331—S.102-Special appeal—Question against intervenor.

The circumstance that a question has been determined at the hearing of the appeal in a rent suit, by which an intervenor may be injuriously affected, will not make the appeal cognizable as a special-appeal, unless the decision has involved some title or interest in land of parties having conflicting claims thereto. **Raj Kishen Mookerjee v Sreenath Dutt 23 W R 408.**

332—S. 102—Special appeal—Suit for Rent under Rs. 100—Title—Two persons.

A and B both laying claim to a certain land brought separate suits for rent against the same tenants. In both these suits the amount did not exceed Rs. 200. Subsequently A sued B to establish his title to the land against him. The District Judge kept the rent suits pending until decision of the suit between A and B which was finally decided in favour of B. The Judge then dismissed the rent suit by A and decreed that of B. *Held* that no second appeal would lie in rent suits, as no question of title between parties, having conflicting claims was decided in them.

Loorga Narain Sen v Ram Lall Chhutar 7 Cal 330.

S. C. Durga Narain Missir v Goburdhun Ghose 9 C L R 86.

11 C C 28

Bengal Acts-(Rent Act VIII of 1869 & X of 1859) S. 102-*Contd.*

333—S.102—Special appeal—Suit for rent below Rs. 100—Landlord and Tenant.

In a rent-suit, the defendant a tenant questioned the title of the landlord. But the Court of first instance holding that there was a tenancy passed a decree for rent. On appeal the District Judge rendered the decree holding that the rent was paid. On appeal to the High Court by the plaintiff, *Held*, that no second appeal would lie as it is for a suit under Rs. 100, and there is no question raised in it relating to a title to land as between parties having conflicting claims thereto. **Ramaprosad Roy v Shorup Parmanick. 8 Cal 712.**

334—S. 103—Civil Procedure Code, 1859, s. 119—Ex-parte decree—Re-hearing.

S. 103 of Bengal Act VIII of 1869 does not apply to applications for a re-hearing after an *ex-parte* decree on the ground of ignorance of the suit.

Drabamayi Guptia v Taracharan Sen. 7 B L R 207; 16 W R 17.

—S. 108.

See Bengal Act III of 1870. Case No. (3) **10 B L R Ap 21; 19 W R 128; 10 B L R Ap 22; Note 15 W R 75.**

335—Ss. 77, 153, 155, 160—Rent suit-Intervenor—Decision of Deputy Collector if appealable to Collector or Zillah Judge—Question relating to title to land, etc "—

Where, in a suit rent, another person intervenes under S 77 of Act X of 1859, on the ground that he had, actually and in good faith, received and enjoyed the rent, before and up to the commencement of the suit, all that the Deputy Collector has to determine is which of the two parties, the plaintiff and the intervenor, was in actual receipt and enjoyment of the rent, and any question of title is gone into only incidentally for the purpose of deciding the main question. An appeal therefore lies from the Deputy Collector's decision to the Collector, and not under Ss. 153, 155 and 160 of the Act to the Zillah Judge.

Rakhal Patak v Kumar (Raja) Jyoti Proshad Singh Deo. 13 C W N 599 4 Ind cas 536.

Bengal Rent Act X of 1859 S. 161.

336—S. 161-Appeal under C. P. C. Ss. 560, 588—Applicability—Whether Rent Recovery Act X of 1859 a completed Code.

Bengal Acts-(Rent Act VIII of 1869 & X of 1859) *Concld.*

S. 560 of the Code of Civil Procedure and by necessary implication S. 588 also, are applicable to appeals under Act X of 1859 by the operation of S. 161 of the Act. *Quære*—Whether the proposition that Act X of 1859 is a complete Code in itself, requires modification in view of the decision in 9 I. A. 174. **Hare Krishna Mahanti v Bishun Chandra Mahanti. 7 C L J 426=12 C W N 898=35 Cal 799.**

Notes:—Ref: 35 Cal 990=12 C W N 893.

337—Ss. 160, 161—S. 373 of Civil Procedure Code (Act XIV of 1882), applicability of.

The provisions of sec. 373, C. P C., have no application to suits instituted under Act X of 1859. Where a Plaintiff applied to withdraw a suit for rent and the Court permitted such withdrawal but dismissed the suit and did not give distinct permission to bring a fresh suit upon the same cause of action, *Held*—That a fresh suit was maintainable. **Sheikh Golam Mahomed v Sivendra Pada Banerjee. 12 C W N 893 =35 Cal 990.**

338.—S 161—Rent suit—Civil Court-Second appeal.

In a suit for rent under Act X of 1859 a second appeal would lie to the High Court against the judgment of a District Judge passed on an appeal in a suit for a sum below Rs 5000 S. D. A for 1861 p 8 foll; 9 L A 174 ref to; 4 C W N 333 dis. **Sadai Naik v Serai Naik 5 C W N 279= 28 Cal 532.**

Notes:—Ref: 30 Cal 990=7 C W N 864: Ref 12 C W N 893; Fol: 35 Cal 799=12 C W N 888=7 C L J 426; Disc 35 Cal 990 =12 C W N 893.

Bengal Resumption-Effect of Resumption-Effect of Patta Act VIII of 1879.

See (1) Resumption—Effect of.
(2) Resumption—Effect of Patta.

Bengal Revenue Sale Law Act XI of 1859.

See Revenue Sale Law.

Bengal Revenue Sale Law.

See Cases under:—
Sale for Arrears of Revenue.

Bengal Review-Power to Review Act VII of 1868.

—S. 2.
See Review—Power to Review.

Bengal sale for Arrears of Revenue Act XI of 1859.

See Sale for Arrears of Revenue.

Bengal sale for Arrears of Revenue-setting aside sale, Act VII of 1868.

See Sale for Arrears of Revenue-setting aside sale.

Bengal Salt Acts and Regulations, Act VII of 1864.

See Salt, Acts and Regulations relating to-Bengal.

Bengal Sanitary Drainage Act VIII of 1895.

Notes:—S. 1 (3) Rep. Act 1 of 1903.

Bengal school, Hindu Law.

See Hindu Law.

Bengal Service Tenure Act VIII of 1878.

See Service Tenure.

Bengal Storing Jute, Act II of 1872.

—S. 34.
See Storing Jute.

Bengal Survey Act v of 1875.

Notes:—S. 57 Rep. in pt. Ben. Act VII of 1880 s. 1 rep. in pt. Act 1 of 1903; rep. (in Assam) act XII of 1891; Declared in force in the Angul District, Reg. I of 1894, s. 3.

Bengal Survey Act V of 1875.

—S. 40.
See Special or Second Appeal-Orders subject or not to appeal.

Bengal Acts-(Survey Act V of 1875) -*Contd.*

See Superintendence of High Court-Civil Procedure Code, s. 622.

1—Ss 41, 62-Order-Suit for confirmation of possession-Relief inconsistent with plaint.-

S. 62 of the Survey Act is a bar to a suit by a plaintiff against whom an order determining a boundary dispute has been made under this Act, for confirmation of possession on the allegation that he has been in continuous possession from or before the order, such an order having, under S. 41 of that Act, the effect of a Civil Court decree, which is binding on the parties as regards the question of possession.

When the plaintiff sues for confirmation of possession on declaration of title, alleging that he is in possession, and proves his title but fails to prove possession, the Court ought not to award him recovery of possession, unless on the facts alleged in the plaint the action amounts to one for restoration of possession. II C L R 443 and II C L R 451, Dist. **Bissessuri Koeri v Ram Purtap Singh. 14 C W N 366= 4 Ind Cas 547.**

2-Survey Act, v (B C) of 1875, sections 44, 45 clause (b) and section 62 & s. 3-Jurisdiction of Revenue Officer-Butwara Proceedings-Boundary Dispute as to.

Upon an application professedly made under the Survey Act, V (B C) of 1875, the Collector, professing to proceed under that Act, laid down a boundary between two mouzahs on the lines of a boundary made many years before in a Butwara Proceeding between the proprietors of the mouzath who made the application. The plaintiff, who was the proprietor of the other mouzah, although he appeared and made objections before the Collector but did not appeal against his order, now brought a suit to have the boundary rectified.

Held, that the Collector had no jurisdiction under Act, V (B C) of 1875, to determine the boundary as laid down in the Butwara Proceedings so as to bind the plaintiff; and that accordingly the suit was not barred by section 62 of that Act. Clause (b) of section 45 of Act v (B C) of 1875 applies to a survey or some similar proceeding taken by a Revenue Officer for some public purpose, and not to such a proceeding as a butwara. **Hurri Prasad v. Jaumna Parasad, 6 Cal 453=7 C L R 491.**

Bengal Acts (Survey Act V of 1875) -*Concld.*

3—S. 41—Crim. Pro. Code (Act of 1898), Chap. XII—Competent—Court—Survey authorities.

An order by the Survey authorities under S. 41 of the Bengal Survey Act has the force of a Civil Court decree and is therefore tantamount to an order passed by a competent Court as provided for in Chap, XII of the Crim. Pro. Code. On such an order being passed with respect to any lands attached under S. 146, Crim Pro. Code, they should be released from attachment.

C. T. Ambler v Shah Somi Ahmed. 11 C L J 417.

4—S. 62—Boundary dispute-Possession, Evidence of—Suit based on title.

A formal decision on the question of boundary in a boundary dispute under s. 62 of Bengal Act V of 1875, although conclusive as to possession, is no bar to a suit based upon title.

Kala Chara Tea Co., Ld. v Sukul Singh. 13 Cal 280.

Notes:—Ref: 8 C W N 876.

5—S. 45—Obstruction to Canongoe appointed by Settlement Officer—Penal Code, s. 186.

Where a *Canongoe* appointed by a Settlement Officer in connection with the settlement of certain *Khas Mehal* belonging to Government was obstructed in his attempt to drive some pegs in the land by way of demarcating the boundary: *held* that he was not acting in the discharge of any public function within the meaning of s. 186 of the Penal Code, as either of the two conditions required by the Act had not been proved.

Moula Bux v King-Emperor. 6 C W N 120

6—Ss. 59, 60, 62—Decision by a Survey Collector—Right of suit.

A decision under the Survey Act relating to a boundary dispute is conclusive as to possession but would not bar a suit based on title. A suit for declaration of title is not barred by S. 62 of the Survey Act although no appeal is preferred either under S. 59 or under S. 60. Where the evidence of possession is conflicting it may be presumed that possession follows title.

Babu Kasturi Singh v Rajkumar Babu Bissun Pragas Narain Singh. 8 C W N 876.

Bengal Tenancy Act (VIII of 1885).

See (1) Cases under Appeal—Acts—Bengal Tenancy Act.

(2) Landlord and Tenant—Forfeiture—Breach of Conditions.

—Applicability of, to Chowkidari Chakran Land Considered. **9 C W N 571**

—Tenancy Act—Agricultural tenant—Ejectment suit—Disclaimer of title, no ground of forfeiture :—See Landlord and Tenant. **9 C W N 28**

—Forfeiture—Denial of landlord's title—How far landholder entitled to khas possession :—See **6 C W N 575.**

Bengal Tenancy Act VIII of 1885—Ss. 12 (2), 13 (1), (2) Am, Act VIII of 1886 ; Supplemented, Ben. Act 111 of 1895, Ss. 20, 28 to 32, 36 (c) : ss. 30 (a), 31, 39 (6), 52, ch X and S. 119 Am ss. 31-a, 31-B, ins Ben Act 111 of 1898 ; Certain transfers under ss. 12, 13, 17 or 18 validated provisions of those sections as to fees; Am s. 106 Am Ben Act 1 of 1903 ; ss. 1 (3), 3 (5), (10), 12 (2), (3), 13 (1), (2). 15, 16, 19, 22, 40, 52, 58, 67. 69, 75, 88, 101 (2), 102, ch X, Pt II (heading), ss. 104, 104-H (G), 105, (2), 106, 107, 108, 109, 109-A, 111,112, Ch XI (heading), ss.116, 120, 148, 153,158 (1), 161,168 (1), 169 (1), 170, 174 (2), 178, 189, 192, sch III am,ss.14, 45 Rep Ch IV-A (ss.18-A to 18-c) ss. 40-A, 102-A, 103-B, 105-A, 108-A, 109-B, 109-C 109-D, 111-B, 115-A,147-A, 147-B. 148-A, 153-A Ch. XIII A, (s. 158-A), ss. 158-B, 186-A, 188-A, ins s. 114 rep in pt and am ss. 149, 150 rep in pt (in Bengal), Ben Act 1 of 1907 ; ss. 1 (3), 3 (5), (10), 12 (2), (3), 13 (1), (2), 15, 16, 19, 22, 40, 52, 58, 67: 69, 75, 101 (2), 102, 103-B. Ch X Pt 11 (heading), ss. 104, 104-H (3), 105, 106, 107, 108, 109, 109-A, 111, 112, Ch XI (heading), ss. 116, 120, 148, 153, 158 (1), 161, 168, (1), 169 (1), 170, 174 (2), 178, 189, 192, sch. III am ss. 14, 45 rep Ch IV-A (ss. 18-A to 18-C), ss. 40-A,102-A, 105-A 108-A, 109-B, 109-C, 111-B, 115-A, 147-A, 147-B, 148-A, 153-A, Ch XIII-A, (s. 158-A), ss. 158-B, 186-A, 188-A, ins s. 114 rep in pt and am ss. 149, 150, rep in pt (in Eastern Bengal), E B and A Act I of 1908 ; s. 84 Declared in force in the Sonthal Parganas Reg III of 1872, s. 3, as amended by Reg III of 1899, s. 3.

—Record of rights—Weight to be given to:— **5 C L J 925.**

Bengal Acts-(Tenancy Act VIII of 1885)-*Contd.*

1—Bengal Tenancy Act—Arrear of putni rent due to a co-sharer Zemindar—Suit by him under Act VIII of 1885 to recover the whole rent of the tenure—Refusal of his co-sharer Zemindar to join him as plaintiffs to bring the same—Law applicable to the case—Agreement to pay shares in the putni rent separately—Its effect on the right to sue and on the tenure.

The appellant, a co-sharer in a Zamindari interest, in consequence of the putni rent falling into arrear so far as the share which should have come to him was concerned, brought a suit making the putnidars defendants and joining as co-defendants his co-sharers in the Zemindari on the ground that they refused to join him as plaintiffs. The suit was framed as one under the Bengal Tenancy Act to recover the whole rent of the tenure and for that purpose to bring to sale the tenure itself. The plaint also asked in the alternative for a decree for the appellant's share of the rent.

Held, that the appellant was competent to bring a suit, under the Bengal Tenancy Act for the whole rent due in respect of the property in suit.

Held, also that the law applicable to the present case must apparently be that by the express terms of the Bengal Tenancy Act in the event of the rent being unpaid the owners of the Zemindari interest were entitled, by suit under that Act to bring a putni to sale with consequences prescribed by that Act, and it was a general rule—a rule not derived from the Bengal Tenancy Act, but from quite another branch of law namely, the general principles of legal procedure —that a sharer, whose co-sharers refuse to join him as plaintiffs, and sue for the whole rent on the tenure, unless there was something to exclude the case from the operation of those rules.

Upon a contention that the case excluded from the operation of those general rule on the ground that by express or implied agreement between the Zemindars and the putnidars, the sharers in the putni rent of the several Zemindars were to be paid and so far as they were paid at all, were in fact, paid separately.

Held, that the right to bring the tenure to sale for arrears of rent remained intact, and also

Bengal Acts-(Tenancy Act VIII of 1885)-*Contd.*

the right of one sharer to sue; making this co-sharers defendants when they would not join as plaintiffs.

Their Lordships had no inclination to question the course of rulings in Bengal that agreement, either expressly proved or implied by the conduct of the parties, might establish the right to sue separately for the shares of rent receiveable by the separate share-holders.

Their Lordships thought that it was clearly a sound view of the law, as clearly laid down in Bengal, that such an agreement, expressed or implied, merely affected the right to sue separately for rent, and in no other respect modified the terms of the holding. **Raja Pramada Nath Roy v Raja Ramani Kanta Roy. 10 Bom L R 66=12 C W N 249=35 Cal 331 P C=35 I A 73=7 C L J 139= 18 M L J 43=3 M L T 151**

Notes.—Fol: 35 Cal 744=7 C L J 425=13 C W N 793; Appl; 12 C W N 835; Ref: 14 C W N 352=11 C L J 140; 14 C W N 335= 3 Ind Cas 34; 3 Ind Cas 29=3 Ind Cas 306 =13 C W N 650=36 Cal 765; 11 C L J 56; 4 N L R 45.

2.—Denial by tenant of landlord's title Forfeiture.

Under Act VIII of 1885, there is no forfeiture arising out of a denial by the tenant of the landlord's title. (17 Cal 196, Ref.)

Nizamuddin v Mamtazuddin. 28 Cal 135= 5 C W N 265.

Notes:—Ref: 9 C W N 928=2 C L J 389.

3-Tenure—Transferability—Purchasers from same tenant—Competency to question validity of transfer.

A licensee from some of the representatives of a tenant is not entitled to question the validity of the purchase from some other representative of the same tenant (11 C W N 76, 6 C W N 624, 2 C W N 279, Rel.) **Tamij Mandal v Golam Rabbani Biswas. 7 Ind Cas 720.**

4—Rent suit—Decree, power of Court to make —Civil Procedure Code Ss. 210, and 622—High Court's power of revision.

A decree for rent under the Bengal Tenancy Act cannot be made payable by instalments, s. 210 of the Civil Procedure Code not applying to such a decree.

Where a Munsif made an order for the payment of the amount of rent decreed by instalments he committed an error of law only and not an error in the exercise of his jurisdiction within S. 622 Civil Procedure Code, **Shib Narain Mookerjee v. Baikuntha Nath Isar, 11 C W N 857.**

5—Assignee of land as well as arrears of rent.

The person to whom the land, the rent for which is claimed as also the arrears of rent are transferred is an assignee of the whole interest of the landlord and is a landlord within the Bengal Tenancy Act. **Sashi Kumar Mirbahar v. Sita Nath Banerji. 7 C L J 425.**

Notes:—Ref: —10 C L J 396,

6—Bengal Tenancy Act not a complete Code: —Per Mookerjee J.— The Bengal Tenancy Act does not purport to be a complete Code even in respect of the law of landlord and tenant; nor does it profess to incorporate the general principles of the law of contract and the doctrines of Equity Jurisprudence, in so far as they may have to be applied in the determination of disputes between landlords and tenants.—**Kripa Sindhu Mookerjee v. Ananda Sundari Debi. (1905) 35 Cal 34=11 C W N 983 At 996= 6 C L J 273.**

7—Horticultural purposes, land let for—Applicability of Act—Adverse possession presumption of permanence.

The provisions of the Act will apply in deciding the question of title to the land originally let out for horticultural purposes. Where rents were received by the landlord from the transferee of an old tenant in the name of the latter the question of inference to be drawn from that fact is not one of law. The receipt of rent from a transferee as an agent is not a recognition of the transfer.

A limited interest in land may be acquired by adverse possession.

Where land was let as garden land with special reservations regarding trees, the fact that the land had been used as *bastu* land for the last 40

Bengal Acts-(Tenancy Act VIII of 1885) S. 2-*Contd.*

years will make no difference and there will be no presumption that the lease was a permanent, transferable one, and if the tenant chose to build on the land he must be held to have done so at his own risk. 15 W *R* 197; 7 C W N 132 Fol; 11 C W N 242 Dist. **Deb Narain Dutt v. Baidya Nath Modak Napit.** **2 Ind Cas 148. =14 C W N 68.**

8—Act VIII of 1885 Consideration—Right of stranger to impugn—Record of rights—Settlement Officer, power of.

Stranger cannot impugn a title deed on the ground that no consideration passed, yet a defendant sued in ejectment can do it.

The Bengal Tenancy Act does not authorize a Settlement Officer to make any declaration as to the jointness or separateness of tenants, in the column which is set apart for their names and if he does so it is of no effect. **Har Lal Raut v Jai Lal Raut.** **5 Ind Cas 291.**

9—10—Bengal Tenancy (Amendment) Act S *1*—Effect of—*R*etrospective validation of sales: Section I, Act I of 1903 (B C) enacts retrospectively that no transfer which has heretofore been made under S. 13 of the Bengal Tenancy Act shall be deemed to be invalid merely on the gronnd that the landlord's fee has not been paid and consequently it validates all such tranfers questioned in appeals pending when the Act was passed. A sale held at the instance of an assignee of a rent decree who is not also an assignee of the landlord's interest in the land if legal, has at most the effect of a sale held in execution of a decree for money under the Civil Procedure Code. Such a sale accordingly does not affect the interest of unrecorded cosharers in the tenure who are not parties to the decree or to the execution proceedings.

Manuratt Nath v. Harinath Das. **1 C L J 500.**

11—Ss. 2, 11, 17, 88—Sub-division of tenure—Transfer of a share of a permanent tenure—Validity.

Where the holder of a permanent tenure transferred a portion of it and the transferee held that portion separately and was allowed to pay proportionate rent for the same to the landlord for a great many years. *Held*, that upon sale by the transferee of that portion of the tenure his liability for rent to the landlord ceased. His act did not have the effect of sub-dividing the tenure,

Kali Sundari Debea Chaudhurani v. Dharani Kanta Lahara Chaudhuri. **10 C W N 272=33 Cal 279.**

12—S.2—Bengal Tenancy Act (VIII of 1885), Sections 2, cl. (4), 74, 179—Act X of 1859, Sec. 10 Reg. V of 1882, Sec 3.

Where a permanent tenancy was created by a lease dated 1860, *i. e*, before the passing of the Bengal Tenancy Act, the provisions of sec. 179 of the Act would not apply to the case, and the land lord could not recover any *abwab* from the tenant.

Sec. 10 of Act X of 1859 or Sec 3 of Reg. V of 1812 corresponding to Sec. 74 of the Bengal Tenancy Act made all impositions upon all classes of tenants, including a permanent tenure holder. in excess of the specified rent, illegal.

An agreement by a permanent tenant to give a certain number of cocoanuts to the landlord as *bhet* and to perform certain services (*begar*) without any remuneration, in addition to the rent, was illegal under the law as prevailed before the passing of the Bengal Tenancy Act.

Under Sec 2, cl, (4) of the Bengal Tenancy Act, the landlord cannot now recover the *abwab* which he could not recover under the old law.

Aparna Charan Ghose v. Karam Ali. **4 C L J 527=10 C W N 527.**

13.—Bengal Tenancy Act, Ss. 2 (2), 20, 21, 116—Extended to Orissa—Right of occupancy—Occupancy in Nij-jote land, not so extended, effect of Rent Act (X of 1859) Sec. 6, and proviso repealed.

Under Sec. 2 sub sec. (2) of the Bengal Tenancy Act, the extension of Secs. 20 and 21 of the Act to Orissa has the effect of repealing Sec. 6 and the proviso to that section of Act X of 1859, which are inconsistent with the provisions of Secs. 20 and 21 and the provisions of Sec. 6 and its proviso which correspond to Sec. 116 of the Bengal Tenancy Act are no longer in force in Orissa.

Bengal Acts-(Tenancy Act VIII of 1885) S. 2 -*Concld.*

Ss 20 and 21 of Bengal Tenancy Act having been extended to Orissa and Sec. 116 not having been so extended, a *raiyat* in Orissa can acquire a right of occupancy in *nij-jote* lands.

Brahmanunda Mahapatra v. Arjun Raut. I C L J 310.

14.—Ss 2 (2), 127-Auction-sale, setting aside of—Orissa Division—Sale held under the Bengal Rent Recovery (Under-tenures) Act (VIII of 1865 B. C), read with S 105 of the Rent Recovery Act (X of 1859).

A judgment-debtor is entitled, under the provisions of S 174 of the Bengal Tenancy Act, to have a sale reversed, when held under the Bengal Rent Recovery (Under-tenures) Act, 1865 read with S 105 of the Rent Recovery Act, in respect of property situate in Orissa Division.

The provisions of S 2, sub-section (2) of the Bengal Tenancy Act were introduced by way of excessive caution. Even if such a provision had not been incorporated in the Bengal Tenancy Act the effect would have been that, as soon as any portion of the Bengal Tenancy Act was extended to any locality, it would by implication repeal the inconsistent provisions of the pre-existing statutes in force there. **Bikal Parida v. Jogendra Nath Bose** 14 C L J 168.

Bengal Tenancy Act S 2 (4)
See Act S 2 (4) S 74
Case no (297)10 C W N 527.

15.—S. 3—Co-sharer taking kabuliyat in respect of his share-Rent decree, execution purchase under—Priority of title——Purchaser under mortgage decree against holding--Bengal Tenancy Act (VIII of 1885) S 3 cl. (9) and Sch. III Art 3—" Holding"—Special limitation—Dispossession by auction purchaser, not incapacity of landlord. P held 7 bighas of jote at a jamma of Rs 9. The defendants, who were 4 annas landlords took from P a *kabuliyat* in respect of one-fourth of the land, the boundaries given being those of the 7 bighas.

Held, that the defendants must be considered as fractional co-sharers, and not the 16 annas landlords in relation to P; that when they obtained a decree for arrears of rent against P and purchased the one-fourth of the land in execution they did not acquire an indefeasible interest in

Bengal Acts-(Tenancy Act VIII of 1885) S. 3-*Contd.*

the land, so as to have a priority of title against the plaintiffs, who were purchasers in execution of a decree on a mortgage prior to the defendants' purchase.

Held, also that, as the defendants dispossessed the plaintiff not in their capacity of landlords but as auction-purchasers, they could not claim the aid of Art, 3, Sch. 111 of the Bengal Tenancy Act and the benefit of the special limitation of two years.

Held, further that the defendants were not entitled to raise the question of the transferability of the holding, and to plead that plaintiffs had purchased nothing. 1 C W N 521: 25 Cal 97; 2 C W N 44; 25 Cal 917; 2 C W N 680 and 2 C L J 10 Ref. 2 C W N 175; 6 C W N 333; 5 C L J 650; 11 C L J 20; 14 C W N 71; 5 Ind Cas 39, Ref 4 C W N 679; 6 C W N 624 11 C W N 76; 11 C L J 20; 14 C W N 71; 5 Ind Cas 39 Ref.).

Sarat Chandra Chatterjee v. Ishwar Chandra Sheha. 5 Ind Cas 397.

16.—Bengal Tenancy Act, its applicability to the land outside the town of Calcutta——Act II of 1888.

The Bengal Tenancy Act applies to the land being outside the town of Calcutta but within its Municpal boundaries as defined in Bengal Act II of 1888. **Biraj Mohini Dassi v. Gopeswar Mullick.** 27 Cal 202.

Notes:—Ref 13 C W N 605; 8 C W N 301.

17.—s 3, cls. (3) and (5) and ss 4 and 5 cls. (2) and (3)—Liability to ejectment—Non-occupancy raiyats—" Rent "—Payment for "use and occupation. "

The defendants were cultivating raiyats who had held certain land under Government, but not a period sufficient to give them a right of occupancy. The plaintiffs in a suit against the Government succeeded in proving their title to the land. In a suit to eject the defendants as trespassers, inasmuch as they could have derived no title, and no relationship of landlord and tenant existed between them and the plaintiffs who had not recognized their right to cultivate the land,—*Held* that under s 3, cls. (3) and (5), ss. 4 and 5, cls (2) and (3), of the Bengal Tenancy Act, the defendants were " non-occupancy raiyats," and

Bengal Acts-(Tenancy Act VIII of 1885) S. 3-*Contd.*

therefore not liable to enjectment except for the reasons and on the conditions specified in that Act; and no such reasons or conditions existed in the case. Liability to pay for the "use and occupation" of land by a person between whom and the proprietor of such land there exists no relationship of landlord and tenant, is a "liability to pay rent" within the meaning of s 3 cl (5) of the Bengal Tenancy Act Cl. (3), s 5 of that Act is intended merely to define the position of a raiyat in respect to a proprietor tenure-holder, and to distinguish him from what is afterwards described as an under-raiyat. **Mohima Chunder Shah v Hazari Pramanik 17 Calc 45.**

Notes—Ap: 20 Cal 708 F B: 29 Cal 871.

—s 3, cl (5).

See Cess.

See Special or Second Appeal—Small Cause Court Suits—Tax.

18.-S 3,cl (9) and s 65—"Parcel"—"Holding" Meaning of.—

The term "parcel" or "parcels" in s 3 cl 9, of the Bengal Tenancy Act, means "entire parcel" or "entire parcels," and is not intended to include an undivided fractional share in a "parcel" or "parcels" of land. Undivided shares in parcels of land cannot constitute distinct "holding" within the meaning of the Bengal Tenancy Act. 19 Calc 610, 3 C L R 140 and 16 Calc 127, distinguished. **Hurry Churn Bose v Runjit Singh 1 C W N 521.**
Hari Charan Bose v Runjit Singh 25 Calc 917 note

19.—S 3 Cl 16, S 167—'Collector'—Person appointed Collector under some sections.—How far 'Collector' under S 167.

The mere fact that a person has been appointed Collector to exercise powers under some sections of the Act will not make him Collector for all purposes and give him all powers under the Act. **Mohobut Singh v Umahil Fatima 28 Cal 66.**

Notes:—Ref: 29 Cal 813. Fol 2 C L J 99.

20.—Criminal Procedure Code S 146 Attachment—Arrest of time running—Fresh start—Bengal Tenancy Act Sch III Art 3 Limitation which has commenced to run does not cease nor is a fresh period given by an attachment made under S. 146 of the Criminal Procedure Code. Limitation under Art 3 of Sch III Bengal Tenancy Act, begins to run from the date of the ouster and an attachment under S 146 Cr P C does not stop it nor gives a fresh period of limitation.
Deo Narain Chowdhry v C R H Webb 5 C W N 160=28 Cal 86.

21.—Ss 3, 171-'Decree for rent'-Under tenure-holder:

An under-tenure-holder is entitled to pay off a decree which is mainly one for rent and save the property from sale.
Jnanada Sundari Chowdhrani v Atul Chandra Chakravarti 32 Cal 972.

22—.S.3-Rent,meaning of lease, construction of.

Where by a *putni* lease, the annual *Jama* rent was fixed at Rs, 6,000 and, besides the said rent, the putnidar (lessee) undertook to deposit into the Collectorate the Government Revenue of Rs. 40,156-4-9½ fixed for the share of estate granted in *putni* and payable by the lessor, *kist* by *kist*, failing which the *putni* lease was to be cancelled and would become null and void and the landlord was to take *khas* possession.

Held, that the payment of the *patnidar* of the Government Revenue, though no doubt was a part of the consideration to be tendered by the lessee for the enjoyment of the tenure it was not money payable to the landlord and as such was not rent within the meaning of S 3 of the Bengal Tenancy Act and could not be recovered as rent under the special provisions of the putni regulation, **Maharaja Bahadur Sir Jotindra Mohan Tagore v Bibi Jarao Kumari. 3 C L J 7=10 C W N 201=1 M L T 8=33 Cal 140 (P C)**

23.—S 3 Cl 5, Bengal Tenancy Act Sch III—Limitation—Starting point.

The period of limitataion for a land-lord to recover a sum of money payable by a tenant under S 42 (b) of the Bengal Drainage Act VI of 1880, begins to run from the date on which the landlord engages to pay the costs with which he is charged and not from the date on which Collector assesses the amount payable by the tenant under S 44. The period of limitation for such a suit is

Bengal Acts-(Tenancy Act VIII of 1885) S. 3-*Contd.*

three years and such a sum is recoverable as rent and the word " rent " in Sch III of the Bengal Tenancy Act includes "money recoverable under any Enactment for the time being in force as if it was rent." **Mon Mohini Dasi v Priya Nath Besali 8 C W N 640.**

Notes:—Fol 11 C W N 57; C L J 19.

24.—s 3, (5) Sch III Art. 2 (6)--Rent or damages-Covenant to pay rent due by landlord to superior landlord-Breach-Suit-Limitation.

The Defendants took settlement of some lands from the Plaintiffs. In the *kabuliyat* executed by the Defendants, the terms of the agreement were as follows:—

"In all fixing the annual rent.....at Rs. 4,991-12-3 and granting a permanent *durputni* and *se-putni* settlement.....you have executed in my favour the .....*pottah*. I therefore execute this kabuliyat and agree that I shall pay Rs.3,191-12-3, the annual rent payable into the estate of your said *putnidars* and *maliks* and pay the remaining profit of Rs. 1800 a year to you.....I shall pay the *putni* and *durputni* rents and cesses payable by you.....and take *dakhilas* for that and make them over to you and I shall take *dakhilas* from you ..... If by reason of my default in payment of the said rents the *maliks* bring suits for arrears of rent and in execution of decree, your *putni* and *dur-putni* rights be attached and brought up for sale..... then you will deposit the said amount or rent and bring a suit against me for arrears of rent and recover that amount with interest and costs by sale of this my *dur-putni* and *seputni* rights and from other properties." Defendants failed to pay to the superior landlords rents due for 1304 and 1305 and the latter sued the Plaintiff for the same and obtained decrees, in execution of which the properties were attached and advertised for sale. Plaintiffs thereupon paid off the decretal debts on 8th September 1898 and in Bhadro 1308 (7th September 1901) brought this suit for recovery, as damages, of the said amount from the Defendant. It was objected that the suit was not maintainable and was barred by limitation: *Held*—that the suit was properly brought as a suit for damages. There were here two separate and distinct covenants, one to pay Rs. 3,191 odd to the superior landlords and the other to pay Rs. 1,800 as rent to the Plaintiffs as landlords.

Bengal Acts-(Tenancy Act VIII of 1885) S. 3-*Contd.*

The former amount was not payable as rent as defined in the Bengal Tenancy Act, and Plaintiff's proper remedy was to bring a suit for damages. 4 C W N 3; s. c. 27 Cal 67 (1899), distinguished. *Held*—That the present case was undistinguishable from. 11 Cal 221 (1884), which had not been overruled by the Full Bench in 4 C W N 3: s. c. 27 Cal 67 (1884). **Hemendra Nath Mukherjee v Kumar Nath Roy. 9 C W N 96.**

25—S. 3 (10), 21—Occupancy, right of.

A tenancy is found to have existed for at least 50 years in respect of a piece of land which was used for agricultural or horticultural purposes and which is situated within the limits of the Dacca Municipality. Held that even if the Bengal Tenancy Act has no operation in urban areas, the tenant had acquired a right of occupancy before the passing of the Bengal Tenancy Act under the repealed Acts X of 1859 and VIII (B. C.) of 1869. *Semble*:-The term 'village' as defined in S. 3, Sub-S, (10) is not confined to non-urban areas outside the town of Calcutta. It has no operation as regards homestead lands whether situated in towns or outside towns. **Syed Hassan Ali v Gobindalal Basak. 9 C W N 141.**

26— Ss. 3 (7), 5 (1), 65—Tenure-Tenureholder -Interest in land—Sarbarakari pattah—Construction—Permanent tenure between zemindar and patnidar, creation of, whether valid.

If a pattah do not confer on the lessee any interest in land, it does not create a tenure.

Where a zamindar gave a *sarbarakari jamai* settlement of certain *putni mehals* by a *pattah* which conferred on the person to whom the *pattah* was given all the powers which the *Zemindar* had to realise the rents payble by the *patnidars*, including the power of suing the latter using the zemindar's name: *Held*, that the zemindar merely made arrangements for the collection of rents: that he did not create any interest in land as that of a tenure-holder in the *sarbarakar*, and that, what was intended to be created was a personal obligation between the parties, and that the *sarbarakar* could not maintain a suit for rent against the *patnidar*.

Obiter dictum:—A zemindar cannot lawfully create a permanent tenure between his own inter-

Bengal Acts-(Tenancy Act VIII of 1885) S. 3-*Concld.*

est and a *putni* taluk under him **Bibi Jarraw Kumari Saheba v Hanifuddin Akanda 4 Ind Cas 471=14 C W N 389**

27—S 3 cl 9—Holding meaning of—Undivided share in lands

When an undivided share in lands is leased to a *raiyat* such share does not constitute a holding within the meaning of the Act A purchaser of such share of lands, even in execution of a decree for rent, does not, consequently, acquire any right to annul incumbrances I C W N 521 2 C W N 44 680, Refd to **Ahamadulla Sheikh v Gagan Mollah. 2 C L J 10**

28—S 3 (9)—Holding—Division into separate portions—Transfer of one of them—Landlord's right of re-entry

Where there are several tenants in a holding and each of them holds a separate portion of the holding, each of these portions should not be treated as a separate holding, and a transfer of one of those portions does not operate as an abandonment which will entitle the landlord to re-enter that portion **Purna Chandra Chatterji v Bejoy Kumar Pal 1 Ind Cas 109**

29—Ss 3 (13), 15 16 'Succession'—'Representation'—Suit by administrator not barred under S 16.

Ss. 15 and 16 of the Bengal Tenancy Act do not refer to the case of repersentation, but to that of beneficial succession

Therefore a suit for arrears of rent brought by the surviving administratrix to an estate is not barred by virtue of the provisions of ss 15 and 16 of the Bengal Tenancy Act 3 C W N 371 Ref **Bipro Das Khasnavis v Pachi Bibi 5 Ind Cas 434**

30—Bengal Cess Act S 4, explanation and s 20 (a) and (b)-Road cess return-Conversion of nakdi into bhaoli rent shortly before return submitted —Annual value how to be assessed—Alteration in area of holdings and tenures by reason of exchange amongst tenants, if must be specified in return

The plaintiffs who had a share in a mouzah had their share separated by partition in 1300, F. S. Subsequently to the partition, the defendants who were tenants and were paying nakdi rent agreed to pay bhaoli rent from the beginning of 1302 F. S It also appears that, after the partition the tenants of the whole estate agreed amongst themselves to respectively hold lands in that share only in which they held homestead lands and in this way an exchange of lands took place between them On the 4th of Assin, 1302, F S, the plaintiffs submitted a road cess return in respect of their separated share, in which the nakdi rents which prevailed up to the end of 1301, F S., and not the recently settled bhaoli rents were mentioned Further, the statement of land, holding or tenure given in the return corresponded with the state of things as they existed prior to the exchange effected between the tenants Plaintiffs having sued the defendants for bhaoli rents calculated on lands held by them since the exchange the defendants objected that the provisions of cls. (a) and (b) of s 20 of the Act had not been complied with *Held*, that as there was no enhancement of rent but only conversion of nakdi into bhaoli rent and as no calculation of annual value based on the average money value of three years' bhaoli rent as contemplated in the explanation to s 4 of the Act was possible in this case the plaintiffs had substantially complied with the provisions of s 20, cl. (b) of the Act that the sums payable by stallkeepers may come within the definition of rent **The Secretary of State for India in Council v Karuna Kanta Chowdhury 11 C W N 1053 F B= 6 C L J 342=35 Cal 82.**

Bengal Acts (Tenancy Act VIII of 1885) S. 4 *Contd.*

31.—Ss 4 (a) 11, 18-*Raiyat* holding at fixed rates—Occupancy *raiyat*—Qabuliat—Construction

Where a *qabuliat* provided that the rent was to be paid *putra pautradi krame* (down to sons, son's sons and so on), that the tenant would pay additional rent for any excess area found to exist and would get a reduction rent in respect of any defect of area, that the tenant would not excavate any tank or construct any buildings in the land and that the tenant would not alienate the land and *jama* by gift or sale or by granting temporary or perpetual settlement.

Held, that the tenant was not a *raiyat* at a fixed rent or rate of rent, and that he had no right to transfer the holding.

Bengal Acts-(Tenancy Act VIII of 1885) S. 4-*Concld.*

Held, further that although there is no express condition against the tenant mortgaging yet a mortgage, leading to a sale of the holding owing to the default of the mortgagor comes within the prohibition of the lease (20 Cal 273 Dist) **Narendra Bhusan Roy v Banku Behary Ghosh. 8 Ind Cas 825**

—S 5

See (1) General Clauses, Consolidation Act, 1868 s 6

(2) Landlord and Tenant—Liability for Rent.

32 —S 5—Non occupancy raiyat—Ejectment—Trespasser

Before the passing of the Bengal Tenancy Act, a person had settled on a land as a raiyat and tenant by a trespasser He was sued in 1888 by the true owner in ejectment the owner obtaining possession of the land from such trespasser through the Court on the 27th January 1886 The defendant had not at this time acquired the right of occupancy *Held* that within the meaning of s 5 sub s. (2) of the Bengal Tenancy Act, such person was a non-occupancy raiyat and was protected from ejectment by that act 17 Cal 45, approved **Binad Lal Pakrashi v Kalu Pramanik 20 Cal 708**

Notes —Dist 26 Cal 516=29 Cal 871=9 C W N 571=1 C L J 303=31 Cal 703=8 C W N 320=5 C L J 9=8 C W N 315=34 Cal 109=11 C W N 201=5 C L J 33 Ref 25 Cal 324 34 Cal 516 F B=11 C W N 626=5 C L J 457=2 M L T 219 10 C L J 55

—S 5—cl (5)

See Right of Occupancy—Acquisition of Right —Mode of Acquisition

33 —Bengal Tenancy Act s 5, sub section 1 —The meaning of tenure-holders as contemplated by the section and the whole Act.

The plaintiff acquired from the proprietor or another tenure holder a right to hold law for the purpose of collecting rents from the occupants of the land on a contention that the plaintiff was a tenure holder within the meaning of s.5 Sub section 5 of Bengal Tenancy Act

Held, that the contention was not sound Taking the provisions of the Act relating to tenure holders, as a whole the plaintiff cannot

Bengal Acts (Tenancy Act VIII of 1885) S 5-*Contd.*

be included in the term 'tenure holders" A tenure holder within the contemplation of the Act must be a person who holds land which is used for agricultural or horticultural purposes.

Umrao Bibi v Mahomed Rajabi. 27 Cal 205=4 C W N 76.

Notes —Ref 13 C W N 949.

34—S 5 If may grant perpetual lease—Bengal Tenancy Act (VIII of 1885), secs 5 181—Tenure Holding—Contract

As a general principle a *ghatwal* is not competent to grant a lease in perpetuity and his successor is not bound to recognize such an incumbrance 15 W R 38 (1871), followed. A lease in perpetuity granted to the plaintiff by Defendant No 7 who is a *ghatwal* jointly with the predecessors of the other *ghatwal* Defendants is inoperative even against Defendant No. 7 as the lease is one and indivisible *Held*—Also on the construction of the lease and findings of the lower Appellate Court that the lease created a tenure and not a *raiyati* holding **Narain Mullick v Badi Roy 6 C W N 94 =29 Cal 227.**

35 —S 5—Where the area of land held by a tenant is more than 100 *Bighas*, the presumption is that he is a tenure-holder and not a Rayat This presumption is not rebutted by the Kabuliat being on a printed form or that in the rent receipt the tenant was described as *Raiyat*, the question being one of substance and not of form **Gokul v Pudmanund. 4 Bom L R 793=6 C W N 825= 29 Cal 707=29 I A 196, P C**

Notes —Ref. 8 C W N 117.

36 —Ss 5 20 (3) 26, 79, 82, 85 and 178—Non-occupancy raiyati holding—Heritability—Custom—Contract.

Held by a majority of the Full Bench (*Brett and Mitra JJ dissenting*) that, under the Bengal Tenancy Act the right of a non occupancy raiyat is not heritable.—*Quære*—Whether the right is heritable apart from the Act ? **Mohunt Lukhan Narain Das v Jainath Panday. 11 C W N 626, F B=5 C L J 457= 34 Cal 516=2 M L T 219.**

Notes —Appl 13 C W N 913, Cons. 13 C W N 937.

Bengal Acts (Tenancy Act VIII of 1885) S. 5-*Contd.*

37.—Bengal Tenancy Act s. 5-S. 166-Avoidance of encumbrance by purchaser, one of co-sharers of tenure—Jote-Tenure or holding-Begal Tenancy Act VIII of 1885, s.5

One of the several tenure-holders who purchases the teuure at a sale for arrears on default committed in payment of rent of the same holding, cannot claim the advantageous position which is provided by the last portion of s. 66 of Act VIII of 1869 (Bengal). The principle is that no man should benefit by a wrong done by himself, though he is only one of the several people responsible for it. The description of a property as "jote" does not necessarily show that it is simply an ordinary holding and not a tenure. Where the jote exceeds 100 bighas in area, the presumption in the Bengal Tenancy Act should be applied under which the holding, until the contrary is shown, must be regarded as a tenure.

Syed Nawab Ali Chowdry v Hemanta Kumari Debi. **8 C W N 117.**

38.-Ss.5,49-Tenant of homestead land under a raiyat-Notice to guil-T. P. A. S. 106.

Where the lands included in the holding of an agricultural raiyat consisted jointly of agricultural and partly of homestead land. and the portion which could be used as homestead was let out for use as homestead:--*Held*, That the under-tenant was an under-raiyat within the Bengal Tenancy Act and the Transfer of Property Act has no application. That in order to maintain a suit in ejectment a notice under S. 49, Clause 6, of the Bengal Tenancy Act was necessary and it was to be served in accordance with the rules framed under the Act.

Babu Ram Roy v Mohendra Nath Samanta. **8 C W N 454.**

39.—S. 5—"Jote" tenure or holding.

The description of a property as a 'jote does not necessarily shew that it is not a tenure and that it is simply an ordinary cultivating 'jote' or holding. If the area of a 'jote' exceeds (100) one hundred bighas, the presumption in the Bengal Tenancy Act should be applied under which, until the contrary is shown, the holding must be regarded as a tenure. 29 Cal 707 (1902), referred to. **Syed Nawab Ali v Hemanta Kumari Debi.** **8 C W N117.**

Bengal Acts-(Tenancy Act VIII of 1885) S. 5 *Contd.*

40. Ss.5, 49,—Presumption—Written lease.

The presumption in s. 5 of the Bengal Tenancy Act can be rebutted by the conditions of the lease which may indicate the creation of raiyati interest. And such raiyati interest is not affected by the person acquiring putni and durputni interest in the same portion of the estate after acquiring raiyati interest. There is no merger. A written lease without fixing the term is a lease from year to year and falls within cl. (b) of s.49 of the Bengal Tenancy Act. **Idugazi Doctor v Chandra Kali Sundrani.** **8 C W N 139.**

Bengal Tenancy Act—S. 5 (2)——Pasture land, acquisition of, occupancy right in. **See** Londlord & Tenant-Occupancy Right.

14 C W N 372=5 Ind Cas 783.

41.—Ss. 5 (5), 45, 115—*Zurpeshji* lease-Tenant if may acquire occupancy—Proprietor's private land-Admission by tenant, decision upon, if should be reverse.

Held. (affirming to High Court)—That the tenant's possession under a Zurpeshgi lease, which merely provided for a part of the rent to be paid in advance-there being no stipulation for the payment of interest on the money so advanced—was that of cultivators and not of creditors as well; and the lands being found not to be the proprietor's private lands, there was nothing to prevent the tenants acquiring the occupancy right therein.

When the presumption raised by S. 5 (5) of the Bengal Tenancy Act was met by a finding rebutting such presumption, the High Court was right in holding that the tenant was a raiyat and not a tenure holder, although the area exceeded 100 bighas.

With regard to another plot, the Court of first instance had held it to be the proprietor's private land, dealing with the matter on the footing of an admission made at the trial by the tenant's defendants:

Held—That the High Court had erred in going behind that admission and re-opening the question as to whether it was the private land of the proprietor. **Damodar Narayan Chowdhri v Dalgliesh.** **15 C W N 345 (P C)= 9 M L T 364=8 A L J 441=13 C L J 512= 13 Bom L R 396.**

Bengal Acts-(Tenancy Act VIII of 1885) S. 5-*Contd.*

42.—Ss.5 (5), 104-H, 111-A-Erroneous entry in Settlement Rent Roll as to tenant's status—Suit by tenant for declaration of status—Limitation—Tenure-holder or raiyat, tenant whether—Original purpose ascertained, evidence of subsequent conduct and surrounding circumstances to show change of purpose whether admissible—Change of status by agreement-Area, presumption from-Rebuttal.

Where no question as to entry of a rent settled, or an omission to settle rent is concerned, a suit by a tenant for a declaration that an entry in the record-of-rights describing him as a tenure-holder is erroneous and for a declaration that he is an occupancy raiyat is not a suit under S. 104-H, but falls within the category of suits alluded to in the proviso to S. 111-A of the Bengal Tenancy Act, and may be brought within six years.

Held—That the tenant, who was admittedly in occupation of 1815 *bighas* of land, had succeeded in rebutting the presumption under S 5 (5) of the Bengal Tenancy Act, and established that he was an occupancy raiyat.

Per N. Chatterjea, J. It is only in cases where the terms of the lease creating the tenancy are ambiguous or in cases where there is no written lease, and it is not clear what the original purpose of the tenancy was, that the Court should look into the subsequent conduct of the parties and surrounding circumstances to determine the nature of the tenancy. Once, however, the original grant is clearly shown to be a raiyati by a lease unambiguous in its terms, or by other evidence where there is no written lease, the mere fact that the tenants subsequenly sublet the land would not alter the character of the tenancy. There is nothing to prevent the landlord and tenant, notwithstanding the existence of an unambiguous lease, to alter the original nature of the tenancy by agreement, and there may possibly be cases where subsequent conduct may be set up as evidence of such agreement. But where no such agreement is set up and it is clearly proved that the land was originally acquired by the tenant for cultivating it himself or by hired servants or by members of his family, the character of the tenancy is not affected by the mere fact that the land was subsequently let out to tenants. 15 C W N 218, Explained.

Raja Promodo Noth Roy v Asiruddin Mandal. 15 C W N 896.

Bengal Acts-(Tenancy Act VIII of 1885) S. 5-*Contd.*

43.—Bengal Tenancy Act s. 5,—Ejectment, suit for—Origin of tenancy—Raiyati holding or tenure-Tenancy, nature of—Landlord, dealings with tenant-Conduct-Holding, under-letting of, to under-tenants-Right of occupancy-Status of tenure-holder and raiyat, definition of, if exhaustive—Estoppel by conduct.

Section 5 of Act VIII of 1885 (Bengal Tenancy Act) defines the status of a tenure-holder as also of a raiyat, but neither the definition of a tenure-holder nor that of a raiyat, is exhaustive.

A person who may have originally acquired a large tract of land ostensibly with the object of cultivating it himself or by his servants or members of his family, may, by his conduct, afterwards convert himself,so far as third parties (under-raiyats) are concerned, into a rent receiver and give those persons as against himself the right to remain upon the land without being liable to be ejected at his instance.

Mohesh Jha v Manbharan Mia. 5 C L J 522.

44.—S.5 (5)—Presumption rebuttable.

The presumption arising under S. 5 (5) of the Bengal Tenancy Act is a rebuttable one.

Dalgilish v Damodar Narain Chowdhury 8 C L J 533.

45—S. 5 (5)—Ejectment—Presumption-Tenure-holder-Raiyati interest—Test.

The presumption mentioned in s. 5, sub section (5) Bengal Tenancy Act that the tenant shall be presumed to be a tenure-holder until the contrary is shown, where the area held by him exceeds one hundred bighas, applies even to a case of tenancy created before the Act come into force.

The only test of a raiyati interest is to see in what condition the land was when the tenancy was created if raiyat were already in possession of the land and the interest, created was a right to collect the rents from them; that is not a raiyati interest but if the tenant was let into physical possession of the land, that would be a raiyati interest. (24 Cal 272 (P. C)=23 I A 158, 9 C L R 449 fol:) **Khatajan Bewa v. Aswini Mohan Ghose. 2 Ind Cas 72.**

46—S. 5, cl(5)—Tenure or holding—More than 100 bighas—Character of holding.

Bengal Acts (Tenancy Act VIII of 1885) S. 5 -*Contd.*

The words of s 5 Cl 5 of the Bengal Tennacy Act afford no ground for holding that the fact that the quantity of the land exceeds 100 *bighas*, is conclusive evidence that the land forms a tenure.

In determining the question of the character of the holding, not only the origin of the tenancy should be taken into consideration but also the subsequent conduct of the parties in regard to the land.

Where 200 *bighas* of jungle land were leased for the purpose of being brought into cultivation, *Held* that the words would not necessarily imply that the tenant was to bring the lands under cultivation himself or by members of his own family or by his servants, and that the intention might be to bring under cultivation by establishing tenants thereon.

Where the original area of jungle lands taken by a tenant was considerably more than what could be cultivated by him or by members of his family or by hired servants or with the aid of partners and the tenant himself did nor appear to be a man of the cultivating class and where the subsequent settlements were also of large area and the total amount of land exceeded 1,300 *bighas*; *Held*, that the lands were taken as a tenure (10 C W N 164 Fol.) **Midnapur Zemindary v. Sham Lal Mitra. 6 Ind Cas 362.**

47—S. 5 Cl. (5), Sch 111 Art 3—Presumption—Holding less than 100 bighas—Limitation Limitation Act (XV of 1877), Sch, 11. Art 142 Suit for possession by tenant—no evidence as to character of tenancy—Burden of proof—whether general or special limitation applicable,

Cl. (5) of S 5 of the Bengal Tenancy Act does not embody a presumption that, where the area held by a tenant is less than 100 *bighas*, the tenant is to be presumed to be a *raiyat* until the contrary is shown.

Where the plaintiffs in a suit for possession of land have been proved to be the tenants of the disputed land under the defendants as their landlords who have unlawfully dispossessed them, and no information is available as to the origin of the tenancy or the purposes for which the tenancy was created, it is for the defendants to prove the special circumstances which would bridge the ordinary Period of limitation applicable to the case. **Tara Nath v Ishwar Chandra Das. 11 Ind Cas 164.**

Bengal Acts-(Tenancy Act VIII of 1885) S 5 -*Concld*

48—S. 6 cl (13) and s. (30)--Road—Public right of way—Vesting in Municipality.

The words " not being private property and not being maintained by Government or at the public expense " in s. 30 of the Bengal Municipal Act, refer only to bridges, tanks, etc and not to the words 'all roads including the soil'. Where certain land is kept open for the purpose of allowing people generally to pass over it to visit a religious car preserved in a shed on the road, and the people pass over by the implied permission of the *shebarts* to pay *pronami* to the idol in the car and for a certain time in each year traffic is entirely stopped and the land is covered by temporary sheds erected by shopkeepers from whom the *shebarts* collect tolls: *Held* that the public have no right of way as of right over the open land, which is not therefore, a road as defined by s. 6 cl. (13) of the Municipal Act, and is not vested in the Municipality under s. 30. **Cumud Bandhu Das Gupta v. Kishori Lal Goswami, 9 Ind Cas 562.**

49—S. 7—Tenure—Enhancement—Permanent tenure evidence of-Second appeal-Question of law,—Nature of tenancy—Civ Pro Code (Act V of 1908), s. 100 -

In a suit for enhancement of the rent of a tenure it was proved that the object of the lease forming the tenure was the realisation of rent from the tenants and the reclamation of jungle lands, that the conduct of the parties for more than sixty years showed that, notwithstanding one transfer and several successions, the same rate had beeen maintained, that there was a covenant for the assessment of rent at the same rate upon excess lands found upon measurement, and that the rent was progressive :—*Held*, that an inference of permanency as to the rate of rent was legitimate (1 C, L J. 572. Foll). The question as to the nature of a tenancy is a question of law which can be dealt with by the High Court in second appeal. **Ram Dayal Giri v Midnapur Zemindary. 7 Ind Cas 785.**

Notes.—Fol: 8 C W N 774, F B.

50—S. 7—Suit for enhancement—Road-cess returns as evidence—Cess Act (IX of 1880 B C),

Bengal Acts-(Tenancy Act VIII of 1885) S. 7-*Contd.*

S. 95—Evidence Act (1 of 1872 Ss. 114 (g), 32—Presumption—Burdan of Proof :

In a suit for enhancement of rent, payable by certain fractional shareholders in a Talook, the Zemindar put in as evidence several road cess returns which had been filed on behalf of another fractional shareholder and which showed that the tenants were receiving from subtenants considerably higher rent than they were paying to the Zemindar, -and this was found to be the only reliable evidence produced by either party *Held*, that the returns, though not conclusive, *prima facie* showed that the existing rate was not fair or equitable and this evidence shifted the onus on the tenants to rebut any presumption raised by the returns by producing the collector's papers. As the tenants had not done this, the Court was justified under s. 114 (g) of the Evidence Act, to award enhanced rate on the basis of the returns.

Hem Chunder Chowdhry v Kali Prosunno Bhaduri 8 C W N I=30 Cal 1033 (P C) 30 I A 177 P C.

Notes—Dist: 32 Cal 118.

51—S. 7—Enhancement of rent—Fair and equitable rent—Construction of lease:

Held upon a construction of the *Kabuliyat* that the tenant's liability to pay an enhanced rent under S. 7 has not been in any way restricted by the *Kabuliyat*. Where in a suit for enhancement of rent under S. 7 the rent assessed by the lower court amounted to 70 per cent, on the rent assets after deducting collection charges and therefore 30 per cent was left as the tenure holder's net profits but the rent was thereby nearly trebled:—*Held* that the rent settled was somewhat larger than what was fair and equitable. **Ram Kumar Singh v Robert Watson & Co, Ld** 9 C W N 334.

52—Tenancy Act—Ss. 7 (1), 188—Co-sharer landlord, if may sue to enhance rent of tenure—Other co sharers joined as defendants-"Required to be authorised under the Act" meaning of:

The institution of a suit for enhancement of rent is a thing authorised by the Bengal Tenancy Act within the meaning of S. 118 of the Act in the case of tenure holders as well as occupancy raiyats A fractional landlord is not entitled to maintain a suit for enhancement of rent even

Bengal Acts-(Tenancy Act VIII of 1885) S. 7-*Concld.*

though he should join his co-sharers as defendants in the suit. L R. 32 I A. 73: s. c. 12 C. W. N, 249 (1907) dist **Roy Jotindra Nath Chowdhury v Prasanna Kumar Bannerjee** (1910) 15 C W N 74 (P. C.).

53—Sec. 7—Enhancement of rent of tenure—Permanent tenure, evidence of.

In a suit for the enhancement of the rent of a tenure, it was proved that (1) the tenancy had been created for purposes of reclamation, but when it originated, could not be determined, (2) the tenancy was not limited in duration and had descended from father to son and from son to grandson, (3) that the rent fixed in respect of the lands originally comprised in the tenancy had naver been altered,(4) excess land reclaimed from time to time had been included in the tenancy and rent had been assessed thereon, but at each settlement the rent assessed at the previous settlement had been left untouched, (5) that the rent was progressive, the full amount being reached in the fourth year and the parties agreeing that the lessee should thenceforth continue to pay the full amount and (6) the lessee was entitled to hold excess lands at a rate fixed in the contract.

Held that from these circumstances the inference might legitimately be drawn that the tenure was permanent, the rent had been fixed in perpetuity and was not liable to be enhanced.

Robert Watson & Co. Ld. v Radha Nath Singh. 1 C L J 572.

Notes Comp: 8 C L J 513.

—S. 8 (c) Repeal of enactment—Retrospective operation. See Act VIII of 1885 (Bengal Tenancy) 9 Ind Cas 805.

54—Bengal Tenancy Act Amendment Act (III B. C of 1898), S. 9—Decision of settlement Officer that land not held rent free—Res judicata—Decision under Ch. X of the Bengal Tenancy Act (VIII of 1885) before amendment.

In a proceeding under Ch X of the Bengal Tenancy Act before the passing of Act III B C of 1898, the Settlement authorities found that lands claimed by the tenants as their rent free lands were not rent free and they accordingly assessed the same with rents.

Held that by the operation of S. 9 of Act III B. C. of 1898, the Civil Court is precluded from

Bengal Acts-(Tenancy Act VIII of 1885) S. 8-*Concld.*

adjudicating on the same matter. **Nabin Chandra Chakrabarty v Maharaja Radha Kishore Manikya Bahadur 11 C W N 859**

55—S. 9-Every settlement of rent or decision of a dispute by a Revenue Officer:

The words 'every settlement of rent or decision of a dispute by a Revenue Officer' can only apply to those cases which the Revenue Officer has jurisdiction to try and therefore such decision does not operate as a decree of a Civil Court.

Radha Kishore Manikya v Durganath Bhuttacharjee. 32 Cal 162.

Bengal Tenancy (Amendment) Act S. 9.

See Bengal Tenancy (Amendment) Act S. 106=Case No (401) **8 C W N 741**

56—Ss.10,89-Landlord and tenant-Amalnamah, construction of—Ejectment—Bengal Tenancy Act (VIII of 1885) S. 10, 89.155, 178 Sub-Sec (1) cl. (c).

An *amalnamah* neither stamped nor registered recited that in anticipation of the execution of a proper *mourasi mokarari* lease of waste land the plaintiff had agreed to place the defendant in possession of the land that, out of the total sum of Rs. 2,000 payable as premium, Rs. 500 would be paid at a certain time, and the remainder by equal instalments in two years ; that in default of the payment of the bonus, the *amalnamah* should stand cancelled; that for two years the land was to be held rent free, and after that at a progressive rent : and that, in the event of failure to cultivate the land in the next two years, the grantor would be at liberty to re-enter :

Held, that there was a present demise and not merely an agreement to demise and the possession of the defendant was that of a tenant.

The proviso to S. 178 does not exclude the operation of S. 155 of the Bengal Tenancy Act (10 Bom 101 Ref:). **Champklatika Mitra v Nafar Chandra. 8 Ind Cas 44**

57—S. 10—Transfer of Property Act (IV of 1882), Ss.1, 12 Bengal Tenancy Act (VIII of 1885) Ss.10,11,155--Statute, repeal of, by implication-Lease-Condition restraining alienation-Validity-Breach of condition—Compensation.

Bengal Acts-(Tenancy Act VIII of 1885) S. 10-*Concld.*

Before a Court can hold that there has been a repeal of one enactment by another by implication, it must be satisfied that the provisions of the two enactments are so inconsistent or repugnant that they cannot stand together.

S. 10 of the Transfer of Property Act has not been repealed by implication by Ss. 10 and 11 of the Bengal Tenancy Act. The provision in the former Act saving conditions restraining alienation in leases where the condition is for the benefit of the lessor, is not inconsistent with or repugnant to the provisions of the latter Act, which gives to lessors general powers of alienation and the two provisions in the two acts are capable of standing together.

A permanent lease provided that the lessee should not transfer the land to anybody, and that, should he do so, he would lose all his interest in the land which would become the *khas* land of the lessor. The lessee having transferred the land the lessor brought a suit for ejectment.

Held, that though the *qabuliyat* contained a condition for re-entry, that should not be enforced, unless the defendant fails to pay to the plaintiff compensation for the breach of the covenant as the Court may deem reasonable, under S. 155 of the Bengal Tenancy Act. **Kheshab Lal Nag Majumdar v Madhu Sudan Pal Kundu: 6 Ind Cas 685=12 C L J 126.**

58—Ss. 10, 11 do not override S. 11, T. P. A: **Kesav Lal Nag Mozumdar v Herasit Ghose. (1910) 12 C L J 126=6 Ind 685.**

59—Ss. 11, 18—"Kaimi" meaning of—Kaimi-holding—How far transferable :—

'Kaimi' does not import fixity of rent and so a kaimi-holding is not transferable under Ss. 11 and 18 of the Bengal Tenancy Act. **Fazeel Sheikh v Karamuddi Sheikh. (1900) 6 C W N 916 at 919.**

60—S. 11, 17, 88—Transfer of tenure piece meal, if sub-division—Liability of transferor to rent.

Where a durputnidar, to the knowledge of his landlord, transferred a portion of the durputni to one person on one date and the remainder to another person on a subsequent date. *Held* (Maclean, C J dubitante) - that after the second transfer the liability of the durputnidar

Bengal Acts-(Tenancy Act VIII of 1885) S. 11-*Contd.*

for rent ceased and the two transferees became jointly and severally liable to the landlord for the same. (16 Cal 642, 19 Cal 17, 4 C W N 590 ref to) *Maclean C J*—The act of the duputnidar in transferring the tenure was contrary to the provisions of S. 88 of the Bengal Tenancy Act.

Keshori Raman Kapuria v Ananta Ram Laha. 10 C W N 270

61—Ss. 11, 12, 17, 88-Sub division of tenure—Transfer of a share of a permanent tenure—Validity.

Where the holder of a permanent tenure transferred a portion of it and the transferee held that portion separately and was allowed to pay proportionate rent for the same to the landlord for a great many years. *Held*, that upon sale by the transferee of that portion of the tenure, his liability to the landlord for rent ceased. His act did not have the effect of sub dividing the tenure

Kali Sundari Debi v Dharani Khanta Lahiri 10 C W N 272=32 Cal 279.

62—Ss. 11, 18, 74 and 179—Mokurari, meaning of—Abwab-Rent.

The word "mokurari" means "with fixed rent," that is to say, when applied to a tenure, it means a tenure held at a fixed and permanent rate of rent.

Held, upon a construction of the lease in this case, that it was not a mokurari lease, and that stipulation in the lease for payment of Rs 3 instead of delivery of 2 goats, was an abwab, and that the case did fall within the protection of S, 179 of the Bengal Tenancy Act.

Gayratulla Sardar v Girish Chandra Bhaumik. 12 C W N 175.

63—Ss.—11 and 12—Release by co-sharer, if transfer—Stamp—Registration—Non—payment of land-lord's fee, if invalidates transfer-Bengal Tenancy (Validation) Act (I of 1903), S. 1-Breach of covenant—Cessor of liability.

Certain co-sharers in a permanent tenure by a deed, dated 2nd December, 1893, which was registered in Book 1, under S. 51 of the Registration Act, relinquished all their right, title and interest and claim in the tenure in favour of the remaining co-sharer who, it was stipulated, was to remain in possession and was to be entitled to sell

Bengal Acts-(Tenancy Act VIII of 1885) S. 11-*Concld.*

the tenure. He was also to pay certain debts mentioned in the deed for which the other co-sharers were to be under no liability. The deed was stamped with a five rupee stamp release. No landlord's fee was paid as required by S. 12 of the Bengal Tenancy Act

Held—That the deed was a transfer within the meaning of S 12 of the Bengal Tenancy Act and the transfer was complete as soon as the document was registered. The non-payment of landlord's fee did not render the transfer invalid owing to the operation of S. 1 of Act 1 of 1903 B. C.

Held, further, that the liability of the co-sharers under the lease ceased with the transfer. (16 Cal 642. 19 Cal 17 Ref :)

Hemendra Nath Mukerji v Kumar Nath Roy. 12 C W N 478.

64—S. 11—Import of—

Semble-S.11 of the Bengal Tenancy Act imports that non-permanent tenures are not to be regarded as transferable. **Hira Moti Dasayya v Annoda Prosaud Ghosh.** 7 C L J 553.

65.—S. 12—Transfer of a permanent tenure-Registration.

Under s 12 of the Bengal Tenancy Act the transfer of a permanent tenure is complete as soon as the document is registered. **Kristo Bulluv Ghose v Kristo Lal Singh** 16 Cal 642.

Notes: Fol. 25 Cal 711. Dist: 27 Cal 144. Ref: 10 M L J 147: 10 C W N 270; 9 Bom L R 789; 32 Bom 111 F B.

66.–S 12–Bengal Tenancy Act (1885) Transfer of Tenure—Notice of transfer—— Landlord and tenant—Registration.

After the transfer of tenure by the recorded tenant to anothter person that transfer having been duly registered under the provisions of the Bengal Tenancy Act, the transferor is no longer liable for the rent of the tenure, although the landlord may not have received actual notice of such transfer. 16 Cal, 642, relied on. **Chintamoni Dutt v Rash Behari Mondul.** 19 Cal, 17.

Notes:—Ref· 4 C W N 590; 10 C W N 270; 33 Cal 279=10 C W N 272. Dist; 33 Cal 580. Fol; 12 C W N 478.

Bengal Acts-(Tenancy Act VIII of 1885) S. 12-*Contd.*

67.-S. 12-Bengal Tenancy Act (1885)-Transfer of tenure-Condition not performed.

The transfer of a tenure made under the Act is not binding if the conditions on which the transfer is to be made remains unfulfilled. In such a case the transfer is not binding on the landlord and the tenant still remains liable for the rent. **Dinobundhu Roy v Banerjee** 19 Cal 774.

68.—S 12—Transfer of occupancy tenure, liability to pay rent-Validity of transfer essential to pass the liability to the transferee—Benami—Registered Kobala.

Held, that transfers, which are colourable and *benami* do not discharge the transferor from his liability to pay rent even though the Kobala is registered. 16 Cal 642 and 19 Cal 17, Dist.

Joy Gobind Laha v Monmotha Nath Banerjee 33 Cal 580.

69.-S.12-Transfer of Property Act (IV of 1882) s. 59—Permanent tenure—Mortgage—Registration.

The provisions of s. 59 of the Transfer of Property Act must, having regard to s. 6 be taken to be subject to the provisions of s 12 of the Bengal Tenancy Act. Accordingly a mortgage of a permanent tenure can only be effected by a registered instrument whether the amount secured be greater or less than R 100. **Soshi Bhusan Bose v Shahadeb Shaha** 3 C W N 499.

70.—Ss 12, 13 - Confirmation of sale—Subsequent payment of landlord's fee—Jurisdiction of Court.

An auction sale was confirmed by the Court overlooking through mistake the fact that no landlord's fee was paid under s 13 of the Tenancy Act. Subsequently on the discovery of the mistake the purchaser, applied for the confirmation of the sale after payment of the landlord's fee and the Court passed an order to that effect:-*Held*, the order was good and the Court had jurisdiction to pass such an order. **Mohesh Chunderdas v Hari Mohan Chakrabatty.** 7 C W N 388.

71.—S 12—Nonpayment of landlord's fee—Validity of transfer—Bengal Act 1 of 1903, S 1.

A decree passed before the passing of Bengal Act 1 of 1903 but pending in appeal at the commencement of that Act is governed by s 1 of that Act as not being final, so that the plaintiff's claim for rent would not be liable to dismissal on the ground that the transfer to the plaintiff was invalid by reason of the landlord's fee not having been paid as required by S 12 of the Bengal Tenancy Act. **Peary Mohun Paul v Arsed Ali.** 8 C W N 239.

Notes:—Ref; 1 C L J 500.

72.—Ss 12, 17, 88—Suit for arrears of rent—Sub-division of holding or tenure by sale of a portion to a third party-Party to suit, third party if a necessary—Suit, if maintainable——Bengal Tenancy Act (VIII of 1885). Ss. 12, 17, 88—Sale of portion of holding if binding on landlord-Plea not raised in the pleadings, if permissible to be raised in appeal—Solenama decree, interpretation of—Landlord, if bound to recognise the purchaser as tenant.

A sub-division of the holding or distribution of the rent cannot, having regard to the terms of Ss 17 and 88 of the Bengal Tenancy Act, be binding on the landlord, unless his consent in writing has been obtained to the sub-division, and the landlord cannot be held to be bound, by reason of the provisions of the Act to make the purchaser of a portion of the holding or tenure,a joint defendant with the defendants who are the only persons recorded as tenants in the landlord's *sheristа*.

In the absence of a contention that the provisions of S 88 of the Bengal Tenancy Act have been strictly complied with, it is not necessary for the Court to take evidence to determine whether a portion of the holding was sold.

The landlord is not bound to recognise any sub division of the holding, unless the provisions of Ss 12 and 17 of the Act have been strictly complied with, or to sue to recover rent of the holding from anybody except the persons whom the landlord has recognised as the tenants.

A consent given by a landlord, by a solenama decree, to a transfer of the whole of a holding or tenure, cannot be taken as his written consent to the division or distribution of the rent of that holding, even though, possibly, under the law, the tenants may be entitled as holders of a parmanent tenure to make a transfer of a portion of their

Bengal Acts-(Tenancy Act VIII of 1885) S. 12-*concld.*

interest in the same to a third party. **Rammoyi Dasi v Rupai Pramanick** 13 C L J 267.

Tenancy Act—S 13—Cl (4)—Durpatnidar's lien if superior to the charges. **See** Bengal Tenancy Act S 165

—S 13.

See Sale for Arrears of Rent—Rights and Liabilities of purchasers. **20 Calc 247.**

73.—Bengal Tenancy Act Ss. 13 and 195 (e) Sale in execution of decree.

Held that s. 13 of the Act is applicable to sales in execution of decree, of Darpatni Tenures. **Mahomed Abbas v Brojo Sundari** 18 Cal 360.

Notes:—Fol 19 Cal 17.

74.—S. 13—Sale of a tenure in execution of a decree not for arrears of rent-Effect of non-payment of landlord's fee or the fee for service of notice of the sale on the landlord before the confirmation of sale.

Under s. 13 of the Bengal Tenancy Act, when a permanent tenure is sold in execution of a decree other than a decree for arrears of landlord's rent due in respect thereof, and the fee prescribed by s. 12 of the said Act is not paid before the confirmation of the sale, the sale is invalid.

Babar Ali v Krishnamanini Dassi, 26 Cal 603: 3 C W N 531.

Notes.—Dist: 7 C W N 591; 8 C W N 239. Ref: 1 C L J 500.

75.—S. 13—Confirmation of sale without payment of landlord's fee—Sale, validity of-Application for possession by auction purchaser—Civil Procedure Code, Ss 244, 318—Appeal—Second appeal;—

Where the sale of a permanent tenure was confirmed without previous payment of the landlord's fee in the manner required by s 13 of the Bengal Tenancy Act, and the judgment debtor objected to the auction purchaser's application for being put into possession under s 318 C P C., on the ground that the sale was invalid: *Held*—That the question was one under s 244, C P C.,

Bengal Acts-(Tenancy Act VIII of 1885) S. 13-*Contd.*

and a second appeal lay. 19 Cal 683. s c 19 I A 166 relied on. That the payment of a landlord's fee does not affect the position of the judgment-debtor but affects the right of the landlord to object to a transfer of a tenant's right without payment of the fee, the object of such payment being to issue notice to the landlord in a case of this discription of the transfer of the tenant's right: and it was not competent to the judgment-debtor, to raise an objection to the delivery of possession under S. 318 C P C. 26 Cal 603 distinguished. **Mohim Chandra Bhattacharjee v Ram Lochan Dey. 7 C W N 591.**

76—Ss. 13, 17, 167—Ejectment, suit for, after notice served on the under-tenure-holders—Notice, legality of—Extinction of right of under-tenure-holders—Annulment of under tenures, if proper—Absence of some of the tenants in the suit for rent, if affects the rent decree obtained by landlord—Payment of landlord's fees, effect of.

A landlord is not bound to join persons who are mere *benamidars* and have no beneficial interest in the tenure as parties defendants in a suit for rent, and the true character of the decree obtained by him cannot be affected by their absence from the suit.

Upon a sale in execution of a permanent tenure under a decree other than a decree for arrears of rent due in respect thereof, the transferee in favour of the purchaser is completed upon payment of the fee, irrespective of its acceptance by the landlord.

As soon as the title of the purchaser has been perfected, the landlord is bound to look to the transferee for payment of rent which has accrued due since that date.

Under the law as it stood before the Bengal Tenancy Act was passed, the landlord was entitled to look to his recorded tenant for all rent, until the name of the transferee had been recorded in his books.

S. 13 of the Bengal Tenancy Act applies to transfers of all permanent tenures, and it is immaterial whether the name of the tenant at the time of the sale has or has not been previously recorded in the books of the landlord.

Bengal Acts-(Tenancy Act VIII of 1885) S. 13-*Concld.*

The unrecorded transferee of a transferable tenure is in no sense a trespasser but is a tenant though his name is not on the books of the landlord, who is entitled to recognition at the hands of the landlord.

If the landlord, in spite of notice that the tenure has passed into the hands of a transferee who has deposited the fee, chooses to bring a suit for rent against the recorded tenant, he does so at his own risk, and has no reasonable ground for complaint if it ultimately turns out that the suit has not been properly constituted and the decree made therein cannot operate as a decree for rent. When a landlord finds that the name of one person is borne on his books as that of the tenant, but the fee has been paid and notice served at the instance of a purchaser of the tenure as the property of a person whose name has not been registered, there is no reason why he should not join the transferee as a party defendant to a suit for rent, so as to avoid possible future dispute as to the frame of the suit and the effect of the decree.

If persons who are interested in the tenure at the date of the institution of the suit for rent are not joined as parties defendants, the decree can operate only as a decree for money.

The mere circumstance that the notice to annul incumbrances is signed by a Deputy Collector will not invalidate it, if he purports to act on behalf of the Collector.

A notice under S. 167 of the Bengal Tenancy Act will not be regarded as a valid and legal notice, if it is shewn that the Deputy Collector acted in excess of the powers conferred on him, and not otherwise. 33 Cal 580, Ref: 16 Cal 612; 19 Cal 17; 21 Cal 433, Ref: 21 W R 94; 27 Cal 789, Ref: W R Gap Act X Rulings 98; 8 W R 96, 17 W R 169, 9 C W N 134, Ref. 27 Cal 545, Ref. 32 Cal 911; 29 Cal 813 Fol. 2 C L J 99; 28 Cal 66, Ref: **Giris Chandra Guha v. Khagendra Nath Chatterjee,** **13 C L J 613.**

Bengal Tenancy Act, S. 13.

See Bengal Tenancy Act, S. 12 (Case No. 10) **1 C L J 500.**

77—S. 15—Bengal Rent Act (VIII of 1869), S. 26—Act X of 1859, s. 37 — Suit by landlords against a tenure-holder in occupation of a share of the tenure without joining other co-sharers of

Bengal Acts-(Tenancy Act VIII of 1885) S. 15-*Contd.*

the defendants for recovery of rents and cesses whether and when maintainable.—

It is the duty of the persons succeeding by inheritance to a permanent tenure to notify the succession, and it is not the duty of the superior landlord to find out who all the heirs of a deceased tenure-holder are. There is no law which compels a landlord in order that he might succeed in a suit for rent to sue all the heirs of a deceased tenure-holder when he has no notice who the heirs are. Where, as in this case, the defendant was admittedly one of the heirs and in possession as such, he is liable for the rent, and he cannot defeat the plaintiff's suit by showing that there were other heirs equally liable, unless he also shows that their names were notified to the landlord as successors of the original holders, or that they have been paying rent and getting receipts as successors. **Khetter Mohan Pal v. Pran Kristo Kabiraj,** **3 C W N 371.**

78—Secs. 15, 16 -Succession—Shebait—Debutter property—Idol.

A acquired a putni in the name and for the benefit of an idol of which he was the *shebait*. Upon his death, he was succeeded by B as *shebait*. B did not give notice to the Collector or pay the fee under section 15 of the Bengal Tenancy Act. B then sued a tenant for rent.

An idol may be regarded as a juridical person capable of holding property, but it is only in an ideal sense that property is so held; the possession and management of the dedicated property belong to the *shebait* in whom is vested the right to bring suits for the protection of the property. The *shebait* has consequently, though not the legal property, yet title as manager of the endowment.

When, therefore, one *shebait* succeeds another, the provisions of Sec. 15 of the Bengal Tenancy Act must be complied with. (31 I A 230 Appl:). **Mabatulla Nasya v. Nalini Sundari Gupta,** **2 C L J 377=10 C W N 42.**

79—Ss. 15 and 16—Joint landlords, one of whom failed to comply with the requirements of S. 15—Effect—Civ.Pro. Code (Act V of 1901). S. 115—Charter Act (24 and 25 Vict; Chap. 104), S. 15.

S. 16 of the Bengal Tenancy Act was not in-

Bengal Acts-(Tenancy Act VIII of 1885) S. 15-*Contd.*

tended to defeat in its entirety a suit brought by one of several landlords, who is not in default in respect of the requirements of S 15, merely by reason of the failure of his co-sharers to comply with those requirements.

Where, a co-sharer of the plaintiff landlord not having complied with the requirements of S. 15 of the Bengal Tenancy Act, the plaintiff brought a suit against the tenants for the entire rent, making the defaulting co-sharers *pro forma* defendants.

Held,—that the plaintiff was not entitled to get a decree in respect of the entire rent payable jointly to himself and his co sharer, but a decree should be made in favour of the plaintiff in respect of the share of rent payable to himself, and if his co-sharer does not comply with the requirements of S. 15 before the decree is made, the claim in respect of the share of rent payable to the co-sharer should be dismissed.

Where the lower Court dismissed the plaintiff's suit for rent in its entirety, on the ground that, his co-sharer not having complied with the requirements of S. 15 of the Bengal Tenancy Act, the whole suit must fail.

Held,—That the High Court can interfere in such a case under S. 115, Civ. Pro. Code, 1908, and under S. 15 of the Charter Act.

Tarini Charan Banerjee v. Chandra Kumar Dey, **14 C W N 788=12 C L J 1= 6 Ind Cas 193.**

80—Ss. 15, 16, 17—Receiver in partition suit —Rent suit not barred under S. 16.

A Receiver in a partition suit is not a person who has become entitled to a permanent tenure by succession within the meaning of S. 16 of the Act. The section does not bar a suit for rent by the Receiver. (6 Ind Cas 416; 12 C L J 252 Ref:)

Harendra Nath Mukherjee v Abinash Chandra Banerjee, **7 Ind Cas 761.**

81—Ss. 15 and 16-Bengal Tenancy Act (1885) —Patni tenures.—

Ss. 15 and 16 of the Act apply to patni tenures. **Durga Prosad Bundopadhya v. Brindabun Roy,** **19 Cal 504.**

Notes:—Ref: 6 C W N 794.

Bengal Acts-(Tenancy Act VIII of 1885) S. 15-*Concld.*

--Ss 15 & 16

See Bengal Tenancy Act Sec. 3 (13) Case No. (29). **5 Ind Cas 434.**

82—Ss. 15, 16—Operation of those sections in a suit for rent of land, to which the plaintiff succeeded before the Bengal Tenancy Act came into force—Construction of statute.—

Ss. 15 and 16 of the Bengal Tenancy Act are not retrospective. **Profullah Chunder Bose v. Samiruddin Mondul,** **22 Cal 337.**

83—Bengal Tenancy Act, Sections 16 & 26—Whether the heir of an occupancy raiyat can compel the landlord to recognize him and register his name.

By the provisions of Section 26 of the Bengal Tenancy Act, the right of occupancy raiyat is expressly declared to be heritable. An heir of an occupancy raiyat, therefore, is entitled to claim recognition from landlord, as the heir of the last recorded tenant, after his death.

Ananda Kumar Naskar v. Hari Dass Haldar, **27 Cal 545.**

84—Sections 15, & 16—Bengal Tenancy Act, —Suit for arrears of rent by patnidars after the death of the last owner, not complying with the provisions of S. 15 — Such suit whether maintainable.

A suit was brought by plaintiffs patnidars to recover arrears of rent due from the defendants in respect of a *Darpatni* held by them under the plaintiffs. The defence was that as neither the plaintiffs nor their predecessor, their mother had complied with the requirements of section 15 of the Bengal Tenancy Act, they were debarred by section 16 of the Act from maintaining the suit. *Held*, it cannot be said that the plaintiffs are claiming rent that fell due during their mother's life-time as the holders of the tenure. They are claiming that rent as the representatives of the holder of the tenure for the time being or as the representatives of their father, entitled to the rent which accrued due during his widow's life-time, but which was not recovered by her and which, therefore, became part of their father's estate. Section 16 of the Bengal Tenancy Act cannot therefore bar the suit. (1899) 3 C W N 294, followed. **William Sheriff v. Jogemaya Dasi,** **27 Cal 535.**

Bengal Acts-(Tenancy Act VIII of 1885) S. 16-*Concld.*

85—Bengal Tenancy Act (1885) s. 16—Right of suit—Omission to give notice of succession to Collector, Effect of—Non-payment of fees, Effect of, on right to decree.—

S. 16 of the Bengal Tenancy Act does not preclude a party from instituting a suit for rent, notwithstanding that the Collector has not received the notice and the fees referred to therein, although it is a bar to the plaintiffs obtaining a decree before the notice and the fees are received by the Collector. **Kalihur Ghose v. Umae Patwari,** **24 Cal 241=1 C W N 98.**

Notes:—Ref: 10 C W N 42=2 C L J 577.

—Ss. 17 and 18.

See Landlord and Tenant — Transfer by Tenant.

86—Ss. 17 88, and 161 — Permanent raiyati holding—Sale of part—Landlord aware of sale, though transferee not recorded in his sherista —Suit for rent — Transferee necessary party—Sub-division of holding—Decree against recorded tenant, effect of—Purchase of part of tenure, if an incumbrance.

When raiyats having permanent interest in a holding sold a portion of it and the transferees again sold a portion of their purchased interest to one R, and R obtained settlement from the landlord.

Held. that, although the transferees took no steps to get their names registered in the landlord's sherista and had paid no rent since their purchase, inasmuch as the landlord had notice of the purchase, under S. 17 of the Act, he was bound to bring a suit against the transferors and the transferees jointly.

A sale of the holding in execution of a decree for rent obtained against the transferors only did not therefore affect the transferees' interest in the holding.

Bengal Acts-(Tenancy Act VIII of 1885) S. 17-*Concld.*

The landlord was bound to recognise the transfer, though in the absence of his written consent as required by S. 88 of the Act, he was not bound to recognise the sub-division effected by the transfer.

The interest of the transferees was not an incumbrance which could be avoided by a purchaser at a rent sale. **Baistab Charan Chowdhry v. Akhil Chandra Chowdhury,** **11 C W N 217.**

—s. 17.

See Bengal Tenancy Act s. 11—Case No.(60) **10 C W N 270.**

—s. 17.

See Bengal Tenancy Act ss. 11 & 12 Case No. (61) **32 Cal 279.**

Bengal Tenancy Act s. 18—Landlord and Tenant—Occupancy right—Jungleburi kabuliat —Construction. **See** Landlord and Tenant, **31 Cal 960.**

87.—S. 18—Scope of.

S 18 of the Act does not make all the incidents of permanent tenure applicable to raiyats holding at fixed rates but only the provisions as to transfer and succession. **Nilmani Maitra v Muthura Nath Joardar.** **5 C L J 413,**

Notes —Ref: 6 C L J 527=13 C W N 1025.

88.—Ss. 18, 30—Interest created by a *jungleburi* lease—Provision for enhancement of rent—Occupancy right.

The interest, created by a *jungleburi* lease which does not either expressly provide that the interest of the tenant was to be heritable or perpetual or expressly exclude enhancement on any ground, and which expressly provides for enhancement on the ground of increase in the productiveness of the soil effected at the expense of the landlord, is not one covered by s. 18, Act VIII of 1885. *Per Rampini J.*—The raiyat holding under the lease is an occupancy-raiyat.

Raj Kumar Sarcar v Naya Chatoo Bibi. **31 Cal 960.**

Bengal Acts-(Tenancy Act VIII of 1885) S. 18 *Concld.*

89.—Ss. 18, 73, 88—Cause of action—Attachment—Raiyat at fixed rate—Transfer of shares of holding—Suit by landlord against old tenant—Landlord's knowledge of transfer—Decree whether binding on transferee.

A mere attachment is sufficient invasion of a person's right to give him a cause of action. A raiyat at fixed rates under s. 18 of the Bengal Tenancy Act is entitled to sell shares or specific portions of his holding; if he sells portions of his holding to several purchasers, such purchasers are not reduced to the portion of ordinary occupancy *raiyats*. A landlord in suing for rent is bound, if he is aware of the purchases, to implead the purchasers as parties to the suit. (11 C W N 217, Fol). If a landlord omits to join a purchaser of whose purchase he is aware, the purchaser will not be bound by the rent decree, and will be entitled to bring a suit for a declaration that the decree is inoperative as against him.

Akhoy Kumar Mitter v Sri Narain Dey.
9 Ind Cas 663.

Bengal Tenancy Act VIII of 1885.
—s. 18.

See Bengal Tenancy Act s. 11 Cas No. (62).
12 C W N 175.

—s. 19.

See Right of Occupancy—Loss for Forfeiture of right.

90.-91—Bengal Tenancy Act, Ss 19 and 181-Acquisition of Chowkidary Chakran land—Service tenure—Landlord's Tenancy Act.

A raiyati tenancy was created under a Chowkidari in Chowkidari Chakran land so far back as 1846. *Held*, that having regard to S. 6 of Act X of 1859 as soon as the Act came into force the raiyat acquired a right of occupancy. B L R Sup., Vol. 202; 15 W R 231 Ref. to. That the right of occupancy acquired before 1859 would

Bengal Acts-(Tenancy Act VIII of 1885) S. 19-*Concld.*

be maintained under the act of 1859 as also under the provisions of S. 6 of Act VIII of 1869 B C., and would continue to exist under S.19 of the Bengal Tenancy Act. 21 Cal 129 foll. **Ram Kumar Bhuttacharjee v Ram Newaj Rajguru.**
8 C W N 860.

92.—s. 19—Bengal Tenancy Act—Bengal Tenancy Act 1885 s. 19 (2)—Definition of Ryot, Occupancy for horticultural purposes

The definition of the word "ryot" is not exhaustive; and there is nothing in it to show that a person who has taken land for horticultural purposes is excluded from the definition.

Hurry Ram v Nursingh Lal,
21 Cal 129.

Notes.—Fol: 8 C W N 860. Ref: 31 Cal 1021.

93.—Bengal Tenancy Act, s. 19—S. 6-Right of occupancy in chowkidari chakran lands—S. 19 Bengal Tenancy Act (1885)—S.6, Act VIII of 1859.

There is nothing to prevent a tenant from acquiring a right of occupancy under s. 6, Act X of 1859, even in chowkidari chakran lands. (B L R Sup. Vol. 202, 15 W R 231, 6 Leg. Comp. 15, Ref.; 21 Cal 129, Fol.). The right of occupancy acquired before 1859 would be maintained under the Act X of 1859, as also under the provisions of s. 6, Act VIII of 1869 (B C), and would continue to exist under s. 59 of the Bengal Tenancy Act. (21 Cal 129, Fol). **Ram Kumar Bhattacharjee v Ram Newaj Raj Guru.** **31 Cal 1021=**
8 C W N 860=31 I A 17, P C.

Notes.—Ref: 2 C L J 379.

94.—Bengal Tenancy Act (1885) s. 20 cl. (3)—Right of non-occupancy raiyat.

The right of a non-occupancy raiyat (who does not hold under any express engagement) in

Bengal Acts-(Tenancy Act VIII of 1885) S. 20-*Contd.*

his holding is not heritable. Karim Chowkidar v Sundar Bewa. 24 Cal 207= 1 C W N 88.

Notes.—Ref: 8 C W N 479; 31 Cal 757 F B; 6 Bom L R 731; 34 Cal 516 F B; 5 C L J 457 F B; 11 C W N 626 F B; 32 Bom 356; 10 C L J 608. Disc: 13 C W N 937.

95.—Ss. 20, 21-Suits pending at time Act came into force—Suit for ejectment—Acquisition of right of occupancy—General Clauses Act (I of 1868), s. 6.

S. 21 of the Bengal Tenancy Act applies to suits pending at the time the act came into force; *viz.*, 1st November 1885, which had not then resulted in a decree. In a suit instituted on 8th October 1885, to eject the defendants after notice to quit, it was held that, although the defendant had held the land from which it was sought to eject him for less than 12 years and therefore would not, if the Bengal Rent Act (VIII of 1869) had been applicable, have acquired a right of occupancy, yet the effect of ss. 20 and 21 of the Bengal Tenancy Act was to give him a right of occupancy, and therefore he could not be ejected.

Jogessur Das v Aisani Koyburto. 14 Cal 553.

Notes.—Ap: 15 Cal 376 F B.

96.—"Right of occupancy" if covers the case of right of occupancy acquired under laws promulgated since 1859.

The expression "right of occupancy" in sec. 37 of the Revenue Sale Law (Act XI of 1859) is not limited to the right that could be acquired under the rules laid down in Act X of 1859 but also covers "right of occupancy" that might be acquired under laws promulgated since 1859. So a purchaser of an entire estate at a sale for arrears of revenue cannot eject a raiyat who has acquired a right of occupancy in the matter provided by the Bengal Tenancy Act. Sarat Chundra Roy Chowdhury v Asiman Bibi. 8 C W N 601.

97.—Secs. 20, (1), (7), 100—Occupancy right—Presumption—Diarah land—Regulation XI of 1825, Sec. 4—Accretion by alluvion—Pre-existing rights-Settlement from year to year.

Bengal Acts-(Tenancy Act VIII of 1885) S. 20-*Contd.*

The presumption created by clause 7 of section 20 of the Tenancy Act, that a tenant has for twelve years continually held the same land or a part of it, does not extend to *diarah* lands. The presumption is only for the purposes of section 20, regarding the acquisition of occupancy rights and cannot be extended to *diarah* lands for the purposes of sec. 180 of the Act.

Beni Pershad Koer v Chaturi Tewari. 4 C L J 63=33 Cal 444.

Notes.—Expl: 8 C L J 541. Dist: 5 C L J 26= 8 C L J 537=13 C W N 51=13 C W N 269.

98.—Ss. 20, cl. (7), 43, 180, sub-s. (1)-Chur land-Non-occupancy raiyats-—Enhancement of rent—Agreement with landlord in contravention of latter's covenant with Government if enforcible—Stranger benefited by covenant if may enforce it.

Quære—Whether a stranger to a contract is entitled to claim performance of a covenant inserted therein for his benefit or protection. The benefit of such a covenant, if enforcible, may be waived by the party benefited. Where a settlement-holder of Government *khas* mehal lands by his *kabuliyat* under-took not to enhance the rents of the tenants, *held*—that, tenants, who entered into agreements with the settlement-holder for payment of higher rents, waived the benefit of the covenant and were not entitled to set it up in defence, in suits for enhanced rents based on these agreements. (32 Cal 463, Fol.). The presumption under s. 20, cl. 7 of the Bengal Tenancy Act, that a raiyat has continuously held the lands as such for 12 years, arises only in proceedings under Bengal Tenancy Act,but a suit for rent is not a proceeding under that Act. (12 C W N 249, 35 Cal 331, 7 C L J 139, 11 C L J 56, Rel. on). Tenants holding *chur* lands are liable, until such time as they have acquired occupancy rights therein, to pay rents at rates agreed upon between them and the landlord irrespective of the provisions of s. 43. The introductory words of sub-s.(1) of s.180 govern the whole of the remaining sub-section,including the clause about payment of rent during the period preceding the acquisition of a right of occupancy,so as to exclude the operation of s. 43 of the Act to such cases.

Jehander Baksh Mullik v Ram Lal Huzra. 14 C W N 470=5 Ind Cas 565= 11 C L J 364=37 Cal 449.

Bengal Acts (Tenancy Act VIII of 1885) S. 20-*Contd.*

99.—Ss. 20 and 29, cls. (a),(b) proviso I—Enhancement of rent—Realisation for 3 years.

Section 29 proviso 1 controls merely clause (a) and not clause (b) of the section. The fact therefore that rent at the enhanced rate has been realised for three years is no answer to the defence that it has been illegally enhanced in contravention of section 29.

Section 20, sub section 7 of the Bengal Tenancy Act does not apply to a suit for rent which is not a proceeding under the Act within the meaning of the section. **Mulluck Chand Das v Satis Chandra Das. 11 C L J 56= 3 Ind Cas 306=14 C W N 335.**

Notes:—Fol: 11 C L J 366=37 Cal 449=14 C W N 470=5 Ind Cas 565.

100.—Occupancy right, acquisition of—Bengal Tenancy Act (VIII of 1885), *Secs.* 20 and 21—Right of a settled raiyat, acquisition of Presumption under section 20, cl. 7.

To show that a raiyat has under section 21 of the Bengal Tenancy Act, acquired a right of occupancy in a holding, it is not sufficient to show that he has got other occupancy holding in the same village; what is required to be shown is whether the tenant is a settled raiyat or not within the meaning of section 20, and has, as such, acquired a right of occupancy in the *jote* in dispute.

Per Rampini J:—An occupancy right may be acquired by purchase but the right of a settled raiyat can be acquired only by a continuous holding of land in the village for twelve years. The presumption under clause 7 of section 20, of having held the land for twelve years, arises only when the other occupancy holdings are held under the same landlord. **Kuldip Singh v Chhatur Singh Roy. 3 C L J 285.**

Bengal Tenancy Act S. 20—(114)—Ss. 20 and 21—See Res Judicata—Adjudications. **1 C L J 310.**

101—Ss.20, 21—Co-tenants—Relinquishment by same, effect of—Payment of rent—Person in possession as owner—Creation of tenancy.

Where some lands were held by several occupancy-raiyats jointly and some of them relinquished in favour of the landlord.

Bengal Acts-(Tenancy Act VIII of 1885) S. 20-*Concld.*

Held, the relinquishment did not operate by way of enlarging the rights of the raiyats who remained on the land, by giving them an interest over the whole holding. They could claim a right only over the share originally held by them. Sections 20 (4) and 21 of the Bengal Tenancy Act did not apply to the case.

Payment of rent and acceptance thereof do not create the relationship of landlord and tenant when the person to whom the payment is made and who accepts the same is not only not the real owner, but not in possession as *de facto* proprietor in good faith. **Peary Mohun v Radhika Mohun. 5 C L J 9=8 C W N 513.**

—S. 20.

See Bengal Tenancy Act S. 2 (2)-Case no (13) **1 C L J 310**

102—Ss, 20, 21—Bengal Tenancy Act (1885),-General clauses Act (I of 1868) s. 5—Pending suit, restrospective enactment when applicable to —Right or occupancy.

S. 21 sub-s (2) of the Bengal Tenancy Act is expressly retrospective, and applies to suits pending at the date of the commencement of that Act. 14 Cal 553, followed. **Tupsee Sing v Ramsarun Koeri. 15 Cal 376.**

Notes:—Ref: 16 Cal 267 F B; 21 Cal 940 F B.

103—S. 21—Suit for ejectment by purchaser —Defence by occupancy raiyat—Onus.

A purchaser of an estate at revenue sale sued an occupancy raiyat for the recovery of some lands which were situate within the ambit of the estate, *Held*-That the onus is, in the first instance, on the raiyat to make out a *prima faice* case that at the time when the revenue sale took place and the Plaintiff purchased the estate, he held the land in suit as a raiyat within the meaning of the proviso in sec. 37 of the Revenue Sale Law or within the meaning of sec. 21 of the Bengal Tenancy Act. **Ambica Churn Chakravarti v Dya Gazi. 10 C W N 497.**

104—S. 21 cl (b)-Bengal Tenancy Act, 1889—Enhancement of rent by contract—Agreement not within the section.

An agreement embodied in a kabuliat to pay a certain amount of rent in settlement of differ-

Bengal Acts-(Tenancy Act VIII of 1885) S. 21-*Contd.*

ences to avoid further litigation is not an agreement to enhance within the meaning of s. 21, cl. (b), of the Act. **Sheo Sahoy Panday v Ram Rachia Roy. 18 Cal 333.**

Notes:—Fol: 28 Cal 90. Dist: 33 Cal 607=11 C W N 62=4 C L J 320. Ref: 36 Cal 604=9 C L J 313.

105—S. 21-Zuripeshgi lease-Lease for cultivation—Occupancy, right of, whether can arise.

Neither of the cases 24 Cal 272 and 2 C W N 752 is authority for the proposition that a raiyat, by taking a zuripeshgi lease of land, of which he was previously or then put in possession as a raiyat, loses his raiyati status or divests himself of his right to acquire a right of occupancy in the land.

Held, on terms of the present lease, that it was a cultivating lease and that the lessee did by 12 years' continuous possession, acquire a right of occupancy over the leased land.

Ramdhari Singh v M H Mackenzie. 10 C W N 351.

106—Section 21—Ejectment, suit for—Cultivating raiyat—Leases construction of—Occupancy right, accrues in what land.

Under the provions of section 21 of the Bengal Tenancy Act, if a tenant is an occupancy or settled raiyat in respect of some lands in a village, he is entitled to possession or an occupancy raiyat of the whole of the lands he holds in the village, *provided he holds them* (that is, the lands other than those of which he is an occupancy or settled raiyat) as a raiyat. But if he holds them as a tenure-holder, his occupation of some lands as a raiyat will not give him the rights of a raiyat in the other lands. **Bujrangi Raut v M H Mackenzie. 7 C L J 475.**

107—Ss. 21, 178, 182—Suit for rent and ejectment from homestead (*bastu*) land—Raiyat with right of occupancy in agricultural land in the village in which he has homestead land—Ejectment on expiry of lease regarding homestead land—Settled raiyat, right of—Occupancy right.

A tenant, who is not a raiyat in respect of a piece of *bastu* or homestead land but is so in respect of the agricultural land which he holds in the village, and the homestead land is held otherwise than as part of the tenant's holding as a raiyat, must be regarded, in the absence of any allegation of local custom or usage, as holding the homestead land in accordance with the provisions of the Bengal Tenancy Act applicable to land held by a raiyat; such a tenant has, under S. 21 of the Act, a right of occupancy in the piece of homestead or *bastu* land as well as in the agricultural land in the village of which he is a settled raiyat.

Golam Mowla v Abdool Sowar Mondul. 13 C L J 255.

Bengal Acts-(Tenancy Act VIII of 1885) S. 21-*Concld.*

108—Ss. 21, 44. 45, 182—Homestead—Raiyat holding land at another village under different landlord—Ejectment—Non-occupancy raiyat—Expiration of term.

The land in dispute was let to the defendant in 1896 for three years. Upon the expiry of that term, he was allowed to hold over and on October 12th, 1905, the plaintiff-landlord served him with notice to quit the land on April 14th, 1906. A suit for ejectment was filed on December 4th, 1906.

Held, that as the notice was not served within six months before the expiration of the term, nor the suit instituted within six months after the expiration of the term, the suit was barred under Ss. 44 and 45 of the Bengal Tenancy Act.

Obiter dictum:—The provisions of the Bengal Tenancy Act are applicable to the homestead of a person who is raiyat, although he is not a *raiyat* of the village in which the homestead land is situated and is not a *raiyat* of the same landlord as the landlord of the homestead land. 4 C L J 332; 10 C W N 944, rel on.

Harihar Chattopadhyaya v Dinu Bera, 10 Ind Cas 139.

—S. 21.

See (1) Bengal Tenancy Act s. 2 (2)-Case No (13) **1 C L J 310.**

(2) Bengal Tenancy Act S. 3 (10) Case No (25) **9 C W N 141.**

—s. 22,

See (1) Right of Occupancy-Loss or Forfeiture of Right.

(2) Right of Occupancy—Transfer of Right.

Bengal Acts-(Tenancy Act VIII of 1885) S.22-*Contd.*

109—Bengal Tenancy Act (VIII of 1885) Ss. 22, 49—Transfer of non-transferable occupancy holding–Sale by purchaser to under-tenant, effect of—"Otherwise," meaning of, in S. 22.

A non-transferable occupancy holding under the plaintiff belonged to B, who sublet a portion of the same to defendants. Nos. 1 and 2 then sold the holding to a third party who again sold the same to defendant No. 1. The plaintiff sued for recovery of possession, and it was contended in defence that the effect of the transfer of the holding is that of abandonment which should be considered to be a transfer in favour of the landlord, who is bound to sue for evicting the defendants as the original tenants would have been bound to do, that is, after notice under S 49 of the Bengal Tenancy Act.

Held, that what had taken place in the present case was not tantamount to a sale by the tenant in favour of the landlord, and was not to be clothed with the same legal effect.

Where the plaintiff is not the immediate landlord of the under-tenant, S 49 Bengal Tenancy Act, has no application.

S. 22 of the Act applies only to occupancy—holdings which are transferable.

The word "otherwise" in that section is used in respect of the transaction, which is *ejusdem generis* with the co-ordinate words used in the section by transfer or succession and cannot be held to apply to the present case. (27 Cal 473; 4 C W N 569.) **Radha Nath v Aditya Prosad Dass, 5 Ind Cas 264.**

110—Bengal Tenancy Act (VIII of 1885) Ss. 22 (1), 85, 167—Purchase of a raiyati holding by a landlord in execution of a decree for rent—Annulment of incumbrance—Notice if necessary—Annulment of incumbrance.

An under raiyati lease if created by an instrument which is not registered is invalid under s. 85 of the Bengal Tenancy Act, and a landlord purchasing the holding of the raiyat in execution of a decree for arrears of rent is entitled to take

Bengal Acts-(Tenancy Act VIII of 1885) S.22-*Contd.*

khas possession by ejecting such under-raiyat without annulling the same by a notice under *S* 167. The rights under such an under-raiyati lease are not protected by *Sub-S* I of *S* 22 of the Act.

Peary Mohun Mukerjee v Bada Chunder Bagdi. 5 C W N 310=28 Cal 205.

Notes:—Dist: 3 C L J 155; 31 Cal 932; 34 Cal 104=3 C L J 155; 13 C W N 913.

111—Ss. 22, 49 (b) and 85 (2)—Under-raiyat, ejectment of—Notice to quit.

If a landlord (permanent tenure-holder) purchases from his occupancy raiyat his right, title and interest in the holding by a deed of sale, he cannot, by virtue of such purchase, eject the under-raiyat, who was let into the land by the occupancy raiyat, without serving him a notice to quit under s. 49 (b) of the Bengal Tenancy Act, even if the subletting was made without the landlord's consent and otherwise than by a registered instrument. 28 Cal 205, Dist: 31 Cal 932, Appr.

Amirulla Mahomed v Nazir Mahomed, 3 C L J 155=31 Cal 932=34 Cal 178.

Notes:—Appr: 34 Cal 104=3 C L J 155, 13 C W N 913, Dist. 2 C L J 570.

112—*S.* 22, *Sub-s.* (2)—Purchase of an occupancy holding by a co-sharer-landlord–Termination of occupancy right.

Held by the Full Bench (Rampini. J; dissenting).—The result of a purchase by a co-sharer-landlord of the occupancy holding of a tenant is not the extinction of the tenancy right altogether but only of his occupancy right in the holding. (24 Cal 143 Appr:). **Ram Mohan Pal v Sheikh Kachu. 1 C L J 1=9 C W N 249 =32 Cal 386 F B.**

Notes:—Ref: 7 C L J 712=34 Cal 516=11 C W N 626=5 C L J 457 Fol: 13 C W N 913,

113—Ss. 22, 159—Before amendment by Act I (B. C,) of 1907, Ss, 22, 159—Purchase of occupancy jote by Co-sharer landlord—Merger of occupancy right-Fresh acquisition of occupancy right, if takes place—Sale of holding for its arrears—Purchaser acquires non-occupancy right—Right to annul sub-lease.

Co-sharer landlords, having purchased an occupancy jote, do not, by twelve years occupation of

Bengal Acts-(Tenancy Act VIII of 1885) S. 22-*Contd.*

it after their purchase acquire occupancy right in it. A purchaser of the jote,at a sale in execution of a decree for (16 as,) rent obtained against them only acquires a raiyati holding without occupancy right.

Such a purchaser has power to annul incumbrances under S. 159 of the Bengal Tenancy Act.

A purchaser of a non-occupancy holding at a sale for its own arrears can avail himself of the general provisions of Chap. XIV of the Act and if the previous tenants has sublet the land (which he is not prohibited by law from doing), the sublease can be annulled by the purchaser under S. 159. **Ram Lal Sukul v. Bhela Gazi.**
14 C W N 814=6 Ind Cas 370=37 Cal 709.

114—Ss. 22, 49, 85 (1) Under-raiyat holding under an oral lease—Raiyat's interest purchased by landlords—Latter, if may evict under-raiyat-Merger.

A landlord purchasing the interest of an occupancy raiyat under him is not entitled to treat as a trespasser an under-raiyat holding the land under an oral lease from the raiyat. 31 Cal 932, 34 Cal 104, 5 C W N 310, 28 Cal 205.

It is at least doubtful whether the doctrine of merger applies to lands in the mofussil. 10 W R at P 15, 19 Cal 760, 3 C L R 159.

But even if it applied, the doctrine as obtaining in England would not help the landlord in this case, and under S 22 of the Bengal Tenancy Act, it is only the occupancy right, and not the holding itself which is extinguished. I C W N 166, 24 Cal 145, 148, 9 C W N 249, 32 Cal 368. **Lal Mahomed Sarkar v. Jagir Sheikh.**
13 C W N 913=2 Ind Cas 654.

115—Ss 22—Or otherwise Ejusdem generis -Mortgage lien subsists.

The words "or otherwise" in S 21 of the Bengal Tenancy Act must be construed *Ejusdem generis*, and do not include the case of a holding reverting to the landlord on the failure of the tenant's heirs. 2 C L J 570 Fol.

In such a case the lien of a mortgage whom the tenant had mortgaged the holding, does not subsist. **Muktakeshi Dasi v Pulin Behary Singh 8 C L J 324=13 C W N 12=1 Ind Cas 155.**

Bengal Acts-(Tenancy Act VIII of 1885) S. 22-*Contd.*

116—Secs 22, 49, 85, and 86 clauses (5) and 7 applicability of—Jotedar and under-raiyat—Surrender by raiyat of a part of holding—Landlord's right of re-entry without notice to quit—Notice to under-raiyat, whether necessary.

Plaintiff a *jotedar* under the Government, let out a portion of his *jote* to a *raiyat* as *Chukanidar* who again sublet a portion of his holding to the defendant, without the consent of the plaintiff,and otherwise than by a registered instrument. Subsequently the *raiyat* having surrendered the portion of his holding which he had sublet to the defendant, plaintiff brought this suit for recovery of *khas* possession.

Held, neither Sec 22 nor Sec 49 of the Bengal Tenancy Act applied to the case.The landlord was entitled to *Khas* possession and no notice to quit was necessary.

A *jotedar* under the Government is not necessarily a "proprietor or a permanent tenure holder" within the meaning of Sec 22 of the Bengal Tenancy Act.

A *raiyat* under a *jotedar* cannot be regarded as an occupany *raiyat*.

A *chukani* right does not necessarily mean a right of occupancy.

The terms, "transfer succession or otherwise." in Section 22 do not mean and include a,"surrender"; the expression "or otherwise" as used in the section means "or in a similar way."

Sec. 49 of the Bengal Tenancy Act refers to a suit in ejectment brought by the immediate landlord of the under-raiyat and has no application to a suit like the present, where the plaintiff is not such immediate landlord.

Held, further:-Under S 86. clause 7, the whole or a part of holding may be surrendered and there is no distinction in principle as to the landlord's right of re-entry under clause 5, whether the surrender is of the entire or of a part of the holding.

Even when the surrender is of a portion of a holding, there is no provision of the law which makes it obligatory upon the landlord to serve a notice to quit upon the under-raiyat before he can be ejected from such portion. 4 C W N 667 Appl: 31 Cal 932 Dist. **Badan Chandra Das v Rajeswari Debya. 2 C L J 570.**

Bengal Acts-(Tenancy Act VIII of 1885) S. 22-*Conta.*

Notes,—Ref: 13 C W N 12=8 C L J 324= 1 Ind Cas 55.

117—Bengal Tenancy Act (VIII of 1885)s 22 Cl (3)—Acquisition of occupancy right in a holding by a temporary lessee of the village—Occupancy-right, merger-Occupancy right, acquisition by purchase-Acquisition of occupancy-Right by statutory method.

When the temporary lessee of a village purchases an occupancy-holding within the village during the term of his lease, the occupancy-right is not extinguished, but inures to his benefit even on the expiry of his lease.

Section 22 Cl (3) of the Bengal Tenancy Act only prevents the acquisition of occupancy rights by an *ijaradar* or farmer of rent by the statutory method under Act itself,but he can acquire such right by purchase.

Ramrup Mahto v H Manners. 4 C L J 209.

Notes-Ref 13 C W N 664.

118—S. 22—Purchase of occupancy-holding by co-sharer landlord—Holding not transferable —Right of purchaser.

A co-sharer landlord, making a purchase of a holding with a right of occupancy,would be entitled to hold the land in opposition to any other co-sharer under S.22 of the Bengal Tenancy Act,only when the occupancy right was transferable by custom; that section, before its amendment in 1908, had not the effect of making transferable occupancy rights which were not transferable by custom, and therefore, a non-transferable occupancy holding could not be sold to a co sharer landlord, so as to give the transferee a right to retain possession of it. (27 Cal 473, Ref.; 24 Cal 148, 1 C W N 166; 24 Cal 521; 32 Cal. 386; 9 C W N 249 (F B.) 1 C L J 1, Ref.). **Bejoy Singha Neogi Chowdhury v Shashimukhi Chowdhurani. 12 Ind Cas 67.**

119—Bengal Tenancy Act, Sec. 22—Occupancy right, devisibility of—Non-occupancy right heritability of-Occupancy right, severable or not-Child-bearing, possibility of.

A Hindu died leaving two daughters, one of whom had sons and the other daughters only. During the lifetime of the sonless daughter, the grandsons sued to recover possession from a devisee of the owner on the ground that they were entitled to the estate as the sister of their mother was past child-bearing and was disqualified from inheriting.

Bengal Acts-(Tenancy Act VIII of 1885) S. 22-*Contd.*

Held, that the suit must be dismissed, as it could not be affirmed that the sonless daughter whose husband was alive was not *putra sambhabita* (that is, could not possibly bear a son).

Quœre, whether a non-occupancy right is heritable or not and whether an occupancy right is severable or not except to the extent and in the manner indicated in section 22 of the Bengal Tenancy Act?

Per Doss J. (Jenkins C. J. and Mookerjee J. not expressing any opinion):-When an occupancy right is devised by will, the heirs of the testator are bound thereby. **Udoy Chandra Das v Hari Das Bairagi 10 C L J 608=13 C W N 937=3 Ind Cas 417.**

Bengal Tenancy Act Ss.22 *(3)*, 116-Ijaradar-Ejectment—Character of land when material—Occupancy right. **See** Ejectment.

13 C L J 568.

—S. 22.

See (1) Bengal Tenancy Act S.49 (b)-Case No (171) **3 C L J 155.**

—S. 22 *(1)*.

Bengal Tenancy Act s. 167. Case No (521) **28 Cal 205.**

—s. 23.

See Landlord and Tenant—Property in trees and Woods on Land.

120—Bengal Tenancy Act (1885) s. 29—Contract Act (IX of 1872), Ss. 23 and 24—Void agreement—Enhancement of rent by contract by more than two annas in the rupee.

A contract under S. 29 of the Bengal Tenancy Act to pay an enhanced rent by more than two annas in the rupee is void. **Kristodhone Ghose v Brojo Gobindo Roy. 24 Calc 895= 1 C W N 442.**

Notes:—Ref: 25 Cal 781; 36 Cal 604=9 C L J 343 ; 2 C L J 540.

Bengal Acts-(Tenancy Act VIII of 1885)-S. 23 *Contd.*

121—S. 23—Agricultural purpose—Building indigo factory—Specific Relief Act, S. 54 ill. k—Injunction restraining tenant from rendering land unfit for tenancy—Suit if maintainable.

The cultivation of indigo is an agricultural purpose but the manufacture of indigo cakes out of indigo plants cannot be said to be an agricultural purpose Where land is let out for agricultural purposes generally, the erection of an indigo factory on a part of such land must render it unfit for the purposes of the tenancy ; and the landlord would be entitled to sue for injunction restraining the tenant from building such factory on the land. **Surendra Narayen Singh v Hari Mohan Misser 9 C W N 87=31 Cal 174.**

Notes. - Reversed· 11 C W N 794 P C=6 C L J 19 P C=34 Cal 718 P C=31 I A 133=9 Bom L R 750=17 M L J 361.

122—Ss. 23 76, 77 —Dwelling-house of an occupancy raiyat—Masonry building.

A suitable dwelling-house of a raiyat within the meaning of S. 76 of the Bengal Tenancy Act need not necessarily be of a temporary description. The question raised in the case was whether the defendants who were occupancy raiyats had a right to erect as a dwelling-house a building consisting of masonry walls and a corrugated iron roof 18 cubits in length and 14 cubits in breadth on a site in the holding on which the dwelling-house had all along stood. and which had been used as the homestead land of the holding from the time of his father and of his predecessors in interest before him *Held* that the defendants had a right to do so. 6 W R Act X Rul. 40 Foll; 10 C L R 25 Ref. 12 W R 495,17 W R 416 Dist. **Hari Kishore Barna Sarma v Baroda Kishore Acharja Chowdry. 8 C W N 754=31 Cal 1014.**

123—S. 23—Restriction as to user of land under it, is a question of fact—Land let out for agricultural tenancy—Occupancy tenant's right to erect indigo factory on such land.

The question arising with regard to the restriction in S. 28 of the Bengal Tenancy Act that the user of the land must not be such as to render it unfit for the purposes of the tenancy is essentially a question of fact. **Hari Mohan Messer v Surendra Narain Singh 17 M L J 361=9 Bom L R 750=11 C W N 794=6 C L J 19=34 Cal 718; =34 I A 133**

Bengal Acts-(Tenancy Act VIII of 1885) S. 23-*Concld*

124—S. 23—Trees—when tenancy was created before Transfer of Property Act—Transfer of Property Act (IV of 1882), Ss. 2, 108, cl. (b).

A tenant of homestead land has the right to cut and appropriate fruit trees grown by him or his predecessor's interest on the holding, when it is established that the tenancy was created before the Transfer of Property Act came into operation. **Mofiz Sheikh v Rasik Lal Ghosh. 6 Ind Cas 796=37 Cal 815=14 C W N 952=12 C L J 246.**

125—S. 23—Usage—Local custom-Customary law Nature of usage-Proof of usage-Nature of proof required-Bengal Tenancy Act (VIII of 1885), S 23-Occupancy raiyat-Use of land of holding Impairing value or rendering unfit-Bandh Digging tank-Making bricks. 7 M I A 263 ; 4 W R 8 (P C) , 20 W R 154 ; 3 M H C R 75 ; 3 C W N 23, Ref, 34 Cal 718, (P C) : 2 M L T 399 ; 11 C W N 794 : 6 C L J 19 ; 9 Bom L R 750 ; 17 M L J 361 (P C) Ref. **Raja Sati Prasad Garga v Manmatha Nathkar. 6 Ind Cas 291.**

—s. 25.

See Right of Occupancy-Acquisition of Right -Mode of Acquisition.

—s. 25, cl (a).

See Limitation Act, Art. 32.

126—Sections 25, 155—Ejectment, suit for—Claim, extent of—Portion or whole—Transfer of a portion of an occupancy holding—Forfeiture.

In a suit instituted by a landlord under Sec. 155 of the Bengal Tenancy Act for ejectment on the ground that the occupancy raiyat has used the land in a manner which has rendered it unfit for the purposes of the Tenancy within the meaning of Sec. 25 of the Act, the claim must include all the lands comprised in the tenancy. If the claim is limited to a portion of the land e. g., the portion covered by a building the erection of which is complained of the suit is badly framed and must fail.

The transfer by an occupancy raiyat of a portion of his holding does not effect a forfeiture of his tenancy, if he continues in occupation of the remainder and although the landlord may be entitled to a declaration that the transfer is not binding upon him, he is not entitled to maintain

Bengal Acts-(Tenancy Act VIII of 1885)-S. 25-*Concld.*

an action in ejectment either against the transferor or the transferee. 20 Cal 590 and 2 C W N 155 Fol: 26 Cal 615 doubted. **Rai Kumaleswari Prosad Singh Bahadur v Maharaja Harbullach Narain Singh Bahadur.**
2 C L J 369

Notes:—Dist: 10 C W N 818 Ref. 8 C L J 161.

127—S.25-Denial of title—Forfeiture—Decree of Court-Bengal Tenancy Act (VIII of 1885), Secs 25, 178.

Where the denial by tenant of his landlord's title is followed by a decree of Court affirming such denial, such denial operates as a forfeiture and the landlord is entitled to *khas* possession of the land by ejectment of the tenant (2 C W N 755; 6 C W N 575, Fol 17 Cal 196, 2 C L J 389 Dist.). **Ramgati Mohurer v Pran Hari Seal.**
3 C L J 201.

Notes:—Ref: 34 Cal 922. Dist. 7 C L J 483, 35 Cal 807.

—s. 26.

See Landlord and Tenant—Liability for rent.

128—Sec. 26—Non-occupancy—raiyat, interest of, if heritable—"Expressio unusest exclusio alterius," applicability of.

Held, by a majority of the Full Bench (Brett and Mitra, JJ., dissenting)—that the heritable nature of the interest of a non-occupancy raiyat if it existed before the Bengal Tenancy Act, has not been destroyed by that Act, and if it did not so exist, it has not been created by the Act Sec. 26 of the Act expressly makes the right of occupancy raiyat heritable and therefore by necessary implication the right of a non occupancy raiyat is not heritable.

Per Brett and Mitra JJ.—The heritability of the right of a non-occupancy raiyat can be presumed from the provisions (sec. 20, Cl *3* ; sec 5 Cl 2) of the Bengal Tenancy Act. Sec. 26 occuring as it does in the chapter specially devoted to the occupancy raiyats, is not to be construed with reference to the maxim "*Expressio unusest exclusio alterius.*" Great caution is necessary in dealing with this maxim, and it applies with a force differing in different cases. **Mohunt Leokhan Narain Das v Jainath Panday**
2 M L T 219.

Bengal Acts-(Tenancy Act VIII of 1885)-S. 27-*Concld.*

129.—Bengal Tenancy Act (1885) Ss. 27 and 29—Tenancy-Rent suit—Oral agreement to pay enhancement of rent-Effect of enhancement of rent by a registered kabuliat.

The defendant agreed to pay an enhancement of rent by an oral agreement in 1885. He paid rent at the same rate till 1893 when he executed a registered kabuliat, by which he agreed to pay enhancement of rent which was more than two annas in a rupee. In a suit brought against the defendant tenant on the registered kabuliat—*Held* that, inas much as the enhancement in s 29 of the Act refers to enhancement after the promulgation of the Act, if in this case the enhancement which was made in 1885 was before the Act came into operation, it would not bar an enhancement of rent during the period of fifteen years from the date thereof as contemplated by Sec 29, clause (3). But if it was made after the Act came into operation it would also not bar a subsequent enhancement within fifteen years from the date thereof, as the previous contract was only an oral one and was ineffectual and not binding on the defendant. That having regard to s 29, clause (b) the kabuliat was bad in law as the enhancement was more than two annas in the rupee, and the rent agreed to be paid then was an enhanced rent. The plaintiff would, regardless of the kabuliat, be entitled to recover rent at the rate paid by the defendant for more than three years, in light of the provisions of Ss. 27 and 29, proviso (1). **Mothura Mohun Lahiri v Mati Sarkar**
25 Calc 781.

Notes:—Over, 32 Cal 395 F B=9 C W N 265 =1 C L J 10.

—S 29.

See Contract Act s 74.

130-S 29-Enhancement of rent by registered contract—Increase in the amount of rent by reason of increase of area—Applicability of s 29 in such cases.—

S 29 of the Bengal Tenancy Act applies only to an increase in the rate of rent, and not to an increase in amount of rent, by reason of an increase of the area. **Satish Chundra Giri v Kabiruddin Mallick** **26 Calc 233.**

131.—S 29—Contract in settlement of differences as to rate of rent—Applicability of section.

Bengal Acts-(Tenancy Act VIII of 1885)-S. 29-*Contd.*

An agreement in a patta to pay a certain rent agreed upon by the parties in settlement of differences as to the amount of rent payable and to avoid litigation is not an agreement to enhance rent within the meaning of S 29 of the Act. 18 Cal 333 foll. **Nath Singh v Damri Singh 28 Cal 90.**

Notes—Dist. 33 Cal 607=11 C W N 62=4 C L J 320; Ref 36 Cal 604=9 C L J 343.

132—Sec 29—Sub-section (b)—Proviso (1), Proviso (1) to section 29 of the Bengal Tenancy Act does not control sub section (b) of that section. It applies only to sub-section.

The case of (25 Cal 781 Dist.) so far as it decides to the contrary was wrongly decided.

The rate contemplated by proviso (1) does not mean the average rate. **Bepin Behari Mondal v Krishna Dhone Ghose. 1 C L J 10=9 C W N 265=32 Cal 395 F B**

133.—S 29—Enhancement of rent—Conversion of one kind of rent into another kind.

An enhancement under S 29 must be an enhancement of the same kind of rent. The conversion of *nak* into *bholi*, is not an enhancement under the section. **Hassan Kuli Khan v Nakchhedi Nonia 33 Cal 200.**

Notes—Dist 4 C L J 198

134.—S. 29-Enhancement of rent by addition of rent in kind.

S. 29 of the Act applies whether money-rent is enhanced in money or by the addition of a rent in kind. **Kishory Mohan Bose v Sheikh Uzir 14 C W N 693=6 Ind Cas 335=37 Cal 610.**

135.—S 29 (b) provisos (ii) (iii)-Occupancy holding—Rent enhancement of, over 2 annas in the rupee-Relieving tenant from other liabilities-Improvement not mentioned in Kabuliyat, proof of—Evidence Act. S 91:

Where an occupancy raiyat executed a kabuliyat in favour of the landlord stipulating to pay rent at an enhanced rate of more than two annas in the rupee and the kabuliyat did not refer to any improvements of the kind mentioned in proviso. (ii) of S 29 of the Bengal Tenancy Act. *Held*: That sec 91 of the Evidence Act did not preclude the landlord from proving improvements in consideration of which the enhanced rate

Bengal Acts-(Tenancy Act VIII of 1885)-S. 29 *Contd.*

was agreed upon. The consideration did not constitute a term of the contract within that section. The fact that the tenant has been exonerated from certain liability under a previous contract cannot give validity to a stipulation to pay rent at an enhanced rate exceeding 2 As in the rupee. 18 Cal 333=28 Cal 90 Ref. **Probod Chundra Gangopadhya v Cheraj Ali 11 C W N 62=33 Cal 607=4 C L J 320**

Notes.—Foll 9 C L J 343=36 Cal 604.

136.—Ss 29 and 103 B—Record of-Rights—Suit to correct entry—Presumption—Onus Enhancement of rent.

The presumption under S 103-B of the Act is a presumption that the entries were correct at the time of the preparation of the record.

The onus of proving that a *Kabuliyat* contravenes the provisions of S 29 (b) of the Act, is upon the tenant.

Decree for rent was passed on the basis of kabuliyat showing a higher rate than that entered subsequently in the Record-of-Right. **Luchmi Pershad v Ekdeshwar Singh 13 C W N 181=4 Ind Cas 577.**

137.—Sec 29—Kabuliats executed by tenant -Enhancement contravening provision of law-No previous dispute existent—Compromise void not voidable.

A kabuliat executed by a tenant in favour of his landlord, promising to pay future rent at a rate which contravenes the provisions of Sec. 29 B T Act, is void, not voidable, if as a matter of fact there was no existing dispute between the parties as to the rent payable. It cannot be enforced even for such enhancement, as may be within the terms of Sec 29, notwithstanding that enhanced rent at the rate mentioned in the kabuliat has been paid for several years. **Maharaja Manindra Chundra Nandy v Upendra Chundra Hazra 9 C L J 343=36 Cal 604=2 Ind Cas 828.**

138.—Sec 29—Co-sharer landlord-Enhancement of rent.

Section 29 of the Bengal Tenancy Act is quite as much applicable to contracts for enhancement of rent by co-sharer landlords as to those by sole landlords. **Ram Charan Pal Chowdhury v Srimati Ekadashi Dasi 10 C L J 87=3 Ind cas 397.**

Bengal Acts-(Tenancy Act VIII of 1885) S. 29-*Contd.*

139.—S 29 cl (b) and proviso (ii)—Enhancement on groun l of improvement——Burden of proof.

A landlord, to entitle himself to recover more than the rate indicated in clause (b) of S 29 must establish the conditions set forth in the second proviso; that is to say, when the enhancement sought is on the ground of improvement, it is incumbent on him to show that the improvement has been effected and that it exists and subsequently produces its estimated effect in respect of the holding.

Ramanath Hudati v Jote Kumar Mukherji 2 Ind Cas 660=11 C L J 1

140.— Ss 29, 30, 31.

S 29 governs ss 30 and 31,and therefore under ss 30, and 31, regard should be had not to the rates *actually* paid by the raiyats for land of a similar description, but to the rates of rent *lawfully* payable by them. 32 Cal 395 (F B), 9 C W N 265 (FB), 1 C L J 10; 24 Cal 895, 1 C W N 442 Ref. **Nobin Chundra Shaha v Kula Chunder Dhar 3 Ind Cas 402.**

141—S 29—Rent portion of, kept in abeyance by contract—Claim by landlord of that portion—Enhancement.

Where the landlord agreed, to hold a portion of the rent in suspense, and to receive the balance, at which rate the rent of the holding was realised for a number of years, and subsequently the landlord claimed at the full rate.

Held, that this was not remission by grace but remission by contract, and the enhancement being more than two annas in the rupee, is in contravention of clause (c) of S 29, and that the higher rent was not recoverable. **Jotindra Nath Acharjee Chowdhury v Moharshey, 3 Ind Cas 430.**

142—S. 29—Enhancement of rent-*Bona fide* dispute. settlement of.

Held, the limitation as to enhancement of rent provided in S. 29 of the Bengal Tenancy Act does not apply in the case of a contract by which the rent is adjusted or settled in a case of *bona fide* dispute whether as to the rate of rent or as to the area of the land comprised in the tenancy. **Kedarnath Hazra v Maharaja Manindra Chandra Nandi (1909) 5 Ind Cas 309=11 C L J 106.**

II C. C 27

Bengal Acts-(Tenancy Act VIII of 1885) S. 29-*Contd.*

143—S. 29, cl. (b)—Agreement by tenant for settlement of *bona fide* dispute as to rent—Recitals in agreement, whether conclusive—Burden of proof on landlord—Strict proof that case is taken out of statute—Proof by independent evidence.

An agreement to pay a certain amount of rent entered into by a *raiyat* for settlement of a dispute as to the nature of the existing rent with a view to avoid further litigation, is not an agreement to enhance the rent within cl (b) of S. 29 of the Bengal Tenancy Act.

But if the landlord relies upon this principle, he must establish satisfactorily that circumstances exist which render the provisions of the statute inapplicable.

The recitals contained in an agreement executed by a tenant are not conclusive upon matters affected by the instrument It is obligatory upon the landlord to give independent evidence to show that there was a *bona fide* dispute in existence at the date of the execution of the agreement, the settlement whereof would take the case out of the provisions of the S. 29.

If it is shown that the origin and incidents of a tenancy are unknown, the view may very well be taken that there is a *bona fide* dispute as to the amount of rent. But the mere circumstance that the tenant claims that the rent is so much, while the landlord asserts that it is otherwise, does not conclusively show that there is a *bona fide* dispute as to rent. 11 C L J 106; 5 Ind Cas 309; 18 Cal. 333; 28 Cal 90 Foll

Ram Pratab Koery v Gokul Kuar 12 Ind Cas 589.

144—Sec. 29—Rent, portion of, held in abeyance by grace of landlord—Hajut—Agreement to pay the portion—No enhancement.

Where in a *kabuliyat* it was stated that the annual rent was a certain sum but the landlord agreed on account of the straitened circumstances of the *raiyat* to hold a portion of it in abeyance (*hajut*) and to receive the balance at which rate the rent of the holding was realised for a number of years, and subsequently the tenant executed a second *kabuliyat* by which he agreed to pay out of the amount kept in abeyance, a certain sum in addition to what he had been paying before.

Bengal Acts-(Tenancy Act VIII of 1885) S. 29-*Concld.*

Held, that the second agreement was not in violation of the provisions of section 29 of the Bengal Tenancy Act, even if the increase exceeded by more than two annas in the rupee, the amount which the tenant had been paying before, for this was no *enhancement* of the rent of the holding within the meaning of the section; and that the *jama* of the holding was what was lawfully agreed to and stated in the *kabuliat*, and if the parties agreed that a portion of it should be held in abeyance for a time it would not be unlawful for them to enter into a subsequent agreement that either the whole of the amount that was kept in abeyance or a portion thereof should be paid by the one to the other.

Ram Doyal Das v Kamala Priya Debya. 6 M L T 192=3 Ind Cas 223

Bengal Tenancy Act s.29 cls (a),(b) proviso 1

See Bengal Tenancy Act s. 20—Case No. (99) **11 C L J 56.**

—s. 29 cl (b).

See Bengal Tenancy Act s. 48—Case No. (172) **2 C L J 540.**

145—Bengal Tenancy Act (1885) S. 30, cl. (a),—Suit for enhancement of rent—Prevailing rate—Average rate—The term "prevailing rate" does not mean the average rate, but the rate actually paid by ryots for land of a similar description and with similar advantages, it should be construed in the same sense in which it is used in earlier cases decided under Act X of 1859. **Shital Mondal v Prossonnamoyi Debya. 21 Cal 986**

146—S. 30—Enhancement suit—Reference to arbitration—Jurisdiction of arbitrators to settle equitable rent.

In a suit for enhancement of rent under s. 30 of the Bengal Tenancy Act, the case was referred to arbitration on the application of the parties, and the arbitrators settled a fair and equitable rent. *Held* that the arbitrators had jurisdiction to do so inasmuch as the parties declared that they would be bound by what the arbitrators would decide. **Ganga Charan Roy v Sasti Mandal. 6 C W N 614.**

Bengal Acts (Tenancy Act VIII of 1885) S. 30-*Contd.*

147—" Holding, " Meaning of.

The term " holding," as used in s. 30 of the Bengal Tenancy Act, means an entire holding. **Baidya Nath De v Ilim. 25 Cal 917 =2 C W N 44.**

Notes.—Ref: 10 C L J 618; 2 C L J 10; 26 Cal 937; 27 Cal 417; 7 C W N 670; 8 C W N 192. Dist: 2 C L J 534; 8 C W N 192; 751 Ap: 25 Cal 917.

148—Ss. 30, cls. (a), and (b), 31, cl, (b), 32, cl. (a) 39, cls. (1), (4) and (6)—Enhancement of rent, suit for—Existing rent below prevailing rent—Rise in prices of food crops—Comparision with average price list, obligatory on Court—Where prevailing rent in village is paid in contravention of S. 29, the rate in neigh bouring villages to be considered—Revenue Officer—Local inquiry—What directions to be given by Court.

In a suit for enhancement of rent under S. 30, cl. (b) of the Bengal Tenancy Act, on the ground of a rise in prices, it is obligatory on the Court to compare the average prices under S. 32, cl. (a) and to refer to the price list of staple food crops prepared under s. 39, cl. (1). It is illegal to dismiss such a suit without the comparison and reference imposed by the terms of the law.

Where enhancement is claimed on the ground that the existing rent is below the prevailing rent, under cl. (a) of S. 30, if the Court is satisfied that all the rent in the village should be excluded from consideration because it is fixed in a mode which contravenes the provisions of S. 29 of the Bengal Tenancy Act, then an enquiry should be directed, which will bring to light the prevailing rate of rent paid by occupancy raiyats for similar lands in neighbouring villages.

A Revenue Officer can hardly be expected to know the requirements of the Civil Courts, and it is proper that the Civil Courts, in directing a local inquiry under cl. (b) of s. 31 of the Bengal Tenancy Act, should indicate to the Officer what it is that the Court precisely requires. **Nabin Chandra Saha v Kula Chandra Dhur. 6 Ind Cas 506=14 C W N 914 =37 Cal 742.**

Bengal Acts-(Tenancy Act VIII of 1885) S. 30-*Contd.*

—S. 30

See Enhancement of Rent — Grounds of Enhancement—Rate of Rent lower than in adjacent places. **1 C W N 310.**

149 —" Holding ", Definition of—Enhancement of rent.—

An undivided share of lands comprising a holding does not fall within the definition of a holding given in the Bengal Tenancy Act; and s. 30 of the Act does not apply to an enhancement of rent of such a share. **Haribole Brohmo v. Tasimuddin Mondul, 2 C W N 680.**

Notes:—Ref: 2 C L J 10. Dist: 8 C W N 751.

150—Ss. 30 and 52—Joinder of causes of action.

There is nothing in the law which prevents one suit being brought for enhancement under s. 30 and for alteration of rent under s. 52 of the Bengal Tenancy Act. The two causes of action may be joined in one suit. **Sarada Charan Chatterji v. Iswar Samli, 11 C W N 1154.**

150A—Bengal Tenancy Act (VIII of 1885), Ss. 30 cl. (*b*) 32, cl. (*a*)--Enhancement—Decennial periods.

When a landlord applies for enhancement of rent of an occupancy raiyat under section 30, cl. (*b*) of the Bengal Tenancy Act, on the ground of rise in the average local prices of staple food crops, the decennial preriod taken as the basis of comparison under s. 52 cl. (*a*) must be entirely distinct, and may not partially coincide. **Anonda Prosad v. Bhattacharjee v. Nibarani Dasi, 11 C L J 380=5 Ind Cas 290.**

151—Ss. 30, 37, 50, 52, 115—Res judicata—Presumption as to status from uniform payment of rent after record of rights published — Suit for increase of rent for increased area — Civil Procedure Code, S. 13—Res judicata:—

Where after an entry in the record of rights that the tenant is an occupancy raiyat, the landlord brought a suit for enhancement of rent: *Held*,—That notwithstanding the provisions of S. 115 of the Bengal Tenancy Act the tenant was entitled upon proof of uniform payment of rent for 20 years before the record-of-rights were framed, to the benefit of the presumption under sub-section (2) of S. 50. That the word " thereafter" in S. 115 refers to a period subsequent to publication of the record-of-rights. A suit for assessment of additional rent on the same additional area which formed the subject matter of a previous suit, is barred as the division in the previous suit operates as *res judicata*. **Mahargel Radhakishore Mainka Bahadur v. Umed Ali, 12 C W N 904.**

Notes:—Ref: 13 C W N 1149 F B; 10 C L J 343 F B.

152—Ss. 30, 50, 181—Enhancement of rent suit for—Ghatwali Chakran lands— Resumption by Government Transfer to Zemindar — Settlement, fresh, from Zemindar—Presumption-Occupancy raiyat:—

Where there is no Ghatwali tenure in existence, it having been resumed and where there has been none at least for some years before the institution of the suit, no question arises as to any provision of the Bengal Tenancy Act affecting the incidents of a Ghatwali tenure and S. 181 of the Act has no application. In order to make the rule in S. 50 of the Act applicable to a case two conditions must be satisfied, viz., first, that the suit is one under the Bengal Tenancy Act and secondly that the raiyat and his predecessor in interest have held at a rent which has not been changed during the twenty years, immediately preceding the institution of the suit. There is nothing in the nature of a Ghatwali tenure to shew that as long as such a tenure existed, the presumption under S. 50 of the Bengal Tenancy Act could not by reason of S. 181 of the Act, arise. *Semble:*—If with reference to a raiyat holding under a Ghatwal the presumption embodied in S. 50 cl. (2) of the Bengal Tenancy Act be applied that does not in any way affect any incident of the Ghatwali tenure, Sec. 50 merely embodying a rule of evidence and raising a rebuttable presumption. 5 W R 215; 15 W R 38; 1 B L R 75 Note; 6 C W N 94, Dist:

Gourikanta Mukhopadhaya v. Ram Gopal Mukhopadhaya. 2 C L J 379.

153—Ss. 30, 31-A—Enhancement of rent—Prevailing rate—Adoption of lowest rate.

In a suit for enhancement of rent, if it is found that the majority of the tenants holding similar lands do not pay one uniform rate, the lowest rate may be adopted as the prevailing rate, and the rent may be enhanced up to that limit. 1 C W N 310, Foll. **Lalit Koer v. Babu Hit Narain Singh, 9 Ind Cas 5.**

Bengal Acts-(Tenancy Act VIII of 1885) S. 30-*Concld.*

Bengal Tenancy Act, S. 30.

See (1) Bengal Tenancy Act S. 105—Case No. (386). **33 Cal 837.**

(2) Bengal Tenancy Act, S. 65—Case No. (271). **2 C L J 379.**

154—Bengal Tenancy Act, Ss. 30 and 32-Enhancement—Decennial periods.

When a landlord applies for enhancement of rent of an occupancy raiyat under section 30 cl. (b) of the Bengal Tenancy Act, on the ground of rise in the average local prices of staple food crops, the decennial periods taken as the basis of comparison under section 32 cl. (a) must be entirely distinct and may not partially coincide.

Annanda Prosad v. Nibarani Dasi, 11 C L J 380.

155—Ss. 37, 113.—The limitation imposed by S. 37 is not confined merely to cases where an enhancement is actually made. It applies to cases where a suit for enhancement is dismissed on the merits. S. 37 should be read with S. 113 and both are based on the same principle. **Rameswar Singh v. Bhubaneswar, 33 Cal 837.**

156—S. 37—Suit for ejectment by purchaser—Occupancy raiyat—Defence—Onus — Bengal Tenancy Act (VIII of 1885), s. 21.—

A purchaser of an estate at a revenue sale sued an occupancy *raiyat* for the recovery of some lands, which were situate within the ambit of the estate. *Held*, that the onus is, in the first instance, on the *raiyat* to make out a *prima facie* case that, at the time when the revenue sale took place and the plaintiff purchased the estate, he held the land in a suit as a *raiyat* within the meaning of the proviso in s. 37 of the Revenue Sale Law or within the meaning of s. 21 of the Bengal Tenancy Act. **Ambika Churn Chakravarti v. Dya Gazi, 10 C W N 497.**

Bengal Tenancy Act S. 37.

See (1) Bengal Tenancy Act, S. 105, Case No. (386). **33 Cal 837.**

(2) Bengal Tenancy Act, S. 30 Case No. (151). **12 C W N 904.**

157—S. 38—Settlement of rent—Grounds for abatement of rent — Permanent and temporary deterioration.—

Bengal Acts-(Tenancy Act VIII of 1885) S. 37-*Concld.*

A liberal interpretation should be put upon the word "permanently" in s. 38, sub-s. (1) cl. (*a*) and the word construed with reference to existing conditions. It cannot be said that a deterioration is not permanent, only because by the application of capital and skill it might be removed. In determining the liability to additional rent, the Settlement Officer is by s. 52, sub-s. (2), cl. (*c*), bound to consider the length of time during which the tenancy has lasted without dispute as to rent or area. Although only an occupancy raiyat can bring a suit under s. 38, the principles laid down in that section ought to be taken into consideration in all proceedings for settlement of rent, whatever be the status of the raiyat.

Gouri Pattra v. Reily, 20 Cal 579.

Notes—Rel: 10 C W N 46. Dist: 2 C L J 125. Ref: 5 C L J 538.

158—Ss. 38, 52 — Landlord and tenant—Abatement of rent of portion of which tenant did not obtain possession.

Where in a suit for rent a tenant who did not obtain possession of a portion of the lands let out to him, pleaded that he was not bound to pay rent of that portion.

Held—That he was not entitled to say so and it was not necessary for him to bring a separate suit for abatement of rent; and that a suit under Ss 38 and 52 of the Bengal Tenancy Act was not necessary, as those sections do not apply where the tenant has never been put into possession by the landlord. **Sita Kumara Debi v. Biprodas Pal Chowdhury, 12 C W N 767.**

159—*Ss.* 38, 105, cl. (4) — *Settling fair and equitable rent—Second appeal — Presumption—Existing rent — Non-payment of rent for a generation.*

In a proceeding under *S.* 105 of the Bengal Tenancy Act, there is no second appeal.

In such a proceeding it was found that no rents had been paid in respect of the lands for over a generation:

Held, that there was no 'existing rent' so as to attract the presumption under cl. (4) of *S.* 105,

Bengal Acts-(Tenancy Act VIII of 1885) S. 38-*Concld.*

and that there had been no increase or reduction of rent, but merely the fixing of a fair and equitable rent. **Kali Sankar Debya v. Kaloo Mollah, 9 Ind Cas 493.**

—S. 39 Cls. (1). (4) & (6).

See Bengal Tenancy Act s. 30, cls a, b case No. (148). **14 C W N 914.**

—S. 40.

See Rent.

161—Bengal Tenancy Act (1885) s. 40 cl. (5) —Order commuting bhowli rent to nagdi rent—Omitting to state time—When order takes effect

The provisions of *S.* 40 cl. (5) are imperative, and should be strictly complied with before an order under that section can have any effect.

Chowdhry Raghu Nath Sarun Singh v. Dhodha Roy, 18 Cal 467.

162—S. 40—Commutation of rent—Jurisdiction of Civil Court.—

An order passed in appeal by a Revenue Court under s. 40 of the Bengal Tenancy Act is final, and no suit lies in the Civil Courts by which its propriety can be questioned. **Lalla Saligram Singh v. Ramgir, 3 C W N 311.**

163—Ss. 42 and 44—*Suit* by landlord to recover from tenant certain drainage charges—Limitation—Time from which limitation runs—Bengal Tenancy Act (VIII of 1885), s. 3, sub-s. 5, sch III.—

Under s 42 of the Bengal Drainage Act, the right of the landlord to recover from his tenant, any sum as drainage-charges payable by him, accrues on the date on which the landlord has entered into an engagement with the Government to pay the sum assessed by the Commissioners appointed under the Act, and not on the date on which the Collector assesses the amount payable by the tenant under s 44. (8 C W N 640, Fol: and Expl.). Cl. (*c*) of s 42 of the Act does not entitle the landlord to recover from his tenant in any one year more than one-tenth of the total sum payable by him. **Naffer Chandra Maji v. Jyote Kumar Mukerjee, 5 C L J 19= 11 C W N 57.**

Bengal Tenancy Act S. 43.

See Bengal Tenancy Act, s. 180, Case No. (598). **14 C W N 470.**

Bengal Acts-(Tenancy Act VIII of 1885) S. 44-*Concld.*

—S. 44.

See Landlord and tenant—Forefeiture—Denial of title. **1 C W N 156.**

165.—S. 44——Raiyat from an Ijaradhar to continue after expiry of the ijara-Ejectment suit by subsequent raiyat from landlord.

A purchaser of a non-transferable occupancy holding who has obtained recognition of his purchase by the landlord, has no right to eject a tenant who had, prior to the purchaser's recognition, lawfully entered into occupation of the holding as a raiyat under authority from the landlord's Ijardhar for a term; his raiyati interest would continue even after the expiry of the Ijara. He can only be ejected if one or more of the grounds mentioned in S. 44 of the Bengal Tenancy Act were made out. (1893) 30 Cal 708 ref. to. **Atal Chandra Rishi v Lakhi Narain Ghose. (1908) 10 C L J 55= 2 Ind Cas 417.**

166.—Ss. 44 (c), 45, 196—General Clauses Act (1 B. C. of 1909), S. 8 (c)——Repeal of enactment—Retrospective operation—Ejectment suit for-Non-occupancy raiyat—Notice to quit.

A suit for the ejectment of a non-occupancy raiyat, without giving him notice to quit, brought before the repeal of S. 45 of the Bengal Tenancy Act which required such notice, is bound to fail.

The plaintiffs, who at the date of their suit, had a right limited by law in a particular way, cannot take advantage of subsequent legislation removing that limitation; their rights must be determined by the law as it stood at the date when the suit was instituted.

Per Woodroffe, J.—S. 196 of the Bengal Tenancy Act, 1885, applies only where both that Act and the Act of 1907 which amended it governed the proceedings, as in the case of a suit instituted after 1907 in which case the law to be administered would be the Bengal Tenancy Act as modified by the Act of 1907.

Kumar Kalanand Singh v Dhekh Dhari Singh. 9 Ind Cas 805.

167.—S. 45—Tenant with an undivided share of a holding whether a "raiyat".

Bengal Acts-(Tenancy Act VIII of 1885) S. 45-*Concld.*

A tenant with an undivided share in a holding may be a "raiyat".

S 45, Bengal Tenancy Act, includes a tenant without occupancy right, in possession of an undivided share of a holding. (1 C W N 521; 2 C W N 44; 25 Cal 917; 2 C W N 680; 2 C L J 10 Ref.) **Banku Behary Sarkar v Benode Pal Kumar. 3 Ind Cas 350.**

168—Bengal Tenancy Act. s 45—Denial of landlord's title in rent suit—Dismissal of suit—*Res judicata*—Bengal Tenancy Act S.45.

In a suit for arrears of rent the tenant defendant pleaded that there was not the relationship of landlord and tenant,and the suit was dismissed The landlord then brought a suit for khas possession.

Held, that the suit was maintainable, and that the tenant should not be permitted to argue that the relationship should be established in his favour. 5 Ind Cas 708. 14 C W N 339 Fol.

Ekbar Sheikh v Hara Bewah. 8 Ind Cas 660

169.—Bengal Tenure Act (VIII of 1885) s. 46 sub-section (9)—Enhancement of rent—Non-occupancy raiyat.

Held, sub section (9) of section 46 of the Bengal Tenancy Act is not exhaustive.

It was not intended by that section that if there be no land of similar description and with like advantages in the same village, as the land in the suit, then it should be impossible to enhance the rent of non-occupancy raiyats in any way. **Hosain Ali Khan v Hati Charan Shaw 27 Cal 476=4 C W N 321.**

170—S. 48—Operation of s 48 on suit instituted before Act came into force.

S. 48, cl. (a), of the Bengal Tenancy Act is retrospective. 26 Cal 199 note, approved of.

Guru Das Shut v Nand Kishore Pal. 26 Cal 199.

Ram Kumar Jugi v Jafar Ali Patwari. 26 Cal 199, note.

Notes.—Ap: 26 Cal 199. Appl: 2 C L J 540. Fol: 28 Cal 166.

171.—Retrospective in operation-S.48 (*a*) is retrospective and therefore affects tenancies

Bengal Acts (Tenancy Act VIII of 1885) S. 48-*Concld.*

created even before the Act.

Babaluddin Mahomed v Dwarkanath Singha 28 Cal 166.

172—Ss.48 29, cl.(6), 85, Sub-S. (2)-Contract for rate in excess of the maximum prescribed validity of.

A contract for a rate of rent in excess of the maximum rate prescribed is not wholly void but nothing in excess of the prescribed rate can be recovered. Such a contract is different from the one contemplated by S 29 cl. (6) and S.85 sub-section (2) of the Bengal Tenancy Act (2 Cal 199; 26 Cal 199 (note) Ref) **Sitanath Midda v Basudeb Midda. 2 C L J 540.**

173.—Sec. 48 -Under-raiyat—Money rent—Payment of fixed amount in cash in default of payment in kind.

When under a *kabuliat*, an under raiyat was liable to pay as rent a certain quantity of produce and in the event of failure to do so, he was liable to pay a fixed amount in cash, his rent is a money rent within the meaning of section 48 of the Bengal Tenancy Act and the limit imposed by that section must be observed.

Quære. Whether the words 'holding at a money rent' in section 48 of the Bengal Tenancy Act are description of the landlord or of under-tenant.

Ananda Chandra Roy v Makram Ali. 10 C L J 144=3 Ind Cas 204.

—s. 49.

See (1) Landlord and Tenant—Ejectment—Notice to quit.

(2) Landlord and Tenant—For feiture—Denial of Title.

174.—S 49 Cl, (b)-Notice to quit-Notice to quit in the early part of a year, valid.

A notice under s.49 (b) need not mention any particular time within which the under raiyat is to quit the land A notice requiring the tenants to quit at the early part of a year still good notice, though they are entitled to stay till the end of the year. 1 C W N 133 Fol.

Dwarkanath Santra v Rani Dassi 28 Cal 308.

175.—Bengal Tenancy Act S 49—Ejectment, suit for—Notice to quit service of—Bengal

Bengal Acts-(Tenancy Act VIII of 1885) S. 49-*Contd.*

Government rules of 21st December 1885—Rule 3, Ch. 1—Service in case the tenants are more than one—Non-service in the prescribed form—effect of.

A notice to quit addressed to several tenants must be served by proclamation and beat of drums as provided by Rule 3, Ch I, of the rules made by the Bengal Government under the Bengal Tenancy Act. Personal service can only be effected when the notice is directed to single tenant **Tamasha Bibi v Mathura Nath Bhowmik. 6 C W N 67=28 Cal 590.**

176-Bengal Tenancy Act (VIII of 1885) Sec. 49—Notice to quit-Ejectment of under raiyat—Service of notice.

Where a notice to quit to an under raiyat was served in Pous 1303, and he was required to quit in Bysak 1304 and the suit was not instituted till the 1st Bysak 1305.

Held-That the tenant was liable to ejectment. (1 C W N 133) relied upon; (6 C W N 69) distinguished. **Mohendra Nath Sarkar v Biswa Nath Haldar. 6 C W N 183= 29 Cal 231**

177.-Ss 49 (b), 22 88 (2)—Under-raiyat ejectment of—Notice to quit.

If landlord (Permanent tenure-holder) purchases from his occupancy raiyat his right, title and interest in the holding by a deed of sale, he cannot, by virtue of such purchase, eject the under-raiyat, who was let into the land by the occupancy raiyat without serving him a notice to quit under S 49 (b) of the Bengal Tenancy Act even if the sub letting was made without the landlord's consent and otherwise than by a registered instrument. (28 Cal 205 distinguished).

Aminulla Mahomed v Nazir Mahomed 3 C L J 155=31 Cal 932.

178—S 49 (b)—Under raiyat holding on a written lease for indefinite time-Liability to eviction on a notice to quit.

Where an under raiyat holds under a written lease for an indefinite time the raiyat is not entitled to eject him by giving him a notice under sec.49 (b), he can be ejected only for nonpayment of rent. **Madan Chandra Kapali v Jaki Karikar, 6 C W N 877.**

Bengal Acts-(Tenancy Act VIII of 1885) S.49-*Contd.*

Notes.—Ex· 8 C W N 136; 139; 140. Ref: 11 C W N 190 Fol: 36 Cal 256; 9 C L J 76. Rel: 13 C W N 183. Ref: 13 C W N 35 note.

179.—S. 49—Under-raiyat—Bona fide transferee of a holding-How an under-raiyat.

A *bona fide* transferee of a holding legally untransferable is an under-raiyat within *S.49* for the purpose of notice to quit **Fazeel Sheikh v Keramuddi Sheikh. (1906) 6 C W N 916 at 919.**

Notes.—Dist: 6 C W N 919.

180.—Secs 49, 85-Permanent lease by a raiyat -Right of suit by assignee of under—raiyat against purchaser of raiyati interest.

A raiyat granted a permanent sub-lease and an assignee of the interest of the under raiyat sublet to the plaintiff. Plaintiff was dispossessed by the purchaser of the right, title and interest of the raiyat, at a sale in execution of a decree and brought a suit to recover possession from the latter. *Held* that the plaintiff could not succeed except on proof of title; and the permanent lease being invalid under S. 85 Bengal Tenancy Act, plaintiff had no title. That not being a defendant resisting a suit for eviction plaintiff could not, on the ground of mere prior possession, claim the protection afforded by the provisions of S 49 (6) of the Bengal Tenancy Act to an under-raiyat with a *bona fide* subsisting tenancy whose permanent lease is void and cannot be put in evidence. 6 C W N 916 dist.

Ramgati Mandul v Shyama Charan Dutt. 6 C W N 919.

Notes:—Ref· 8 C W N 446; 31 Cal 647. Dist: 13 C W N 183; 36 Cal 256.

181.—S.49—"Unwritten lease."

S 49 of the Bengal Tenancy Act contemplates two classes of cases (*a*) written lease for terms and (*b*) unwritten lease; it does not contemplate the case of a written lease without any term.

Mohendra Nath Sepai v Parbutty Charan Dass 8 C W N 136.

Notes.—Rel: 8 C W N 139.

182.—S.49—Written lease—meaning of.

The expression "written lease" in Cl. (b) of s. 49 means such a lease as is mentioned in Cl. (a) [illegible]

Bengal Acts-(Tenancy Act VIII of 1885) S. 49-*Contd.*

a., a written lease defining the terms of the tenancy. **Komaruddi v Sreenath Chowdhry 8 C W N 136**

183—S 49—Written lease meaning of —

The words "written lease' in Cl (b) of s 49 of the Bengal Tenancy Act means a written lease for a fixed term of years **Idugazi Doctor v Chandra Kali Sundrani 8 C W N 139**

Bengal Tenancy Act s 49—Ejectment suit—Notice to quit **See** S 5. **8 C W N 455**

184—Bengal Tenancy Act (VIII of 1885) s 49 Under Raiyat—Heritability

The heirs of an under raiyat under an annual holding do not acquire an interest in his holding by inheritance. The only right which they have irrespective of custom or local usage, is to remain in possession of the land, until the end of the agricultural year, for the purpose of either realising the rent, which might accrue during that year,or for the purpose of tending and gathering in the crops (8 C W N 479 Expl). **Jemini Sundari Dasi v Rajendra Nath Chukrabutty 11 C W N 519**

185—Ejectment--Delay in suit-Holding over —Mere delay in the institution of the suit after expiry of time is no reason for dismissal of an ejectment suit on the ground that the defendant was allowed to hold over there being no authority for the proposition that the delay raises a presumption that the tenant was allowed to hold over **Ratan Lal Gir v Farshi Bibi 34 Cal 396=11 C W N 826**

186—Ss 49 150—Rent suit—Instalment decree, power of Court to make—Civil Procedure Code, ss 210 622—High Court's power of revision.

A decree for rent under the Bengal Tenancy Act cannot be made payable by instalments S 210 of the Civil Procedure Code not applying to such a decree Where a Munsif made an order for the payment of the rent decreed by instalments he committed an error of law only and not an error in the exercise of his jurisdiction within *S* 622, Civil Procedure Code **Shibh Narain Mookerjee v Baikuntha Nath Isar (1906) 11 C W N 857**

Bengal Acts-(Tenancy Act VIII of 1885) S. 49 *Concld.*

187,—S 49 (b)—Under-raiyat-Ejectment—Bemiadi potta—Notice

An under raiyat holding under a potta executed before the passing of the Bengal Tenancy Act and not expressly providing for the period of its duration comes within clause (*b*) of S 49 and notice must be given as provided thereunder **Raj Kumari Debi v Barkatulla Mandal. 14 C L J 407 (F B)**

188—S 49 (*b*)—Ejectment—Denial of landlord's title—Forfeiture-Under raiyat

In the case under the Bengal Tenancy Act the denial of the landlord's title by the tenant does not create a forefeiture, and the under raiyat who denies his landlord's title cannot be evicted from his holding, except after notice to quit, as prescribed by S. 49 cl (b) of the Act 20 Cal 101 Fol **Sheikh Bechu v Sheikh Solim. 2 Ind Cas 417**

189—Ss 49, 167—Incumbrance, avoidance of——*Sale* of several tenures together—Bona fide purchaser—Under-tenants eviction of

A sale to be invested with the incidents of a sale under this Act, ought to be of one & not of many holdings together, and the mere fact of purchaser being a *bona fide* purchaser would not invest the Court with authority to give him the title which would accrue only under a special procedure laid down in the Bengal Tenancy Act

The procedure under the s 49 would have to be gone through in order to evict yearly under-tenant 34 Cal 298 6 C L J 153 11 C W N 497 Fol **Gopal Chandra v Basir Gazi 7 Ind Cas 17.**

190—Ss 49, 85, 160 (c)—Injunction building pucca house—Permanent lease by raiyat to under-raiyat

The defendant, an under-raiyat of the plaintiff was in occupation of *bastee* land under a lease of a permanent character The lease had been registered notwithstanding cl (2) of S 85

The plaintiff sued for a perpetual injunction restraining the defendant from building a *pucca* house and for demolition of a *pucca* plinth already built

Bengal Acts-(Tenancy Act VIII of 1885) S 49 *Contd*

Held, that the plaintiff was not entitled to ei ther of the reliefs prayed for and that the fact that the lease would constitute a protected inter est at a sale of the holding for arrears of rent was no reason why the defendant should be de prived of the right to build if he has that right under his lease

Semble The lease would be void and the defendant would be liable to be ejected under cl. (c) of S. 49, after due notice to quit, as an under raiyat holding otherwise than under a written lease

Sadhu Charan v Sarbamangala Dasi
8 Ind Cas 65

Bengal Tenancy Acts 49.

See Bengal Tenancy Act S, 22 Case No (116)
2 C L J 570

Bengal Tenancy Acts 49.

See Bengal Tenancy Act s 5 Case No (38).
8 C W N 455

Bengal Tenancy Act s. 49 (b)

See Bengal Tenancy Act s 22 Case No (111)
31 Cal 932

Bengal Tenancy Act s 49

See Bengal Tenancy Act s 22 Case No (114)
13 C W N 913

—s 50.

See Evidence—Civil Cases—Rent Receipts

191—192—S. 50—Applicability of-Tenant or trespasser

The application of s 50 of the Bengal Tenancy *Act* is limited to a suit or proceeding under the Act. In a suit for recovery of possession against certain persons alleged to be trespassers, whether the defendants claim to be tenants, s 50 of the Bengal Tenancy Act will become applicable only after it is proved that the defendants are tenants and it will have to be proved independently of

Bengal Acts (Tenancy Act VIII of 1885) S. 50 -*Contd.*

the section 4 C W N 159, Foll.2 C W N 580, Cons.

Rasamoy Puakait v Srinath Moyra.
7 C W N 132.

Notes Fol. 2 Ind Cas 992, Expl., 9 C L J 467.

193—Land Acquisition Act—Apportionment of, between Landlord and Tenant—Bengal Tenancy Act, S 53, Sub-S. 2

Sub S 2 of S 53 of the Bengal Tenancy Act applies only to suits or proceedings under that particular statute

In apportioning compensation money awarded under the Land Acquisition Act, the Court ought to proceed on the principle of ascertaining on the one hand what is the value of the interest of the Zamindar with which he has parted and that of tenant on the other, and to apportion it accordingly Where the rent is fixed in perpetuity and consequently no question of the chance of enhancement arises, the landlord is not entitled to more than the capitalized value of the rent due to him **Dinendra Narain Roy v. Tituram Mukerjee** **7 C W N 810=30 Cal 801.**

Notes —Foll: 5 C L J 662. See also 28 Cal 146.

194-S 50 -Record of rights-Presumption from twenty years' uniform payment of rent—Rights holding at fixed rates

In a proceeding for record of rights under Ch X of the Bengal Tenancy Act (VIII of 1885), it having been found that certain raiyats were holding their lands at rates which had not been changed during twenty years before the institution of the proceeding the Settlement Officer recorded them as "raiyats holding at fixed rates." In second appeal, *held* that, under s. 50 of the Bengal Tenancy Act, the Settlement Officer was right in giving effect to the presumption that the raiyats were holding at fixed rate of rent and in recording them as "raiyats holding at fixed rates." 24

Bengal Acts-(Tenancy Act VIII of 1885) S. 50-*Contd.*

Cal 152, dissented from. **Dulhin Golab Koer v Balla Kurmi.** 25 Cal 744=2 C W N 580.

Notes:—Con: 7 C W N 132. Ref: 33 Cal 1219.

195—s. 50—Land acquisition proceeding—Apportionment of compensation between landlord and tenant - Presumption of permanency of holding.

Although sec 50 of the Bengal Tenancy Act does not apply when the question of the permanency or otherwise of a tenure arises in a proceeding for the apportionment between landlord and tenant of money awarded for compulsory purchase of land the principle involved in that section is a useful guide to the Court in deciding it.

Nunda Lal Gossami v Atarmoni Dassi. 12 C W N 432=35 Cal 763.

196—s. 50 cls. (2) and (3)—Tenure in existence for more than twenty years, split up into two—New tenancies created—Presumption of fixity of tenure inapplicable.

A tenure held at a fixed rent of *Rs.* 4-8-0 had been existing for a period of 150 years before, 1884. In 1884, the tenure was split up into two tenancies, each bearing a rent of Rs. 2 4 0.

Held, that the presumption under s. 50, cl. (2) of the Bengal Tenancy Act, does not arise in such a case, and the tenant cannot have his name entered in the Record-of-Rights as a tenure-holder holding at a fixed rent. **Uday Chandra Kaji v Nripendra Narayan Bhup.** 13 C W N 410 =35 Cal 287=1 Ind Cas 4.

Notes:—Ref: 14 C W N 335=11 C L J 56= 3 Ind Cas 306.

197—Ss. 50, 105. 106.—Presumption as to fixity of rent-Bengal Tenancy Act (VIII of 1885), Secs. 50, 150, 115—Final publication of Record of Rights.

When an application is made under section 105 of the Bengal Tenancy Act for settlement of rent after the final publication of the Record of Rights the tenant is entitled in spite of the provisions of section 115 of the Bengal Tenancy Act to the benefit of the presumption under section 50 of the said Act

Bengal Acts-(Tenancy Act VIII of 1885) S. 50-*Contd.*

Quere, Whether the word 'recorded' in section 115 of the Bengal Tenancy Act means recorded after all chances of an amendment of the record under any other provisions of the chapter are over, including a suit as contemplated by section 111 of said Act?

Per Coxe J—The particulars in respect of a tenancy, which were the subject of a dispute under section 105 are not recorded within the meaning of section 115 until a note of all decisions of disputes under section 105 has been made under section 107 cl. (2) of the Bengal Tenancy Act.

A decision by a Revenue officer in a proceeding under section 105 of the Bengal Tenancy Act that a tenant is a raiyat at fixed rates, may be regarded as a matter that should be incorporated in the Record under section 107 cl. (2) of the Act, as amended in 1898, and that therefore, where such proceedings were pending, the Record may be regarded as incomplete under section 115 and the tenant is entitled to plead the benefit of section 50 of the said Act. **Pirthi Chand Chowdhury v Sheikh Basarat Ali and Kinu Chandra Chatterjee v Mohesh Dutta Jha** 10 C L J 343=13 C W N 1149=3 Ind Cas 449=37 Cal 30 (F B).

198—S.50, Cl. (2)—Uniform rent—Presumption—Proof from particular year:—

Where a tenant has paid rent for over twenty years prior to the date of suit at a uniform rate which has not changed, the presumption of law under S.50 Cl.(2) of the Bengal Tenancy Act would arise if there is no allegation or proof that a tenancy commenced in a particular year after the permanent settlment. The mere fact that the tenant shows by documentary evidence that the rate of rent has not changed from a particular year would not preclude him from the benefit of the presumption given by Cl. (2) of S.50. **Sheikh Mongala v. Maharaja Kumud Chander Singh Bahadur.** 5 C W N 60.

199—S. 50—Presumption-Landlord and tenant—Ejectment.

Where a landlord brings a suit for ejectment on the allegation that his tenant, who had a non-transferable holding, has sold it to a third peason (one of the defendants) and has abandoned the holding.

Bengal Acts-(Tenancy Act VIII of 1885) S 50-*Contd.*

Held that S. 50 of the Act has no application to such a case. **Sarat Chandra Ghose v. Shyama Chand Singha. 10 C W N 930.**

Notes.—Ref: 9 *C* L J 467; Foll 2 Ind Cas 992.

200—*S.*50—Ejectment, suit for-Raiyat holding at fixed rate—Presumption—Tenancy held for about 25 years—Inference as to rent fixed in perpetuity—Holding, transferability of—Custom or usage—Usage, benefit of, attaches to existing tenancy—Document, effect of, misunderstanding, if a question of law.

From the mere fact that a tenancy has been held for about 25 years before the date of transfer at a uniform rate of rent, it cannot be inferred that the rent was fixed in perpetuity.

The presumption mentioned in S. 50 of the Bengal Tenancy Act applies only to cases which may be called suits or proceedings under the Bengal Tenancy Act. A suit for ejectment on the allegation that a tenant of non-transferable holding sold it to the defendant and has abandoned land, is not a suit or proceeding under the Bengal Tenancy Act.

In cases where S. 50 of the Bengal Tenancy Act is not directly applicable, the Court may act on a similar presumption if the facts justify the necessary inference.

Though the misconstruction of a document which is the foundation of the suit or which is in the nature of a contract or a document of title is a ground for second appeal, a second appeal does not lie, because the Judge in the Court of appeal below has misunderstood the effect of documentary evidence.

In order to prove a custom or usage of transferability, it is necessary to prove that transfers have been made to the knowlegdge and without the consent of the landlord, and that they have been recognised by him without the payment of *nazar* or upon payment of *nazar* also fixed by contract. It is not necessary to prove that the landlord has actually made an objection to a transfer and has been unsuccessful.

The usage or custom must be obligatory;otherwise, it cannot be said to have acquired the imperative character of law. Hence a growing usage of transferability is of no avail against the landlord; the usage to be effective must have already grown up.

Bengal Acts (Tenancy Act VIII of 1885) S. 50-*Contd.*

The principle upon which contractual obligations are allowed to be modified by custom or usage is that such custom or usage may enter into the body of a contract without being expressly inserted, as both parties are supposed to know it and to intend to be bound by it. A usage may grow up so as to affect a pre-existing contract or incidents of tenancies under the Bengal Tenancy Act. In the case of usages of transferability of holdings, they can grow up only by the acquiescence in the first instance of the landlord himself, they are at first matters of choice with him, but may acquire an obligatory element or a binding force after he has acquiesced in the conduct of his tenants for a sufficient length of time. Hence a usage of transferability, after it has grown up, affects not merely tenancies created thereafter but also existing tenancies.

Bazlul Karim v Satish Chandra Giri. 13 C L J 418=15 C W N 752.

201—Enhancement of rent, suit for-Bengal Tenancy Act (VIII of 1885) Secs 50 and 52—Enhancement, grounds of exemption from onus.—Report of Commissioner not challenged in the first Court should be accepted as correct.

When a tenant claims exemption from enhancement of rent under section 50 of the Bengal Tenancy Act the, *onus* lies on him to prove that he has held the tenure at a rent or rate of rent which has not been changed from the time of the Permanent Settlement or for 20 years or more preceding the suit.

When the report of a Commissioner as to the prevailing rate of rent was not challenged by either side in the first Court and was acted upon by it without further corroborative evidence the Lower appellate Court ought not to have gone behind that report and examined the materials on which the report was founded and come to a different finding without allowing the parties opportunity to adduce evidence in support of or to rebut it. **Govinda Priya Chowdhurani v. Ratan Dhupi 4 C L J 37.**

202—S.50 (2)-When presumption applies.

The presumption referred to in S.50 (2) of the Bengal Tenancy Act arises only in suits brought under the provisions of that Act alone. 12 W

Bengal Acts-(Tenancy Act VIII of 1885) S. 50-*Contd.*

R P C 6; 22 Cal; 742 Ref. **Nilamani Maitra v. Mathura Nath Joardar. 5 C L J 413.**

Notes:—Ref 11 C L J 98=13 C W N 1025= 2 Ind Cas 675.

203—S. 50—Applicabitity—Suit for ejectment of transferee from tenant without seeking relief against tenant:—

S. 50 of the Bengal Tenancy Act (VIII of 1885) has no application to a suit brought by a landlord by which he seeks to eject the transferees from his tenant on the ground that they were trespassers and does not practically seek any relief at all against the tenant when the suit is brought under the general law and not under any special provisions of the Bengal Tenancy Act. (1906) 10 C W N 930 ref to. (1902) 7 C W N 132 ref to and expl. **Mohabir Persad v Charles Fox (1909) 9 C L J 467=1 Ind Cas 112.**

204—S. 50—Suit for possession of a holding—Raiyati holding at uniform rate of rent from the permanent settlement—Presumption of fixity of rent when arises—Object of section—Inference as to fixity of rent if deducible from other circumstances when presumption does not arise.

The object of the Legislature in providing for the presumption as to fixity of rent mentioned in S. 50 of the Bengal Tenancy Act (VIII of 1885) was to provide in suits or proceedings under the Act, that is in suits or proceedings between landlords and tenants as such, an easy method of determination of the rights of the parties.

It does not follow that in cases to which the section has no application, it is not open to the Court to draw any appropriate inference from the fact proved by the evidence on the record. 30 Cal 801; 11 C W N 242; 12 C W N 432; 12 C L J 107; 14 C W N 884 Ref. **Nityananda Pal v Nanda Kumar Chowdhuri. 13 C L J 415.**

205—S. 50—Presumption of fixity of rent—Abwab—Jalaparabi.

Where a tenant has paid Rs 23-14-1¼ gds as rent for 60 years before suit, but in the rent receipts up to 1282 B S, the amount was stated to be the total rent *jalaparabi* and exchange to convert sicca rupees into the Company's coin, but after that year, the details were omitted.

Bengal Acts-(Tenancy Act VIII of 1885) S. 50-*Contd.*

Held, that, assuming that *jalaparabi* is an *abwab*, there is nothing to warrant the conclusion that it is not still being realized as an *abwab;* that it cannot be assumed merely from the form of the receipts that the tenant must necessarily have consented to pay the whole sum as the consolidated rent of her land; and that therefore the tenant is entitled to the presumption under S. 50 of Bengal Tenancy Act. **Brindamoyi Dassya v Maharaja Nripanda Narayan Bhup Bahadur. I Ind Cas 21.**

206—Ss 50, 105, 106, 109 A Cl (3)-Presumption of holding from permanent settlement-"Until the contrary is shown" meaning of—S 105—Matter coming under S. 106—Second appeal.

A tenant is entitled even though the proceeding was taken under S. 105 to a second appeal provided that questions were raised and decided under S. 106.

The words "until the contrary is shown" in S 50 mean that either it must be shown that the rate had been raised at sometime after the creation of the tenancy and prior to the suit or that the tenancy was created after the time of the permanent settlement and do not cover any conduct of the tenant, that is, it cannot be found that the presumption has been rebutted by any conduct of the tenant.

A finding without any consideration of the evidence and without giving any reasons for differing from the first Court, cannot be accepted.

Where the Settlement Officer without stating what rents he proposed as fair and equitable under S 105 clause (5) took the consent of the tenant to accept whatever rent the Court would settle as fair and equitable.

Held, that the proceedings were not in accordance with law. 3 Ind Cas 449; 13 C W N 1149; 10 C L J 343 (F B) Fol.

Choa Loll Mondal v. Maharajah Sir Rameshwar Singh Bahadur, 5 Ind Cas 160.

207—Ss. 50, III, III A—Suit for correction or alteration of, if maintainable.

A suit for a declaration that the record was wrong and that the plaintiffs were raiyats with a fixed rent is maintainable. Although such suit is

Bengal Acts-(Tenancy Act VIII of 1885) S. 50-*Contd.*

for a declaration of right under the Specific Relief Act, it is nevertheless a suit authorised by and therefore, under the Bengal Tenancy Act; and consequently the presumption under S. 50 applies. 35 Cal 1013; 12 C W N 1032, 8 C L J 322, Dist: 55 Cal 176; 7 C L J 103: 12 C W N 122; 11 C W N 48: 28 Cal 28; 3 Ind Cas 689; 9 C L J 83; 13 C W N 111; 13 C W N 181; 4 Ind Cas 577; 9 C L J 284; 4 Ind Cas 54. rel:

Maharaja Sir Rameshar Singh Bahadur v Raghunandhan Chowdhury.
5 Ind Cas 266.

208—Ss. 50, 105—Amalgamation of tenures—Permanent settlement.

Where, in a proceeding under S. 105 it is found that the defendant is the owner of six separate tenures, which have been amalgamated into one after the permanent settlement and uniform payment of rent for more than twenty years before the suit has been proved.

Held, that the presumption, which would have applied to the six different tenures if they had stood separately, would apply to the amalgamated tenure under S. 50. 1 Ind Cas 4; 13 C W N 410; 36 Cal 287 Dist. **Prithi Chand Lal Chowdhury v Sheikh Hazari.**
5 Ind Cas 453.

209—Ss. 50 and 106—Presumption of fixity of rent—without.

Where certain holdings of certain tenants had been held at the same rents for periods of 27, 60 and 57 years respectively, and there was no evidence that any different rents had ever been realised.

Held, that, apart from any presumption under S. 50 the statute of the tenant must be held to be that of occupancy *raiyats* holding at fixed rents.

The failure to institute a case under S. 106 does not debar regular suit to establish right. 11 C W N 48; 28 Cal 28, Fol: 35 Cal 1013; 12 C W N 1032; 8 C L J 322, *dissented from.*

Golab Misser v Kumar Kalanand Singh.
6 Ind Cas 217=14 C W N 884.

210—S. 50—Presumption—Tenure—Amalgamation.

No tenant can, after amaglamation of his separate tenures, claim the presumption given by

Bengal Acts-(Tenancy Act VIII of 1885) S. 50-*Contd.*

s. 50 of the Act, if the holding is not shown to have been held in its entirety since the permanent settlement. **Ghanashyam Misser v Kalanund Singh.**
6 Ind Cas 790.

211—Ss. 50 cl. (2), 85, 86, cl (b)—Presumption of permanency—Suit not under Bengal Tenancy Act—Estoppel—Defendant producing false pattah, whether entitled to benefit of presumption—Re-entry by landlord—Tenant surrendering—Ejectment of under-raiyat.

Although the provisions of S. 50, cl. (2), Bengal Tenancy Act, apply only to suits or proceedings under the Act, it does not follow that a Court is precluded from drawing an inference, from the fact of long payment of rent, at an uniform rate, that the *jote* has been held at a fixed rent since the permanent settlement.

Although the defendant set up a false *pattah*, dated some time before the permanent settlement yet he is not precluded from asking the Court to draw an inference as to the fixity of rent, if he has proved other facts which would give rise to such an inference. Where a *raiyat* surrenders his holding, the landlord can re-enter by ejecting the under-*raiyat* without a notice to quit, if not protected by S. 85 or S. 86, cl (b), of the Bengal Tenancy Act. 4 C W N 667; 2 C L J 570, Fol. 5 C W N 858, Fol.

Mukta Sundari Dasi v Bodal Chandra Bhowmik. **10 Ind Cas 164.**

212—S. 50—Presumption of permanency—Suit or proceeding under Act—Ejectment suit on ground of transfer of non-transferable holding, if suit under Act—Second appeal—Misconstruction of document—Mistake as to meaning of portion of evidence which is documentary-Civ, Pro Code (Act V of 1908), S.100—Usage or custom of transferability—Ingredients, what are, to prove the custom—Growing usage if binding upon landlord.

Although the presumption mentioned in S. 50 of the Bengal Tenancy Act applies only to cases which may be called suits or proceedings under the Act, yet even in cases where that section is not directly applicable, the Court may act on a similar presumption, if the fact justfy the necessary inference.

A suit for ejectment on the allegation that the tenant of a non-transferable holding has sold it to the defendant and has abandoned the

Bengal Acts (Tenancy Act VIII of 1885) S. 50-*Contd.*

land, is not a suit or proceeding under the Bengal Tenancy Act.

Though the misconstruction of a document which is the foundation of a suit or which is in the nature of a contract or document of title is a ground for second appeal, a second appeal does not lie because some portion of the evidence is in writing and the Judge in the Court of appeal below makes a mistake as to the meaning of it.

In a suit for ejectment on the ground that the tenant of a non-transferable holding has sold it to the defendant, the only circumstance that the tenancy has been held for about 25 years before the date of transfer at a uniform rate of rent is by itself insufficient to justify the inference that the rent was fixed in perpetuity.

In order to prove a custom or usage of transferability, what is necessary to prove is that such transfers have been made to the knowledge and without the consent of the landlord and that they have been recognised by him either without the payment of nazar or upon payment of a nazar also fixed by custom.

It is not necessary to prove that the landlord has actually made an objection to a transfer and has been unsuccessful.

A growing usage of transferability is of no avail against the landlord ; the usage to be effective must have already grown up.

But a usage of transferability, after it has grown up, affects not merely tenancies created thereafter, but also existing tenancies to which the benefit of the usage attaches. 25 Cal 744; 2 C W N 580 ; 30 Cal 801 , 35 Cal 763 , 12 C W N 432, relied upon. 10 C W N 930, Fol. 19 W R 222 ; 1 C L J 232 : 32 Cal 719 ; 4 C L J 198; 4 Ind Cas 732 . 10 C L J 593, Fol. 8 C W N 214 ; 8 C W N 235, relied upon. 10 C W N 497 : 10 C W N 719 , 4 C L J 306 33 Cal 1094 , 12 C W N 878, Fol. **Buzlul Karim v Satish Chandra Giri Mohant 10 Ind Cas 325**

Bengal Tenancy Act S. 50—Applicability —**See** (1) Landlord and Tenant—Transfer of tenant's interest. **2 Ind Cas 992.**

(2) Bengal Tenancy Act s. 30—Case No. (151). **12 C W N 904.**

(3) Begal Tenancy Act S. 30—Case No (152). **2 C L J 379.**

Bengal Acts-(Tenancy Act VIII of 1885) S. 50-*Concld.*

(4) Bengal Tenancy Act S. 65—Case No (271). **2 C L J 379.**

(5) Bengal Tenancy Act S. 55—Case No (234). **12 C W N 432.**

213—S, 51—Suit for bhowli rent—Previous judgment between the parties allowing nakdi rent, whether res judicata—Record of rights, subsequent to the previous judgment entry in, effect of.

Decision in a previous rent suit as to the amount of rent payable does not operate as res judicata in a suit for rent of subsequent years, although it may give rise to a presumption under S. 51 of the Bengal Tenancy Act.

The same principle should be applied to question whether a tenant held at *bhouli* or *nakdi* rent for a particular period.

When a conflict arises as to the rate of rent between that allowed by a previous decree and that entered in the record of rights subsequently prepared, both are to be considered together and weighed against each other.

Record of rights under Chapter X of the Bengal Tenancy Act are prepared with considerable formality, and the proceedings of the Revenue officers are conducted with publicity. Entries in such records should not be lightly discarded (6 C W N 589 Ref. 32 Cal 336. Diss)
Kali Roy v. Pratab Narain. 5 C L J 92.

214—Bengal Tenancy Act (VIII of 1885) sec. 51—Civil Procedure Code (Act XIV of 1882), sec, 13—Res judicata—Rent suit—Presumption.

A decision in a previous rent-suit as to the amount of rent payable was held not to operate as *res judicata* in a suit for the rent of subsequent years, although it was held that it gave rise to a presumption under sec. 51 of the Bengal Tenancy Act that the rents for subsequent years remained the same. **Maharani Beni Pershad Koeri v Raj Kumar Chowbey 6 C W N 589.**

Bengal Tenancy Act s 51--Standard measurement, burden of proof as to—See Limitation Act, 1908, Arts 142, 144. **2 C L J 125**

215—Bengal Tenancy Act (VIII of 1885) s. 52 subsection (6)—Suit for rent by some joint-

Bengal Acts-(Tenancy Act VIII of 1885) S. 52-*Contd.*

land-lord against one joint tenant—The claim of abatement in such a suit—Meaning of 'Tenant'

A suit was brought by some of several joint land-lords against one of several joint tenants for recovery of the plaintiff landlord's share of the rent payable for the defendant-tenant's share of the tenure under a previous arrangement. The question is whether the tenant defendant can claim abatement under the provisions of section 52 of the Bengal Tenancy Act in such a suit. *Held*, the expression Tenant' in section 52 does not include the case by a mere co-sharer tenant who has only a fractional share in the tenure; it means the tenant of the tenure, not one of many tenants. To hold that it applied to a co-sharer tenant would result in much confusion, and almost endless litigation. The tenant defendant cannot claim abatement under section 52 of the Bengal Tenancy Act.

Bhoopendra Narain Dutt v Romon Krishna Dutt 27 Calc 417=4 C W N 107.

216—Ss. 52, 154—Excess land in holding—Rent—Back rent.

Under the Bengal Tenancy Act a landlord can claim back rents for excess area in the occupation of the raiyat, provided the claim is not barred by the law of limitation. A S. 359 of 1898 and 26 Cal 739 foll. **Jagannath Manjhi v Jumman Ali** 29 Cal 247.

217—S. 52 and s. 191—Permanent Settlement—Presumption—Uniform rent.

When a question arises as to whether a tenant is entitled to the presumption under s. 50, cl. (2) of the Bengal Tenancy Act, the fact that the estate within which the tenure in question is situated was not permanently settled in the year 1793 does not make any difference. S. 191 of the Bengal Tenancy Act has no application to the present case, inasmuch as the estate, though not permanently settled in 1793, was subsequently permanently settled in the year 1811.

Tamasha Bibi v Ashutosh Dhur. 4 C W N 513.

218—Sec. 52—Additional rent, suit for—Enchancement.

A landlord cannot successfully claim additional rent under sec. 52 of the Bengal Tenancy Act in repect of an excess of area, when he fails to show what the area of the tenure was when

Bengal Acts-(Tenancy Act VIII of 1885) S. 52-*Contd.*

first created and that the rent originally fixed did not cover and was not intended to cover such excess of area. **Rajendra Lal Goswami v Chunder Bhusan Goswami.** 6 C W N 318.

Notes—Rel: 10 C W N 46. Ref: 5 C L J 538.

219—Ss. 52, 74-Landlord and tenant—Bengal Tenancy Act (VIII of 1885), secs. 52, 74—Additional rent for increased area—Limitation.

"All impositions upon tenants under the denomination of *Abwab*, etc, and "all stipulations and reservations for the payment of such" referred to in s. 74 of the Bengal Tenancy Act relate to both past and future stipulations; such stipulations made before the passing of the Bengal Tenancy Act are, therefore, void. The right to recover additional rent for increased area is a recurring one, and a landlord is entitled to exercise it whenever he finds it necessary to do so.

Jotindra Mohan Tagore v Chandra Nath Sahai. 6 C W N 360.

220—Ss. 52 158, cl. (d)—Jurisdiction—Additional rent for additional land, whether can be determined.

Under s. 158 cl. (d) of the Bengal Tenancy Act a Court has to determine what the existing rent is and it has no jurisdiction to determine what the rent should be, and consequently, additional rent for additional area cannot be assessed in such a proceeding **Sir Narain Thakur v Maharaja Sir Luchmeshwar Singh Bahadoor.** 6 C W N 592.

221—Ss. 52, 90, 188—Holder of darmourasi patta—Mokuraridar and zamindar—Zamindar's right of suit for measurement of area and increased rent—Joint landlords.—

R, the holder of *dar-mourasi* patta, executed before the passing of the Bengal Tenancy Act, a *kabuliyat* in favour of his immediate landlord, a *mokuraridar*, which provided that the former should have his name entered in the zamindar's sherista in place of the *mokuraridar's* and pay rent direct to the zamindar, and also, in the event of the area of the tenure exceeding certain bighas, that he should pay rent on each excess bigha, at the rates of 12 annas and 2 annas to the zamindar and the *mokuraridar* respectively; and the agreement was ratified by the zemindar. In a suit brought by the zamindar against R for

Bengal Acts (Tenancy Act VIII of 1885) S. 52-*Contd.*

measurement of the tenure and increased rent, where it was contended by R that under the *kabuliyat* only the *mokuraridar* was entitled to sue for such measurement, or that at any rate he must also sue jointly with the zamindar: *held*, (a) that by accepting the zamindar as the landlord, R had made himself liable to be sued by him, (b) that every landlord has a right under s. 90 of the Bengal Tenancy Act to sue for measurement, (c) that though the zamindar and the *mokuraridar* were both landlords of R, they were not joint landlords within the meaning of s. 188 of the Bengal Tenancy Act, and that even if they were joint landlords, they had ceased to be so as they had been collecting their shares of the rent separately. (19 Cal 610, Fol.), (d) that at any rate, as the contract on which the suit was based was one entered into before the passing of Bengal Tenancy Act, the suit was not one under s. 52 of the Act, and hence the provisions of s. 188 did not bar the suit. (22 Cal 658 Fol.)

Matungiri Dassi v Ram Das Mullick. 7 C W N 93.

Notes—Ref: 35 Cal 417.

222—Suit by co-sharer landlord for rent, maintainability of -Bengal Tenancy Act, Ss 52, 178, 188.

Where a co-sharer landlord brings a suit against a raiyat for arrears of rent and for additional rent on the basis of a kabuliyat executed by the raiyat in which the right of the plaintiff to certain rent was admitted and his right to additional rent for lands found on measurement to be in excess of the area stated was also admitted, and the right of the plaintiffs and the liability of the defendant were distinctly set out as the basis of the agreement between the parties without any other co-sharer landlord. *Held*,—That the suit is maintainable although the cosharer is not made a party. *Held*—That S. 188 of the Bengal Tenancy Act does not affect the co-sharer landlord's right under the kabuliyat unless the right to make such an agreement is otherwise forbidden by the Bengal Tenancy Act. S 78, which is the only section which deals with the full action of landlords and tenants in the matter of contract, does not refer to such a matter. (3 C W N 44, 25 Cal 917 distinguished 19 Cal 610; 1 C W N 521; 25 Cal 917 ref. to.

Gobind Chandra Pal v Hamidulla Bhuian. 7 C W N 670.

Notes—Ref: 2 C L J 534; 35 Cal 417.

Bengal Acts-(Tenancy Act VIII of 1885) S. 52 *Contd.*

223—s. 52—Permanent lease—Diluvion—Abatement.

A tenant holding under a permanent *mokurari* lease is not entitled to get abatement of rent by reason of a portion of the land in his occupation having been diluviated by the action of a river.

Nunda Laul Mukherjee v. Kymuddin Sardar, 9 C W N 886.

224—S. 52—Increase of rent for increased area—Burden of proof.

In a suit brought by a landlord for increse of rent on account of an increase in the area of a holding it was found that the tenant was holding the same lands without any variation in the boundaries that the landlord failed to prove what area was originally leased to the tenant; and there were no materials before the Court for the determination of the question, whether the rent was a consolidated rent or not.

Held, that the landlord was not entitled to any increase under S. 52 of the Bengal Tenancy Act.

In order to succeed the landlord must prove facts and circumstances showing that there was some reason not within the control of the landlord for additional lands being included in the holding. 20 Cal 579 and 6 C W N 318 relied on. **Ratan Lall Biswas v Jadu Halsana 10 C W N 46.**

Notes—Ref: 5 C L J 538.

225—Ss. 52, 188—Suit by cosharer landlord for compensation for use and occupation by tenant of excess land—Parties, all landlords if must be—Absence or prayer for ejectment in such suit—Waiver of right to eject—Suit virtually for rent.

A plaintiff, who sues for compensation for use and occupation of land, but does not ask for ejectment therefrom of the defendant, waives his right to eject and must be taken to have recognized the defendant as a tenant.

Such a suit was treated by the Court as a suit for rent.

When a tenant is found in possession of land, which formed no part of the land originally let out to him, the landlord is entitled to treat the excess land as a new holding and a suit for rent may be brought in respect thereof independently

Bengal Acts-(Tenancy Act VIII of 1885)-S. 52-*Contd.*

of S. 52 of the Bengal Tenancy Act, and thereof S. 188 of the Act, is no bar to a cosharer landlord suing for his share of compensation for the use and occupation of the land by the tenant. (4 C W N 508, *doubted and followed*) **Abdul Hakin Saha v Rajendra Narayan Rai 13 C W N 635=1 Ind Cas 312.**

Notes—Dist 10 L R J 458.

—Ss. 52, 105, 106—Enhancement of rent for increase of area within specified boundaries—Increase of area, proof of—Second appeal, if lies See Civ. Pro. Code, (1908), **15 C W N 921.**

226—S. 52—Additonal rent for excess land when allowable—sec. 109 cl. (3)—Appeal—Decision settling rent.

A landlord is entitled to additional rent for excess lands only when he shows (a) what the quantity of land was at the inception of the tenancy (b) that the rent was settled with reference to the area, (c) that no consolidated rent for the entire area let out was settled and (d) that the quantity of land held at the time of suit is in excess of that originally let out.

Where the decision of the Judge does not settle a fair and equitable rent, but merely proceeds on the ground that there was no excess land and therefore no rent to be settled, an appeal lies. 4 C L J 138. Dist. **Rajkumar Pratap Sahay v Ram Lal Singh 5 C L J 538**

Notes—Ref: 10 C L J 343 F B =C W N 1149 F B=37 Cal 30.

227—Bengal Tenancy Act (VIII of 1885), S. 52—O. 41. r. 23 (1882 S. 562)—Abatement of rent—Measurement—Dispossession by paramount title. When the decision of the first Court is not based on any preliminary ground, the lower appellate Court has no jurisdction to set aside the decree of the first Court under S 562. C. P. C. 1882.

S. 52 of the Bengal Tenancy Act is not exhaustive.

When the tenant is dispossessed of a portion of the land comprised in his tenancy, by a person claiming under a paramount title, he is entitled to a reduction of the rent. 3 C. W. N. 225; 7 C.

Bengal Acts-(Tenancy Act VIII of 1885) S. 52-*Concld.*

W. N. 93. 10 W. R. 120; 1 B. L. R. A. C. 87; 12 W. R. 109 21 Cal. 1005; 21 I. A. 118, Ref.

Rani Dasi v Asutosh Roy Chowdhury 6 Ind Cas 206.

Bengal Tenancy Act S 52.

See (1) Bengal Tenancy Act s 50. Case No (201) **4 C L J 37.**

(2) Bengal Tenancy Act s 30. Case No (150B) **5 Ind Cas 290.**

(3) Bengal Tenancy Act s 105 (2). Case No (393) **2 Ind Cas 263.**

(4) Bengal Tenancy Act s 30. Case No (151) **12 C W N 904.**

(5) Bengal Tenancy Act s 38. Case No (158) **12 C W N 767.**

(6) Bengal Tenancy Act s 105. Case No (386) **33 Cal 837.**

Bengal Tenancy Act S 53.

See Sale for Arrears of Rent—Rights and Liabilities of Purchasers **21 Cal 383.**

228—Bengal Tenancy Act (1885) s 53-Meaning of 'Established usage'—The words "Established usage," in s 53 of the Act, do not refer to a practice previously prevailing between the landlord and tenant but to the established usage of the pergunnah in which the holding is situate.

Hera Lal Das v Mothura Mohun Roy Chowdhry 15 Cal 714.

Notes.—Dist 1 C W N 687. Ref 21 Cal 132.

229-Established usage of the locality. S 53 of the Bengal Tenancy Act contemplates the established usage of the locality and not one between the parties. 15 Cal 714 followed. **Watson and Company v Shree Kristo Bhumick. 21 Cal 132.**

Notes:—Ref 22 Cal 680.

230.—Bengal Tenancy Act S 53, sub-S 2—Land Acquisition Act-Apportionment of, between Landlord and Tenant.

Sub-s. 2 of s. 53 of the Bengal Tenancy Act applies only to suits or pro-

Bengal Acts-(Tenancy Act VIII of 1885)-S. 53-*Concld.*

ceedings under that particular statute. In apportioning compensation money awarded under the Land Acquisition Act the Court ought to proceed on the principle of ascertaining on the one hand what is the value of the interest of the Zamindar with which he has parted and that of the tenant on the other, and to apportion it accordingly. Where the rent is fixed in perpetuity and consequently no question of the chance of enhancement arises the landlord is not entitled to more than the capitalized value of the rent due to him. **Dinendra Narain Roy v Tituram Mukerjee 7 C W N 810=30 Cal 801.**

Notes—Fol: 5 C L J 662. See also 28 Cal 146.

231.—Ss 54, 61, 62, 67-Tender of rent, valid-Deposit-Interest—Tender kept good—Bengal Tenancy Act not a Complete Code—"Arrears"—Landlord and Tenant Procedure Act (VIII of 1869 B C) Sec 21,

Held, by a majority of the Full Bench (Rampini C J and Mitra J. dissenting)—that if a valid tender has been made and improperly refused, it is not obligatory upon the tenant to follow up the tender by a deposit in Court under section 61 of the Bengal Tenancy Act. if the tender is kept good, it is sufficient to stop interest from the date of the tender.

In order to prove that the tender was kept good, it was not necessary for the defendant to prove that it was repeated in respect of prior instalments as each subsequent instalment fell due and was tendered. It was sufficient to prove that after tender, each instalment was kept in hand by the defendant ready to be paid to the plaintiff on demand.

Section 61 of the Bengal Tenancy Act is a enabling section framed for the protection and benefit of the tenant and not a mandatory one imposing penalty for failure to comply with its provisions.

A rent which is tendered with the intention of paying it to the person to whom it is due at the time when it is due, but which is improperly not received by the person to whom it is due, and to whom it is tendered is not an arrear within the meaning of sub-section 3 of the section 54 of the Bengal Tenancy Act.

The definition of "arrear" involves the idea

Bengal Acts-(Tenancy Act VIII of 1885) S.54-*Contd.*

not merely of money unpaid, but of unpaid at the due time. The term "arrear" involves the existence of some default on the part of the debtor.

Though the language of section 21 of Act VIII of 1869 (B C), differs from that of section 67 of the Bengal Tenancy Act, the law as to tender has not been altered by the later Act.

Per Woolerjee J—The Bengal Tenancy Act is not a complete Code, even in respect of the law of landlord and tenant It does not profess to incorporate the general principles of the law of contract and the doctrines of equity jurisprudence, in so far as they may have to be applied in the determination of disputes between landlord and tenant.

The general doctrine of tender is applicable to cases between landlord and tenant, and the rules relating to tender are the same in the case of rent as in other contracts

The effect of the alteration in the provisions as to interest was to take away the discretion formerly vested in the Courts, but this does not in any way affect the case of tender. When a valid tender is established and it is proved to have been kept good, the matter is beyond the domain of discretion of the Courts: the tenant is entitled to claim as a matter of right, that interest should be refused **Kripa Sindhu Mukerji v Annada Sundari Debi. 6 C L J 273= 11 C W N 983=35 Cal 34 (F B).**

Notes.—Ref 6 M L T 255.

232—S. 54—C P C, O. 21 r. 89 (1882 S.310 A)-Application to set as de rent sale—Bengal Tenancy Act (1 B C of 1907) S. 54—Bengal General Clauses Act (1 B C of 1907) S 8 Cl (c)-Right accrued previous to, but, application after, repeal.

A raiyati holding having been sold on a date prior to 22nd May 1907 in execution of a rent decree, an under-raiyat applied to have the sale set aside under S. 310 A, C.P.C, on the 23rd May following. *Held*, that the application could not be entertained, the Bengal Tenancy Act 1 of 1907 having come into operation on the 22nd May 1907. S. 54 of the Amending Act, by enacting that S. 310-A, C. P. C, shall not apply to a tenure or holding attached in execution of a decree

Bengal Acts-(Tenancy Act VIII of 1885)-S. 54-*Concld.*

for arrears due thereon, does not repeal any portion of the Bengal Tenancy Act within the meaning of Sub-S (c) of S. 8 of the Bengal General Clauses Act **Asiruddi Mondal v. Mukhodamoyee Dassi, 12 C W N 434=35 Cal 548.**

233—Ss. 55, 107, 109, 109A and 192-Payment of rent—Appropriation must be specific — Temporary Revenue settlement—Settlement of rent if can be made except upon application by landlord or tenant—Settlement affirmed by Special Judge—Finality—Res judicata.

The provisions of S 55 of the Bengal Tenancy Act are very different from those of S. 59 of the Contract Act. Under S 59 of the Contract Act the Court may have regard, not only to the debtor's express intimation, but also to circumstances implying that the payment is to be applied to the discharge of some particular debt. Under S. 55 of the Bengal Tenancy Act, the debtor must declare the year or the year and the instalment to which he wishes the payment to be created. If he does not do so, the payment may be credited to the account of such year and instalment as the landlord thinks fit.

Where, by an arrangement between the landlord and the tenant, the latter paid a certain sum annually to Government on behalf of the former.

Held—that there was no appropriation of the amount so paid each year to the rent of that year within S. 55, Bengal Tenancy Act.

Quære.—Whether, under S 192, Bengal Tenancy Act, a Settlement Officer can settle the rent payable by the tenant to the landlord, except upon the application of the landlord or the tenant.

Where a tenant, in his appeal before the Special Judge against an order for the settlement of rent purporting to have been made under S. 192 of the Bengal Tenancy Act, did not take the objection that the settlement of rent was made contrary to the provisions of that section and without jurisdiction—and the decision of the Settlement Officer was affirmed by the Special Judge.

Held,—that the matter was *res judicata* and could not be re-opened in the Civil Court, owing to the operation of Ss. 107, 109 and 109A of the Bengal Tenancy Act. **Mohim Chandra Roy v. Srimati Kalitara Debya, 11 C W N 939.**

Notes:—Reviewed 11 C W N 1028.

Bengal Acts-(Tenancy Act VIII of 1885)-S. 55-*Concld.*

234—S 55 — Land acquisition proceeding—Apportionment of compensation between landlord and tenant—Presumption of permanency of holding.

Although s. 50 of the Bengal Tenancy Act does not apply when the question of the permanency or otherwise of a tenure arises in a proceeding for the apportionment between landlord and tenant of money awarded for compulsory purchase of land the principle involved in that section is a useful guide to the Court in deciding it. **Nunda Lal Gossami v. Atormoni Dassi, 12 C W N 432.**

235—Bengal Tenancy Act (VIII of 1885), Section 56, cl. (4), s 187, cl (3), and S. 188—Joint landlords—Authorized agent—Receipt by agent—Presumption.—

In the case of several joint landlords it is necessary for the Court, to find affirmatively that the agent was authorized by them all either verbally or in writing, before giving effect to a presumption under S. 56, cl. 4, of the Bengal Tenancy Act. **Gopinath Chakravarti v. Umakanta Das Roy, 24 Cal 169.**

236—Ss. 58, 59, 67—Payment of rent—Rent, suit for — Appropriation by landlord towards interest due on the arrears—Rent, if necessarily includes interest.

If any sum of money be paid by a tenant to a landlord as rent, and the latter receives it as such, he cannot be permitted to apply that money towards any interest which might then be due to him.

The 'rent" does not necessarily include interest. 25 Cal 571, 22 Cal 575, Ref: **Bhagabati Debya Chowdhurani v. Basanta Kumari Debi, 5 C L J 69=11 C W N 110.**

—S. 60.

See Land Registration Act, S. 78.
26 Cal 712=3 C W N 381.

237—S. 60 — Rent, suit for, maintainability of—Registered proprietor—Unexpunged registered mortgage-Land Registration Act (VII of 1876 B C), s. 26.

S. 60 of the Bengal Tenancy Act, read with s 26 of Land Registration Act, is no bar to a suit for rent by a registered proprietor, in the

Bengal Acts-(Tenancy Act VIII of 1885) S.60-*Contd.*

face of an unexpunged entry in the register in the name of a former mortgagee.

Syed Hasan Mustab v Mabar Mahto, 11 C L J 147=5 Ind Cas 163.

—S. 60. See Estoppel. **13 C L J 693.**

238—S. 60—Registered proprietor, Suit for rent by—Whether the plea that rent is payable to third party allowable—Land Registration Act (VII of 1876), s. 78.—

Plaintiffs, as registered proprietors, brought a suit for recovery of rent. It was found that defendant, in good faith and under the reasonable belief that the land held by him was included in the estate of a third person, attorned to him some four years prior to the suit, and it was held by the lower Appellate Court that under the circumstances the defendant ceased to be plaintiff's tenant, and they could not recover rent *Held*, that upon the above facts s. 60 of the Bengal Tenancy Act did not estop the defendant from pleading that rent was due to a third person, notwithstanding plaintiffs were registered proprietors. **Durga Das Hazra v. Samash Akon, 4 C W N 606.**

Notes:—Ref. 8 C W N 695.

239—S. 60—Registered proprietor—Mortgagee—Rent:—

In a suit for rent by a proprietor registered under the Land Registration Act the defendants are precluded, by reason of S. 60 of the Bengal Tenancy Act, from pleading as a defence to the claim that the rent is due to a mortgagee to whom the landlord has assigned a part of his interest but whose name has not been registered under the Land Registration Act.

Hem Chunder Misri v. Rajah Sir Surendro Mohan Tagore Bahadur, 5 C W N 482.

Notes:—Ref: 8 C W N 695.

240—S. 60—Rent Suit-Defence that plaintiff is a benamidar—Land Registration Act, S. 78:—

By S. 60 of the Bengal Tenancy Act, a defendant, in a suit for rent brought by a person registered as proprietor, is precluded from raising a defence that the plaintiff is a benamidar of another person and as such not entitled to rent.

Sadhu Charan Pal v. Radhika Mohan Roy, 8 C W N 695.

Bengal Acts-(Tenancy Act VIII of 1885) S. 60-*Concld.*

241—S. 60—Registered proprietor, suit for rent by—Tenant's defence on ground of title—Admissibility — Title upon which registration obtained declared void by Court.

S. 60 of the Bengal Tenancy Act does not preclude a tenant defendant from proving that the title under which the plaintiff claims to hold and in respect of which he has been registered under the Land Registration Act has been held by a Court properly constituted to be void and of no effect.

Where this was proved, *held*, that this was a good defence to the suit.

Girish Chandra Chongdar v. Satish Chandra Sarkar, 12 C W N 622.

242—S. 60—Registered proprietor, suit for rent by—Inability of plaintiff to prove realisation of rent for 16 annas share—Plea of rent payable to third party, not allowable.

S. 60 of the Bengal Tenancy Act precludes a defendant, in a suit for rent brought by the registered proprietor, from raising a defence that the rent is due to any third person, even where the plaintiff is not able to prove realisation of rent from the defendant for the 16 annas share. 4 C W N 606; 8 C W N 695, Ref:

Pargon Chowdhury v. Nanku Lal, 8 Ind Cas 832.

—S. 61.

See Landlord and Tenant — Constitution of Relation—Acknowledgment of Tenancy by Receipt of Rent, etc.

25 Cal 1: 24 I A 164.

243—Bengal Tenancy Act (1885) Ss. 61, 62—Order to receive deposit of rent—Review.—

When a tenant makes a deposit of rent under Ss. 61 and 62 of the Act and is given receipt by the Court, the zemindar is not entitled to come in and be heard in the matter. there being no machinery whatsoever for the Court to enter into a judicial enquiry in connection with the deposit. So far as the tenant is concerned, after the deposit is made and receipt granted, the Court is *functus officio*. and is not authorized to return the money to the tenant upon an application made by the zemindar. The words " the

Bengal Acts-(Tenancy Act VIII of 1885) S. 61-*Contd.*

full amount of money then due" in S. 61. and the words "the amount of rent payable by the tenant" in S. 62, do not mean anything more than the words "what he shall consider the full amount of rent due from him at the date of the tenure to the zamindar" as they occur in S. 46 of the Bengal Act VIII of 1869, and have no relation whatsoever to the amount of rent justly due or justly payable by the tenant. **Sirdhar Roy v. Rameshwar Sing 15 Cal 166.**

244—Bengal Tenancy Act (1885) S. 61—Deposit of rent in Court--Bona fide doubt as to who is entitled to rent—Costs where conduct of defendant did not make litigation necessary.—

The deposit of rent in Court under s 61 (where the tenant entertains a *bona fide* doubt as to who was entitled to receive the money) operates as an acquittance; and the suit should be dismissed. Where it is found that the defendant is not to blame for the litigation, and there is no reason why he should not get his costs.

Stalkartt v Guru Das Kundu Chowdhry, 21 Cal 680.

245—S 61-Suit for rent-Deposit of rent by a tenant through the transferee of the holding from him, whether valid.--

A deposit of rent,though not made by a tenant himself, but made on his behalf by a transferee of the holding from him, is a valid deposit within the meaning of s. 61 of the Bengal Tenancy Act.

Behary Lal Mookerjee v. Basarat Mandal, 25 Cal 289

246—S. 61 and sch. III, art. 2 (a)--Notice of deposit of rent on one of several joint landlords —Effect -Limitation.—

If the co-sharer landlords are jointly and severally entitled to rent, the service of notice of the deposit of rent under s. 61, Bengal Tenancy Act, on one of the landlords, does not reduce the period of limitation to six months prescribed in sch. III, art. 2 (*a*) of the Act. **Rup Chand Mahton v. Gurdan Singh, 29 Cal 283=6 C W N 15**

247—S. 61—Valid tender—Deposit of rent:

The statutory provision for deposit of rent under S. 61 of the Bengal Tenancy Act, does not take away the effect of a tender validly made and kept good. 5 C L J 191 ref to. **Jagat Tarini Dasi v Nabagopal Chak. 5 C L J 270= 34 Cal 305.**

Bengal Acts-(Tenancy Act VIII of 1885) S. 61-*Contd.*

Notes.—Appr: 35 Cal 84 F B.=11 C W N 983=6 C L J 273=7 M L T 253=5 Ind Cas 343.

248–Secs 61 and 63, deposit of rent, omission to sue for the rent of the period between deposit and suit, effect of.

Deposit of rent under the Bengal Tenancy Act (VIII of 1885) section 61, must be treated as equivalent to part payment. Notice of deposit under section 63 of the Act does not give a fresh and independent cause of action in respect of the balance then due In a suit for such balance, the landlord is obliged, under section 43 of the Civil Procedure Code, to include a claim for all arrears of rent due at the time of institution.

Atulkrishna Ghose v Nripendra Narain Ghose 1 C L J 114.

249—S. 61—'Ex-parte' entry in order-sheet, not conclusive evidence.

An *ex parte* entry in the order-sheet is by no means conclusive evidence if it is admissible in evidence at all as against the landlord, who was not a party to the proceedings for deposit under S. 61 of the Bengal Tenancy Act—(1883) 1 Cal & El 10 ref to. **Mir Tapurah Hossein v Gopi Narayan. 7 C L J 251.**

250—Ss. 61 (b), 62—Deposit of rent, refusal to accept—Notice, non-issue of—Notice, filing of —Order to file notice, communication of, to the pleader—Withdrawal of money deposited, application for, by landlord—Suit to recover rent—Reconsideration of order application for-Refusal—General Rules and Circular Orders of High Court r 10, Sub-rule (1).

There is no law which entitles a Court to call upon a tenant to file along with his application for deposit of rent a copy of the notice to be served upon the landlord.

Rule 10, Sub-rule (1) of the General Rules and Circular Orders issued by the High Court (Vol 1, page 5) provides that parties in civil cases shall file, whith their applications for the issue of process, printed forms of the same duly filled up in accordance with the rules of the High Court regarding the issue of process, the date of appearance and the date of process will be left blank. This rule has no application to the case of a deposit of rent made by a tenant.

Bengal Acts-(Tenancy Act VIII of 1885) S. 61-*Contd.*

In the circumstances of the case, the High Court directed the granting of a receipt to the tenant under the provisions of Ss 61 and 62 of the Bengal Tenancy Act. **Tara Charan Maity v Paresh Chandra Mookerjee. 14 C L J 116.**

251—Ss 61, 67-Tender of rent-Exoneration from liability to pay interest.

Where rent was tendered to plaintiff's Ammukhtiar but plaintiff refused to accept the same. *Held*—That defendant was liable to pay interest on the arrears inspite of such tender, as he omitted to follow the procedure prescribed by S 61 of the Bengal Tenancy Act **Raja Ranjit Singha v Bhagabutty Charan Ray. 7 C W N 720.**

Notes—Ref. 6 C L J 273 F B, 11 C W N 983 F B. 5 C L J 270, 35 Cal 34 F B. Dist: 34 Cal 305. Appr: 8 C L J 303.

252—Ss 61,182-Deposit of rent by a tenant of homestead land who is also a raiyat of the village, but under a different landlord.

Plaintiff brought a suit for rent of a plot of *bastu* land from the Defendant who was a *raiyat* of the village under another landlord. The Defendant pleaded that owing to dispute between rival landlords he had deposited the rent under sec 61 of the Bengal Tenancy Act and that there was a full acquittance by the deposit. *Per* Ghose, J—It was not necessary to decide in the case whether the Defendant was a *raiyat* under sec 182 of the Bengal Tenancy Act and whether a deposit could be made under sec 61. The deposit had been made in fact, and the question which remained for determination was as to who amongst the rival landlords was entitled to the money made available by the deposit. The present suit was therefore liable to be dismissed. *Per* Geidt, J.—The suit was liable to be dismissed because sec 182 of the Bengal Tenancy Act applied and the deposit under sec 61 was a valid deposit. **Protap Chandra Das v Biseswar Pramanick 9 C W N 416**

—S. 61 sub sec 4.

See Bengal Tenancy Act sch III Art I. Case No (679). **10 C L J 463**

—Ss. 61 & 62.

See Bengal Tenancy Act s. 84 Case No (231) **35 Cal 34 (F B).**

Bengal Acts-(Tenancy Act VIII of 1885) S. 61-*Concld.*

—S 61.

See Bengal Tenancy Act s. 182. Case No (602) **9 C W N 416.**

—S. 63.

See Bengal Tenancy Act s. 61 Case No (248) **1 C L J 114.**

—S. 65.

See (1) Execution of Decree—Decrees under Rent Law.
(2) Landlord and Tenant—Liability for Rent.
(3) Right of Occupancy — Transfer of Right.
(4) Sale for Arrears of Rent—Incumbrances.
(5) Sale for Arrears of Rent—Rights and Liabilities of Purchasers.

253—Bengal Tenancy Act (1885) s 65—Meaning of "charge"-Transfer of Property Act (1882) s. 100.

The word "charge" as used in s. 65 is not such a charge as that defined by s. 100 of the Tranfser of Property Act. **Fotick Chunder Dey Sirkar v Foley. 15 Cal 492.**

Notes.—Ref: 26 Cal 103, 33 Cal 985=4 C L J 219.

254 Bengal Tenancy Act (1885) Ss. 65. 3. cl (5), and s. 161—Sale of tenure for arrears of road cess under decree—Meaning of "rent"—Road cess—Effect of sale in execution of decree for road cess on incumbrance by defaulting tenant.

The word "rent" in s. 65, includes road cess. A tenure-holder granted a usufructuary mortgage of certain lands within his tenure to *A*, and directed the tenants to pay their rents to him. Subsequently the superior landlord brought a suit for road cess against the tenure-holder, and sold the tenure under s 65 in execution of his decree. *A* then brought a suit against one of the tenants for arrears of rent, on the contention that all that passed under the auction sale was the right, title and interest of the tenure-holder, and that his rights under the mortgage were not affected by the sale, and he was still entitled to the rent. *Held*, that Ch XIV of the Bengal Tenancy Act must be read with s. 65 of the Act, and that having regard to the definition in cl 5 of s. 3, "rent" as used in that section, includes road cess paya-

Bengal Acts (Tenancy Act VIII of 1885) S. 65-*Contd.*

ble by the tenant, and that the sale was a sale of the tenure, the purchaser acquiring the property free from the incumbrance created by the tenure-holder in favour of *A*, it not being a registered and notified incumbrance within the meaning of s. 161 of the Act. **Nobin Chand Nuskar v Bansenath Paramanick. 21 Cal 722.**

Notes—Appr: 2 C L J 311. Fol: 8 C L J 519

255—Ss. 65, 188—Money decree-Suit for rent for four years—Plaintiffs constituting the entire body of land-lords for two years—Decree, whether may be spilt up.

In a suit to recover rent for 4 years, the plaintiffs constituted the entire body of landlords as regards the claim for the first two years, but only fractional co-sharers as regards the claim for the last two years.

Held, That the decree passed was not a rent decree under the Bengal Tenancy Act, but only a money decree under the ordinary law.—(17 Cal 390=3 C W N 604) referred to. **Sheikh Naimuddin v Srimanta Ghose 6 C W N 124 =29 Cal 219.**

Notes:—Ref: 1 C L J 500.

256.—S. 65—Decrees for rent by outgoing landlord in possession—Charge.

A suit by a *Ticcadar* after the expiration of his lease against a tenant for the recovery of arrears of rent which had fallen due during the pendency of his lease can be brought under the provisions of the Bengal Tenancy Act. But when the Ticcadar brought a suit for rent more than two years after the expiration of his lease and brought the tenure to sale more than five years after he had ceased to be in possession of the property and when in the meantime the landlord had entered into possession of the property and had obtained a decree for arrears of rent falling due after the lease:—*Held* that there could not be two first charges standing simultaneously against the tenure and that the only person under such circumstances entitled to the first charge was the landlord in possession. That at the sale under the *Ticcadar's* decree, the tenure was subject to the first charge existing in favour of the landlord for the rents which had fallen due after the termination of the lease. 3 C W N 604 followed. 21 Cal 169; 4 C W N 446, s

Bengal Acts-(Tenancy Act VIII of 1885) S. 65-*Contd.*

c 26 Cal 750 (1899) held inapplicable.

Srimanta Roy v Mahadeo Mahata, 8 C W N 531=31 Cal 550.

Notes:—Foll: 35 Cal 737=7 C L J 652=12 C W N 123. Ref: 33 Cal 566 F B=10 C W N 547=3 C L J 470.

257.-S 65—Lalndlord and tenant-Decree obtained by a sharer of a part for whole rent.

A proprietor of a share of the tenure obtaining a decree against the tenants for the whole rent, is entitled to bring the tenure to sale, even though he recognized the sub-division of the tenure among the tenants and chose to accept a decree for the rent of the shares which each tenant was holding. 17 Cal 301 ref. and explained. **Surbo Lal v. Wilson. 32 Cal 680.**

258.—Bengal Tenancy Act (VIII of 1885), Sec. 65—Transfer of Property Act (IV of 1882) Sec, 100—Equity, can it override law—Nominal owner, authority of, to pledge property in arrears for rent—Estoppel, doctrine of.

Where one of two defendants, the father, allows his son, the other defendant, to take the lease of an under-tenure in his name from the plaintiff who is well aware that the father is the real owner of the under-tenure and that the son is only his benamidar, the plaintiff-landlord is entitled to look to the son, the recorded tenant, for the due payment of the rent, and if the under-tenure falls into arrears, the landlord may sue the recorded tenant, the son, and obtain a decree for rent which would be operative against the property in the hands of the father, the beneficial or real owner. But it is not competent to the recorded tenant, the son, to create a charge or mortgage on the property, in the event of the rent falling into arrears, in favour of the landlord. If the beneficial or real owner fails to pay the rent regularly, the nominal owner, has no implied authority to pledge the property in arrears, the creation of such a charge being neither necessary for the purpose of the tenancy nor usual for the management of the tenancy.

When, therefore a landlord accepts an instalment-bond either creating a charge or security on the property for the arrears of rent from the nomi-

Bengal Acts-(Tenancy Act VIII of 1885)-S. 65 *Contd.*

nal owner with full knowledge of the true ownership he cannot be permitted to follow the property in the hands of the true owner.

A suit instituted on a kistibandi or instalment bond, part of the consideration for which was arrears of rent,is a suit not for rent but for money due under the contract, viz, the instalment-bond, by which in lieu of the original liability a new liability was substituted,and the plaintiff can have no charge on the land under the Tenancy Act.

Per Mookerjee J.—The charge referred to in section 65 of the Bengal Tenancy Act is not such a charge as that defined by section 100 of the Transfer of Property Act, and does not require to be enforced in the same manner: the only consequence which follows from the provision that rent is a first charge upon an under-tenure is, that a sale held in execution of a decree for arrears of rent produces the effects described in Chapter XIV of the Bengal Tenancy Act.

A mortgage does whereas a charge does not involve a transfer of an interest in specific immoveable property.

A mortgagee can follow the mortgaged property in the hands of a transferee from the mortgagor,whereas a charge can be enforced against a transferee only if it is shown that he has taken with notice of the charge.

Where an instalment bond provided that the executant would be personally responsible for the payment of the money and that, in case of default it would be competent to the person in whose favour it was executed to institute a suit to obtain a decree and to recover the dues by attachment and sale of an under-tenure.

Held—That upon the terms of the bond, it did not create a mortgage, but merely effected a charge.

The words " and the transaction does not amount to a mortgage" in section 100 of the Transfer of Property Act signify that if the relation created by the instrument is not that of a mortgagor and mortgagee and immoveable property has been made security for the payment of money, there is a charge on the property; they do not mean that if the transaction on the face of it purports to be a mortgage but the instrument is not operative as such by reason of defective execution or non-compliance with the formalities prescribed by the law, the transaction is converted into a charge.

Equity will not contravene the positive enactments or requirements of law and defeat its policy by supplying,under the guise of amending defective instrument is absolutely void, even as between the parties to it.

In the face of the statutory provision contained in sec 100 of the Transfer of Property Act, the Courts in India will not and cannot apply indiscriminately the general equitable principle of English rule,namely, that a mortgage which is defective and is inoperative as such operates as a good equitable lien, if it shows an intention to create a charge.

The validity of equitable mortgages is recognised by the Legislature in this country only to a limited extent.

Difficulty of applying the English rule of equitable mortgages in this country pointed out and explained. **Royzuddi Sheikh v Kritarthanath Mukherjee. 4 C L J 219= 33 Cal 985.**

Notes.—Fol: 31 Mad 337.

259.—Bengal Tenancy Act (VIII of 1885) Secs. 65, 170-Decree for rent -Rent-decree, execution—Landlord's interest in tenure sold after a decree—Decree for rent, if continues to be a first charge on tenure—Civil Procedure Code (Act XIV of 1885). Sec. 278—Claim, if allowable.

If, at the time, when a suit for rent is instituted, and a decree is made, the plaintiff is still the landlord. the fact that subsequently he sells his landlord's interest does not prevent him from obtaining the benefit of Sec. 65 of the Bengal Tenancy Act of bringing to sale the tenure or holding in execution of such decree. the rent containing as a first charge thereon.

If at a date of the suit and the date of the decree, the plaintiff is the landlord, both the suit and the decree for rent would clearly be a suit and a decree under the Bengal Tenancy Act, and under s 170 of the Act, no claim can be preferred

Bengal Acts (Tenancy Act VIII of 1885) S. 65-*Contd.*

under s. 278, Civil Procedure Code, when such a decree is executed by the decree-holder, even if he has parted with his landlord's interest before applying for such execution (3 C W N 604 over)

Khetra Pal Singh Ray v Kritarthamoyi Dasi. 3 C L J 470=33 Cal 566=10 C W N 547

Notes.—Ref: 35 Cal 737=7 C L J 652; 10 C L J 396=12 C W N 123; Dist: 11 C L J 140.

260-261.—Secs. 65, 159—Sale in execution of a decree for arrears of rent at the instance of a cosharer landlord—Interest of transferee of some of the recorded tenants, how far affected.

One of several joint landlords brought a suit for arrears of his share of the rent of a certain occupancy holding against three persons who were the recorded tenants. But two of the recorded tenants had already transferred their interest to the plaintiff.

Held, that the purchaser at the sale in execution of the decree for arrears of rent at the instance of the co-sharer landlord purchased only the right, title and interest of the judgment debtor, and as two of these had no interest at the date of the sale, the right of their transferee was not affected by the sale. **Afraz Molla v Kulsumunnessa Bibi.** 4 C L J 68=10 C W N 176

Notes.—Fol: 10 C L J 201. Ref: 13 C W N 746; 9 C L J 479, 13 C W N 1110.

262.—S. 65—Applicability to patni taluqus—Patni Regulation VIII of 1819, s. 17—Conflict with

There is no conflict between Sec. 65 of the Bengal Tenancy Act and sec 17 (3) of the Patni Regulation. 1 C W N 458 Foll: 26 Cal 103 Dist.

Peary Mohan Mukhopodhya v Sreeram Chandra Bose. 6 C W N 794.

Notes.—Ref: 32 Cal 643=9 C W N 670=11 C C 279.

263.—Bengal Tenancy Act (VIII of 1885), secs. 65, 68—Receipt of rent by tehsildar or go mashtha—Division of holding.

Where a holding is in the occupation of several tenants at one entire rental, the fact that

Bengal Acts (Tenancy Act VIII of 1885) S. 65-*Contd.*

the landlord's tehsildar has accepted from the various tenants proportionate parts of the rent does not bind the landlord to recognise a separation of the tenancy in the absence of evidence to connect the landlord with the receipt of any proportionate rate of rent by the tehsildar.

Maharani Beni Pershad Koeri v Goberdhan Koeri. 6 C W N 823.

Notes—Ref: 10 C W N 216=8 C W N 923=31 Cal 1026.

264—Bengal tenancy Act (VIII of 1885) sec. 65—Sale in execution of a decree for arrears—Liability of purchaser for rent for a period anterior to sale—Notification of sale.

Where a tenure or holding was sold in execution of a decree for rent with a notice that it was saddled with liability for arrears of rent for a period anterior to the date of sale:—*Held*, that the purchaser was liable for the rent of such period. 24 Cal 37 ref to. 21 Cal 169 dist. **Haradhan Chattoraj v Kartik Chundra Chattpadahya.** 6 C W N 877.

265—S. 65—First charge does not do away with personal remedy.

A decree-holder has in execution of a rent decree the right to ask for personal execution against the judgment debtor notwithstanding that he has also the power to sell the tenure in arrears. **Bhabani Charan Dutt v Pratap Chandra Ghosh.** 8 C W N 575.

266 S. 65—Contract Act (IV of 1872) sec 69—Contribution suit for—Purchaser at auction sale, paying arrears which fell due before purchase-Suit against original tenant—Privity-Maitainability. The Plaintiff having purchased a putni at a sale held in execution of a mortgage-decree saved the property from being sold in execution of a decree for arrears of rent by paying in the amount. Those arrears included rents which had fallen due prior to the confirmation of the sale at which plaintiff purchased.

Held, that the plaintiff was not entitled to recover the amount of these rents from the original *putnidar* Sec 69 of the Contract Act contemplates a case where the person who makes the payment is under no legal liability to make it and he pays the money for another person who is

Bengal Acts-(Tenancy Act VIII of 1885) S. 65-*Contd.*

bound by law to pay. The Plaintiff in this case was under a legal liability to pay the rents and so could not come under sec, 69 (I C W N 458 =6 C W N 794 ref to). **Maharaja Manindra Chunder Nandy Bahadur v. Jamaher Kumari Bibi.** 9 C W N 670=32 Cal 643

267:—S. 65—Decree against one of several joint tenants representing all the tenants-Kabuliyat by one of several joint tenants. Where one of several joint tenants executed *kabuliyat* in favour of the landlord and the other tenants acquiesced on the representation of the holding by the tenant who executed the *kabuliyat* and the landlord sued him only for the rent and in execution of that rent decree attached the entire holding, and the other tenants made no attempt to get them recognised or to pay the arrears: *Held*,—That the attachment covered the entire holding unless there was fraud and collusion on the part of the landlord **Rajani Kant Guho v. Srimuty Uzir Bibi.** 7 C W N 170.

267 A-S.65-Rent Suit for-Co sharer landlords-Separate collection, effect of—Right to sue jointly for whole rent—Implied contract.—From the mere fact that the co-sharer landlords have for a long period collected their shares of the *jama* separately, it cannot be inferred that the parties contracted that separate collection should go on for ever. There is nothing therefore to prevent the co sharer land-lords from joining to sue for the whole rent 4 Cal 96, 17 Cal 695, 9 C W N 54, 10 C W N 787 and 3 C L J 379 Ref). **Akhoy Kumar Mitter v Gopal Kamini Debi.** 10 C W N 952=33 Cal 1010.

268—S. 65—Rent, first charge—Mortgagee of raiyati holding, suit by—Transfer of Property Act (IV of 1882 s. 101.).

Where in execution of a decree for arrears of rent, a raiyati holding was sold and purchased by the landlord and the plaintiff, a mortgagee of of the raiyati holding whose mortgage was not annulled, brought a suit to enforce the mortgage, the mortgagee was held entitled to enforce the mortgage on payment of the money due under the rent decree. The landlord when he made the purchase in execution of the rent decree might

Bengal Acts-(Tenancy Act VIII of 1885) S. 65-*Contd.*

be taken to have become absolutely entitled to the property, and it followed from s. 101 Transfer of Property Act, that the landlord's charge for rent which was for his benefit continued to subsist after his purchase. The plaintiff (mortgagee) might be regarded as a second mortgagee, the prior charge being in the landlord.

S. M. Meherunnesa v Sham Sundar Bhuiya. 6 C W N 834.

269.-S 65-Sale of tenure out and out for rent-Re-sale for previous arrears, whether valid-Limitation Act (IX of 1908) Sch I Art 181—Right to make the application.

After a tenure has been sold out and out for the satisfaction of certain arrears, a portion of the same tenure cannot afterwards be sold for a second time for recovery of rent which had previously accrued.

Where such a sale for a second time takes place, an application to have it set aside under O XXI Rule 91 of the Civil Procedure Code, is governed by Art 181 Limitation Act, and time runs from the date when the right to make the application accrues **Gopal Saran Narain Singh v Mahomed Sheikh Ashham.** 6 Ind Cas 804= 14 C W N 1096.

270—Ss. 65 188—Suit by a co-sharer—Decree for 16 annas rent-Execution for plaintiff's share—Transferability of holding, no evidence of —Effect of sale of holing in execution.

One of several joint landlords obtained a decree for the entire 16 annas rent and it was ordered that the plaintiff would get 4 annas and the other proprietors the remaining 12 annas. The plaintiff took out execution only for his 4 annas share and attached the tenant's holding.

Held that the decree is justified by authority.

Held, also, that, the decree being one for the whole rent, it was open to the plaintiff to execute it whether the holding was transferable or not, and the whole tenure would have passed under S 65 of the Bengal Tenancy Act.

But as the plaintiff seeks to execute the decree only in respect of his own share, he does proceed under the Bengal Tenancy Act for bringing

Bengal Acts-(Tenancy Act VIII of 1885) S. 65-*Contd.*

the holding to sale but he is pursuing his remedy as for the execution of a money decree. and it is for him to show that the holding is transferable.

In the absence of any evidence to that effect the sale of the holding has passed nothing. 22 W R 394; 7 Cal 150=8 C L R 445;14 Cal 201;35 Cal 331 (P. C.) Ref: **Ramdin Ojha v. Jodhan Prosad Singh** **3 Ind Cas 29.**

271—Ss. 65, 30, 50, 181—Enhancement of rent suit for—Ghatwali Chakran lands-Resumption by Government—Transfer of Zemindar—Settlement, fresh, from Zemindar—Presumption —Occupancy raiyat.

Where there is not Ghatwali tenure in existence, it having been resumed, and where there has been none at least for some years before the institution of the suit, no question arises as to any provision of the Bengal Tenancy Act affecting the incidents of a Ghatwali tenure, and sec. 181 of the Act has no application.

In order to make the rule in Sec. 50 of the Act applicable to a case two conditions must be satisfied *viz.*, first, that the suit is one under the Bengal Tenancy Act, and *secondly*, that the raiyat and his predecessor in interest have held at a rent which has not been changed during the twenty years immediately preceding the institution of the suit.

There is nothing in the nature of a Ghatwali tenure to shew that as long as such a tenure existed, the presumption under Sec. 50 of the Bengal Tenancy Act could not by reason of Sec. 181 of the Act, arise.

Semble. If with reference to a raiyat holding under a Ghatwal, the presumption embodied in Sec. 50 cl (2) of the Bengal Tenancy Act be applied, that does not in any way affect any incident of the Ghatwali tenure. Sec. 50 merely embodying a rule of evidence and raising a rebuttable presumption. 5 W R 215 ; 15 W R 38; 1 B L R (S N) 7 and 6 C W N 94 Distd.

Gouri Kanta Mukhopadhya v Ram Gopal Mukhopadhya. **2 C L J 379.**

272—Ss. 65, 178, 179—Permanent tenure-holder-Ejectment for non-payment of rent-Contract illegal.

Bengal Acts-(Tenancy Act VIII of 1885) S 65-*Concld*

A contract in contravention of S. 65 of the Bengal Tenancy Act, under which the tenant of a permanent tenure makes himself liable to be ejected upon failure of payment of rent is bad in law, even though Ss. 178 and 179 are inapplicable.

Samant Radha Charan Das v Ananta Prasad Das. **4 C L J 521.**

273—S. 65—T P. Act S. 73—Property between mortgage-decree-purchaser and rent-decree-purchaser.

The purchaser in execution of a rent decree has priority over the purchaser in execution of a mortgage-decree. A mortgagee obtained a decree upon his mortgage in May 1900. In June the landlord of the mortgagor filed a suit for arrears of rent; the suit was decreed and property sold in execution in September 1901. In 1904, the mortgage-decree was executed and the purchaser in execution claimed to hold the land in preference to the purchaser in execution of the rent decree, who has served a notice under S. 167 of the Bengal Tenancy Act. *Held*, the purchaser in execution of the rent-decree was entitled to hold land free of encumbrance. **Gopinath Mahapatra v Kashinath Beg (1906) 9 C L J 234.**

—S 65—Conflict with s. 17 (3) of the Putni Regulation—Rent—First charge—See Ben Reg VIII of 1819, s. 17 (3), **6 Ind Cas 371.**

—S. 65.

See Bengal Tenancy Act S.188, Case No. (623) **29 Cal 219.**

—S. 65

See Bengal Tenancy Act S. 170. Case No (554) **10 C W N 547 E B.**

—S. 65 (1).

See Bengal Tenancy Act S. 3 (1).Case No (26) **14 C W N 389.**

274—S. 66—Suit for arrears of rent brought before expiry of Bengali year—Right to eject tenant.

Where a suit is brought before the expiry of the Bengali year in respct of the arrears of rent for that year, the landlord is not entitled to eject the tenant under s.66 of the Bengal Tenancy Act.

Guru Dass Shut v Nand Kishore Pal. **26 Cal 199.**

Bengal Acts-(Tenancy Act VIII of 1885) S. 66-*Concld.*

Notes.—Ap:26 Cal 199. Appl 2 C L J 540; Fol: 28 Cal 166.

275-S.66-Landlord and tenant-Suit for arrears of rent—Execution of decree for ejectment of arrears of rent—Extension of time for payment.

Per Prinsep and Banerjee JJ.—The extension of time authorized by s. 66, cl. 3, of the Bengal Tenancy Act, can be granted by the Court after the decree, and not only when framing the decree under cl. (2) of that section. The decree for ejectment passed under s. 66, cl. 2, of the Bengal Tenancy Act, need not incorporate the terms as to the ejectment being avoided by payment within fifteen days from the date of the decree. These terms are rather in the nature of a direction to the Court of execution. *Per* Prinsep J—The application for such extension of time may therefore be made by the judgment-debtor on a mere petition, and not in the form of an application for review of judgment.

Bodh Narain v Mahomed Moosa
26 Cal 639=3 C W N 628.

276—S. 66—Sale of defaulting tenure at the instance of landlord who has lost his interest in the estate—Rent decree.

S. 66 of the Bengal Tenancy Act does not apply to a case in which the person seeking to execute the decree is not a landlord at the time of the execution, and s. 65 is limited in the same manner as s. 66. So where a landlord, after obtaining a decree for arrears of rent, loses his interest in the estate, he cannot bring the defaulting tenure itself to sale in execution of his decree.

Hem Chunder Bhunjo v Mon Mohini Dassi.
3 C W N 604.

Notes:—Fol: 29 Cal 219; 8 C W N 531. Dist: 7 C W N 908; 31 Cal 550. Over. 33 Cal 566. F B=10 C W N 547=3 C L J 470. Not Fol. 35 Cal 737=7 C L J 652.

—s. 67.

See (1) Enhancement of Rent—Right to enhance.

(2) Interest——Miscellaneous Cases——Arrears of Rent.

276A.-C. P. C. (Act XIV of 1882)-S. III-Set-off—Bengal Tenancy Act (VIII of 1885), s. 67—Interest.

In a suit for rent brought by a landlord, the tenant defendant claimed a set-off for costs decreed in his favour in a previous rent suit brought by the benamidar of the landlord against the defendant, and in which the landlord was made a *pro forma* defendant.

Held—that the set-off could not be allowed. (10 Cal 697 and 30 Cal 1066 Dist.)

Interest was claimed in the suit at a rate of more than 12 per cent. per annum, on the basis of a kabuliyat executed before the passing of the Bengal Tenancy Act, the tenant being proved to have acquired the holding by purchase.

Held—that the stipulation as to interest must be given effect to. **Tiluk Chandra Roy v Jasoda Kumar Roy. 11 C W N 215.**

Bengal Acts-(Tenancy Act VIII of 1885) S. 67-*Contd.*

277—S. 67—Tenant holding over—Original tenancy expiring after Bengal Tenancy Act became law—Interest—Stipulation for, how far valid :

Whether the tenant holding over is a tenant for year to year, or whether a new tenancy is created for the term of the expired tenancy by implied contract where the tenancy expired after the Bengal Tenancy Act came into force, S. 67 of Bengal Tenancy Act applies, and the tenant holding over will not be deemed to hold subject to any stipulations as to interest which though valid before the Act would offend against S. 67.

Administrator General of Bengal v Asraf Ali. 28 Cal 227

Notes:—Ref : 32 Cal 258 F B=9 C W N 175 ; 31 Cal 647=8 C W N 446 ; 10 C L J 110.

278—S. 67—Several holdings—One distraint-Legality of—Damages, distraint for—Legality of:

Under the Bengal Tenancy Act a landlord cannot by one application apply for distraint for the rent of more than one holding. Under the Bengal Tenancy Act a landlord cannot distrain for damages for non payment of rent, for he was not entitled to damages at all unless he was awarded damages in a regular suit. **Sheobarat Singh v Nowrangdeo Nirain Singh.**

(1901) 28 Cal 364.

Bengal Acts-(Tenancy Act VIII of 1885) S. 67-*Contd.*

279—Secs. 67, 179,—Interest at a higher rate than 12 per cent, Per annum——Permanent lease—Contract.

Held by the Full Bench—(Ameer Ali J. dissenting) that sec. 67 of the Bengal Tenancy Act does not control the provisions of sec. 179 of the same Act.

That in granting a permanent lease within the terms of sec. 179 of the Bengal Tenancy Act, a condition that interest shall be payable at a higher rate than 12 per cent, per annum, as allowed by sec. 67 of that Act. is permissible, 3 C W N 36=26 Cal 130 over ruled. **Matungini Debi v Makrura Bibi. 5 C W N 438=29 Cal 674.**

Notes:—Ref: 32 Cal 749=9 C W N 466=1 C L J 176.

280—S. 67—Liability of auction-purchaser to pay interest at the rate stipulated in the kabuliyat of his predecessor:

A *jama* was created by a kabuliyat dated 11th Joista 1287 (1880), in which it was stipulated that interest would be payable on arrears at the rate of 1 anna per rupee per mensem. It was sold for its own arrears in 1895. *Held* that the lease being a subsisting one, the purchasers (in this case some of the landlord decree-holders) bought the jama subject to the terms of the lease, one of which related to interest. 26 Cal 315 Dist: **Lal Gopal Dutt Chowdry v Monmotha Lal Dutt Chowdhry. 9 C W N 175=32 Cal 257.**

Notes:—Ref: 11 C W N 215=7 C L J 24.

281.—Ss 67, 178 (3) (h)—Abwab puja expeneses-Road cess if abwab-Interest at rates higher than 12 per cent—Contract to pay, if enforceable—Unconscionable contract.

Puja kharach or expenses for a puja, agreed to be paid in excess of the rent, is an abwab and cannot be enforced. Road cess is not an imposition on the tenant by the landlord in addition to the rent, but a tax imposed by Government, and it does not come within the definition of an abwab contained in s 74 of the Bengal Tenancy Act. A contract to pay more than the proportion payable by the tenant under the Road Cess Act is not illegal. 4 Cal 576 and 3 C L J 337 ref to. The

Bengal Acts-(Tenancy Act VIII of 1885) S. 67-*Contd.*

provisions of s 178 (3) (h) are applicable to the case of a kabuliat executed after the passing of the Bengal Tenancy Act. Parties ought not to be allowed to nullify the effect of s 178, Sub. s 3, cl. (h) by contracting themselves out of the provisions of s 67 of the Bengal Tenancy Act which limits the interest to simple interest at 12 per cent per annum by the device of making the rent payable otherwise than quarterly. A contract made after the passing of the Bengal Tenancy Act is not enforceable in so far as it provided for payment of interest at rates higher than 12 per cent. 22 Cal 214 dist. Even if it were open to the parties to contract themselves out of the provisions of S 67 of the Bengal Tenancy Act, a contract to pay interest at the rate of 75 per cent, for arrears of rent payable for land, for which arrears the landlord has good security in holding on which these arrears are a first charge and which he can recover in other ways is an unconscionable one and is one which ought not to be enforced.

Narendra Kumar Ghose v Gora Chand Joddart 3 C L J 391=33 Cal 683.

282.—Bengal Tenancy Act (VIII of 1885), secs. 67, 179—Interest.

Where in a previous suit for rent the Court erroneously held that interest exceeding 12 per cent. per annum was not recoverable from a permanent tenure-holder in a permanently settled area although the kabuliyat stipulated for the payment of such interest: *Held*—That in a subsequent suit for rent the errorneous decision in the former suit would not operate as *res judicata*.

Allimunnissa Chowdhrani v Shyama Charan Roy 9 C W N 466.

283.—Ss 67 and 178—Interest on arrears of rent—Orissa.

In Orissa where the provisions of s. 67 of the Act have been extended but not those of s 178, a contract may be made between a landlord and a tenant, modifying the provisions of S.67 with regard to the payment of interest on arrears of rent.

Gobinda Chandra Mahapatra v Chaudhury Ram Chandra Nisanka Mahapatra 13 C W N 95=4 Ind Cas 324.

284.—S 67—Interest on arrears of rent—Tenacy created before the passing of Act VIII of

Bengal Acts-(Tenancy Act VIII of 1885) S. 67-*Concld.*

1885-Apportionment of rent and recognition of interest by landlord, effect of.

Where the tenancy was created before the passing of the Bengal Tenancy Act and there was an agreement to pay interest on the arrears at a certain rate, the liability to pay interest will be governed by such agreement and not by section 67 of the Act, though there has been a subsequent distribution or an apportionment of rent and recognition of the tenant's acquisition of interest in the holding by the landlord since the passing of the Act. The effect of such distribution or apportionment of rent and recognition of interest is not destructive of the original obligation, nor does it bring into operation the provisions of section 67 of the Act. **Madhumala v Alfuzaddi Kazi 10 C L J 45=13 C W N 962 =2 Ind Cas 415.**

Notes:—*Ref:* 3 Ind Cas 306=11 C L J 56= 14 C W N 335.

—S 67.

See Bengal Tenancy Act s 54. Case No (231) **35 Cal 34 (F B).**

—S 67.

See Bengal Tenancy Act s 58. Case No (236) **11 C W N 110.**

—S 67.

See Bengal Tenancy Act s 179. Case No (597) **29 Cal 674.**

—S 67.

See Bengal Tenancy Act s 61. Case No (251) **7 C W N 720.**

285.—S 68—Interest—Damages.—

In a suit for rent in kind plaintiff is not entitled to damages at a higher rate than 25 per cent under s 68 of the Bengal Tenancy Act

Apurba Krishna Roy v Ashutosh Dutt 9 C W N 122.

—S 68.

See Bengal Tenancy Act s 65. Case No (263) **6 C W N 823.**

—s. 69.

286.—Deposit of crops by order of Collector-Suit against depositaries—Right of suit-Privity-Jurisdiction of Civil Court.

Bengal Acts-(Tenancy Act VIII of 1885) S. 69 *Contd.*

In the course of proceedings held under ss 69, and 70 of the Bengal Tenancy Act (VIII of 1885) the landlord's (ticcadar's) share of the produce was deposited by the Amin. by order of the Collector, with two persons. The depositaries executed and delivered a receipt to the Amin. Some time after the ticcadar made an application to the Collector in order to obtain his share of the produce; but on a representation being made by one of the depositaries that the crops (with the exception of a small portion) had been destroyed by rain, the Collector declined to grant any relief to the ticcadar. The ticcadar than brought this suit against the depositaries for recovery of the value of the crops deposited. *Held* that the receipt executed and delivered to the Amin established privity between the plaintiff and the defendant so as to enable the former to maintain the suit. *Held*, also, that the suit was maintainable in the Civil Court. Ss. 69 and 70 of the Bengal Tenancy Act refer to and contemplate proceedings between the landlord and the tenant. When a plaintiff seeks relief, not against his tenant, but against a third party, depositary or bailee, the suit is not barred by anything contained in those sections **Jaga Singh v Chooa Singh 22 Cal 480.**

Notes:—Ref: 32 Cal 422.

287.—Ss 69-70—Suit by landlord against a third party:—

Ss 69 and 70 of the Bengal Tenancy Act refer to and contemplate proceedings between landlord and tenant, and do not bar a suit by the landlord against third party. 22 Cal 480 Fol.

Chhedi v Chhedan 32 Cal 422.

288.-S.69.70 and s. 188—Rent bhaoli or nugdi —Jurisdiction of Deputy Collector.

When there is a *bona fide* dispute as to the nature of the rent. i. e., whether it is bhaoli and nugdi, the Deputy Collector has no jurisdiction to proceed under the provisions of ss. 69 and 70 of the Bengal Tenancy Act. An application under s. 69 of Bengal Tenancy Act cannot be made by some only of a body of landlords, such an application being authorized by the provisions of the Bengal Tenancy Act, and not by those of the Civil Procedure Code. **Nukheda Singh v. Ripu Mardan Singh 4 C W N 239.**

Bengal Acts-(Tenancy Act VIII of 1885) S. 69-*Contd.*

289.—Bengal Tenancy Act (VIII of 1885) Ss. 69 and 70, O 2 r 2 (1882 Sec. 43-Rent for successive years.

A, a landlord took proceedings against a tenant B for recovery of the rent of the year 1305 by appraisement of the crops under Secs. 69 and 70 of the Bengal Tenancy Act and realised his dues by execution. B then sued to set aside the proceedings as held without jurisdiction and obtained a decree for restitution. Meanwhile , A had sued and obtained a decree for 1306. After being compelled to make restitution, A sued for the rents of 1305 and 1307.

Held; That claim for 1305 was barred by Sec. 43 C P C as it had not been included in the suit for 1306.

Sec 43 C P C includes accidental or involuntary omissions as well as acts of deliberate relinquishment and cannot be controlled by any considerations of the motives of the party to whom it is to be applied.

The claim for rent for several successive years constitutes one whole claim in respect of the cause of action within the meaning of S. 43 C P C even though the claim for one year be taken to have been extinguished by satisfaction and subsequently revived by cancellation of such satisfaction (11 M I A 551 Fol; 12 Cal 50, 12 Cal 482; 12 M I A 244 Appeal). **Syed Abdulla v Hurkishen Singh** **2 C L J 190.**

290.—Bengal Tenancy Act (VIII of 1885), s 69, applicability of—Rent, deposit of—Bengal Tenancy Act (VIII of 1885), Sch. III, Art 2 (a) —Onus—Notice, service of by post, presumption —Fact, question of—Order sheet ex parte entry in, evidentiary value of.

The Court is not precluded under s. 13 of the Civil Procedure Code from trying an issue whether the rent of the holding is payable entirely in cash or partly in cash and partly in kind, as it was not directly and substantially in issue in a previous litigation between the same parties, where the substantial relief sought was a declaration that the appraisement made by the Collector under s. 69 of the Bengal Tenancy Act was invalid.

S. 69 of the Bengal Tenancy Act is applicable upon the assumption that the rent is taken by

Bengal Acts (Tenancy Act VIII of 1885) S. 69-*Concld.*

appraisement or division: the only matter in controversy between the parties is as to the quantity, value or division of the produce; the section ceases to be applicable when there is a *bona fide* dispute as to the character of the holding itself. **Mir Tapurah Hossein v Gopi Narayan.** **7 C L J 251.**

—Ss. 69. 70.

See C P C O 2 r 2 **27 Mad 116.**

291.—S 70—Appraisement—Collector, order of—Finality of order.

To make an order of the Collector, under s. 70 of the Bengal Tenancy Act final, it must be an order in conformity with that section and enforceable as a decree under clause 5. In the absence of such an order, it is competent to the Civil Court to adjudicate upon the question whether the rent is to be taken by appraisement or division of the produce. **Kailaspati Narain Singh v Gango Singh** **10 C L J 599.**

—s. 72.

See Landlord and Tenant—Transfer by Landlord.

292.—S. 72—Transfer of Landlord's interest —Liability to pay rent—Payment to transfer—Notice by transferor and not by transferee.

Where a landlord transferred his interest to another person and the tenant got notice of the transfer from the transferor, but the transferee did not give any notice: *Held*—That the payments of rent made by the tenant to the tansferor after such notice were not valid payments and the transferee was entitled to claim the same from the tenant. The object of Sub-S. (2) of s. 72 is to relieve the transferee landlord from the necessity of giving notice to each tenant individually. It does not say that such a notice shall be a necessary notice. **Nobin Chandra Chowdhury v Surendranath Ghosh.** **7 C W N 454.**

—s. 73.

See Right of Occupancy—Transfer of Right

293.—S. 73—Collection charges—Rent—for abwab.

Bengal Acts—(Tenancy Act VIII of 1885) S. 73—*Concld.*

On the construction of a lease *Held*—that a certain sum described as collection charges as forming part of the rent and was not an abwab 17 Cal 726 dist 11 Cal 175 8 Cal 730 ref

Radha Churn Roychaudhuri v Golap Chandra Ghose 8 C W N 529=33 Cal 834

Notes—Foll 11 C W N 84 Ref 12 C W N 1086=8 C L J 261

—s 74.

See Cess

294—S 74—Illegal cess not consolidated with rent—Decree for the rent and cess—Right of landlord to recover it on subsequent occasion

If any portion of the sums claimed from the tenants is an illegal cess which has never been consolidated with rent it is not recoverable even if at any previous stage it has been decreed by judicial decision 17 Cal 267 foll **Woomesh Chundra Maitra v Baroda Das Maitra (1898) 28 Cal 17 at 21**

295—S 74 Suit by landlord for illegal cesses collected by agent—Contract Act Ss 217 and 218

A landlord's agent is liable to pay the landlord any sums collected by the agent from the tenants as Khurcha or illegal cesses and a suit by a landlord for recovery of sums against his agent will lie. **Nogendra Bala Dasi v Gurudoyal Mukhopadhya 7 C W N 535=30 Cal 1011**

296—S 74—Batta forming a part of rent—Batta claimed on additional rent for increased area in the possession of tenant, how far part of rent

The mere fact that batta formed part of the rent originally fixed and so was not illegal will not make *batta* in respect of additional rent for increased area found in tenant's possession on measurement part of such additional rent and consequently legal **Jotindra Mohan Tagore v Chundra Nath Sahai 6 C W N 360**

297—Ss 74, 2(4), 179 Abwabs Permanent tenure holder under lease created before the Act Stipulation to pay the price of 3 cocoanuts and render one day's personal service over and above rent if enforcible—Regulation V of 1812, S 3 Act X of 1859, S 10.

Bengal Acts (Tenancy Act VIII of 1885) S. 74 *Contd.*

Abwabs are not recoverable from a permanent tenure holder under a lease created before Bengal Tenancy Act came into operation They could not be recovered under Regulation V of 1812 and Act X of 1859 and cannot be recovered under S 179 of the Bengal Tenancy Act owing to the operation of cl (4) of S 2 of the Act

Apurna Churn Ghose v Kasam Ali 10 C W N 527

298—S 74 scope of—Bengal Tenancy Act (VIII of 1885) s 74—Road cess—Abwab—

A contract by which a tenant, as between himself and his landlord, undertakes to pay the whole road cess is not illegal S 41 of the Cess Act is neither exhaustive nor prohibitive and does not invalidate such a contract Road cess is not an *alwab* within the meaning of s 74 of the Bengal Tenancy Act 4 Cal 576 Fol

Ashutosh Dar v Amir Mollah 3 C L J 337

Notes—Ref 12 C W N 151=8 C L J 525 33 Cal 683=3 C L J 391

299—S 74—Rent suit for—Money rent or produce rent—*Kal diyat* construction of—Estimate of value—Payment of interest in default—Bengal Tenancy Act (VIII of 1885) S 74—Under a document the tenants agreed to pay every year 80 cottahs of paddy and 10 cottahs of kalai measured by a cottah of 14 seers as the landlord's share that if, owing to any occurrence, we fail to give the same, then we will pay you its price amounting to Rs 30 in the month of that very year *Held* that estimate of the value was not intended to modify in any way the terms of the contract between the parties, which was that the tenants should pay a yearly rent in kind and that on their failure to do so they should pay its price

There was a clause in the above document providing for payment of interest at a certain rate per month.

Held, that S 74 of the Bengal Tenancy Act had no application **Sheikh Issf v Gopal Chunder Dey 12 C L J 593=8 Ind Cas 896.**

—S 74

See Bengal Tenancy Act s 67 Case No (281). **33 Cal 683.**

Bengal Acts-(Tenancy Act VIII of 1885) S. 74-*Concld.*

—S 74

See Bengal Tenancy Act s 52 Case No (219) **6 C W N 360**

—S 74.

See Bengal Tenancy Act s. 11 Case No (62) **12 C W N 175**

—S 74

See Bengal Tenancy Act s 2 cl (4) Case No (12) **10 C W N 527**

—S 76

See Bengal Tenancy Act s 23 Case No (122) **8 C W N 754.**

—S 77.

See Bengal Tenancy Act s 23 Case No (122) **8 C W N 754**

—S 84

See Appeal—Acts-Bengal Tenancy Act Cases Nos (34 A, 35) **18 Cal 271, 19 Cal 485**

300—S 84—Acquisition of land by landlord Reasonable and sufficient purpose—Collector's certificate-Civil Court jurisdiction and functions —The proprietors of a talukh had constructed an indigo factory and employed an European manager They applied under s 84 of the Bengal Tenancy Act, to acquire by compulsory sale a small piece of land made up of parts of several raiyati holdings within his estate The application was opposed by the proprietors of another indigo factory who had taken under leases the greater part of the lands of the village, including the holdings within which this small piece of land was comprised from the raiyats The collector of the district granted a certificate under s 84, that the purpose for which the land was acquired was reasonable and sufficient The Munsiff tried the matter as a disputed question of fact and came to the conclusion that the purpose alleged was not reasonable and sufficient and declined to authorize the purchase The District Judge on appeal, reversed the Munsif's finding *Held*, that no section of the Act gives a right to appeal, the order of the District Judge was without jurisdiction, and must be set aside *Held* by Prinsep and Ameer Ali, JJ (Petheram C J dissenting)—The certificate of a Collector under s 84 is not conclusive as to the reasonableness or the sufficiency of the purpose for which the land is to be acquired, but the Civil Court is competent to hold a judicial inquiry to determine the grounds on which a certificate is granted. The purpose must have a direct relation to the good of the particular holding and objects which might have a remote or speculative bearing upon the estate seem to me to be foreign to the scope of the Act. *Held* by Petheram C J—The jurisdiction of the Collector under s 84 is final and the Civil Court has only to decide, about the settlement of amount to be paid for the land and the question whether the land is *bona fide* required for the alleged purpose. The words "Sastisfied on the certificate" mean that the Civil Court is to be satisfied on the certificate alone, and is not at liberty to take other evidence on that question, but is to accept the decision of it by the Collector as final **Goghun Mollah v Rameshur Narain Mahta 18 Cal 271.**

Notes —Fol 19 Cal 485, 9 C W N 472.

Bengal Acts-(Tenancy Act VIII of 1885) S. 84-*Concld.*

301—Bengal Tenancy Act (VIII of 1885) s. 84—Acquisition of land by landlord for building purpose—Right to apply—Increase of revenue—Sufficiency and reasonableness of purpose—Collector's certificate not conclusive

A person who is not the immediate landlord of a holding cannot make an application for acquisition of land under sec 84 of the Bengal Tenancy Act on the ground that by the acquisition the revenue would be increased and consequently it would be for the improvement of the estate

Held—That the purpose was not reasonable and sufficient within the meaning of sec 84

The Collector's certificate as to whether the purpose is reasonable is not conclusive, the Civil Court should hold an enquiry as to the reasonableness and sufficiency (18 Cal 271 Fol.) **Narain Mahto v Tekait Brojo Behary Singh. 9 C W N 472.**

—S 85

See Landlord and Tenant—Transfer by Tenant. **26 Calc 46.**

302—S 85—Lease by tenant for a period longer than 9 years—Valuity as between land-

Bengal Acts-(Tenancy Act VIII of 1885) S. 85 *Contd.*

lord and transferee Validity between parties to the transfer.

A lease by an occupancy tenant for more than 9 years is altogether void, as the registration necessary to make it valid is against the provisions of s, 85. It is inoperative not merely as regards the landlord but as between the grantor and the grantee. **Gopal Mondal v Eshan Chunder Bannerjee. 29 Cal 148.**

Notes:—Ref: 6 C W N 916; 8 C W N 136; 11 C W N 190. Rel: 6 C W N 377. Fol: 9 C L J 76; 36 Cal 256=13 C W N 183.

303—S. 85 (3)-Sub-lease before Act, effect of.

A sublease for more than nine years executed before the Act, is valid as between the partis to it though it may be voidable at the option of the landlord. **Gopal Mondal v Eshan Chunder Bannerjee. 29 Cal 148.**

Notes:—Ref: 6 C W N 916; 8 C W N 136; 11 C W N 190. Rel: 6 C W N 377; Fol. 9 C L J 76; 36 Cal 256=13 C W N 183.

304-S. 85-Under-Raiyat—Sub-lease by raiyat for indefinite period of holding—Validity—Right of landlord to eject sub lessee.

A raiyat granted a sub lease from year to year in respect of a portion of his holding. The sub-lessee having been dispossessed by the landord under whom the raiyat held, sued for recovery of possession.

Held, that he was entitled to recover. The sub-lease was not void for all purposes, and so long as the raiyat's interest subsisted,his landlord had no right to eject the sub-lessee.

A sub-lease granted by a raiyat is void only under the circumstances specified therein as against the landlord, but is not necessarily void so far as the parties themselves are concerned. It does not bar the creation of a right in the under-raiyat to the extent of the right of the rayiat himself. (29 Cal 148; 6 C W N 377. relied on; 26 Cal 46; 6 C W N 916; 6 C W N 919; 11 C W N 190 Dist) **Tamijuddi v Ajgar Howladar. 13 C W N 183=36 Cal 256=1 Ind Cas 942.**

Bengal Acts-(Tenancy Act VIII of 1885) S. 85-*Contd.*

305—S.85 (3)—"Sub-lease shall not be valid"—Meaning—Void or void only as against landlord.—

The words 'sub-lease shall not be valid' in S. 85 (3) mean that the sub-lease shall not be valid against the landlord. **Madan Chandra Kapali v Jaki Karikar. 6 C W N 377.**

Notes:—Ex: 8 C W N 136; 139; 140. Ref: 11 C W N 190. Fol: 36 Cal 256; 9 C L J 76. Rel: 13 C W N 183.

306—S. 85 Cl. 2—Under-raiyati lease—Term exceeding nine years—Validity—Ejectment suit by raiyat—Notice.

Cl. 2 of S. 85 of the Bengal Tenancy Act has not been enacted merely for the protection of the superior landlord. A sublease by a raiyat for a term exceeding nine years is invalid even against the raiyat. 29 Cal 148: 6 C W M 377 dist. **Basaratulla Mundle v Kasirunnissa Bibi 11 C W N 190.**

Notes.—Dist: 36 Cal 256; 13 C W N 183 Ex. 13 C W N 35.

307—S. 85-Registered mokurari under raiyati lease—Under raiyats dispossessed by strangers—Suit to recover possession—Proof of title if necessary:

Where certain persons in whose favour an occupancy raiyat had executed a registered mokurari pattah were in possession of the holding as tenants of the occupancy raiyat when they were dispossessed by the defendants who had no title to the land—*Held*—That assuming that the permanent mokurari under raiyati lease was void under S 85 of the Bengal Tenancy Act, it was open to them to prove their tenancy alinnde.—1C. W.N. 248 (1896) 6 C. W. N. 916 (1902) foll.—That their suit to recover possession of the holding from the defendants who were trespassers should succeed upon proof of their bare possession when dispossessed.—6 Bom 215 (1882) foll. **Banka Behary Christian v Raj Chandra Pal. (1907) 14 C W N 141.**

308—Sec.85 (3) Sub-lease for more than nine years—Sub tenant if can question validity.

The words in sub-section (3) of section 85 of

Bengal Acts-(Tenancy Act VIII of 1885) S 85-*Contd.*

the Bengal Tenancy Act "sub-lease shall not be valid for more than nine years from the commencement of the Act" apply only as between the sub-tenant and the land-lord. They do not apply as between the tenant and the sub-tenant. 29 Cal 148; 6 C W N 377 Foll.

Bipin Behari v Amrita Lal Bhattacharji. 9 C L J 76=3 Ind Cas 685.

309—S. 85, sub-sections (1) and (2)—permanent lease by raiyat—Sub-lease, invalidity of, who can question—Estoppel—Previous possession—Specific Relief Act (1 of 1877), S. 9—Ejectment.

S. 85 of the Bengal Tenancy Act defines the restrictions on sub-letting by a raiyat. The first two sub-sections must be read together.

The question of invalidity of a sub lease granted in contravention of the provisions of sub-sections (1) and (2) of s. 85 can be raised only by the landlord of the raiyat.

An under-raiyat who holds under a permanent lease granted by a raiyat, can successfully maintain a suit for possession or defend his possession against the raiyat.

Semble :—In the case of a contract between the grantor and grantee, a question of estoppel may arise.

Quære:—Whether a plaintiff is entitled to a decree for recovery of possession on account of previous possession in an action in ejectment not under s. 9 of the Specific Relief Act. 6 C W N 916; ref: 26 C W N 919, doubted. **Manik Borai v Bani Charan Mandal. 13 C L J 649.**

310—S. 85 (3)—Ejectment—Holding over—Under-raiyat, if can be forcibly ejected.

The representatives in interest of the raiyats, who granted a lease to under raiyats, are not entitled, as between themselves and the under-raiyats, to take up the position that the grant was inoperative.

The tenancy of an under-raiyat who has been allowed to hold over after the termination of nine years from the commencement of the Bengal Tenancy Act and to continue in occupation as tenant is to be terminated in accordance with the provisions of the law, and till such steps have been taken, he cannot be forcibly ejected from the land. 29 Cal. 148; 6 C. W. N. 377 ; 36 Cal. 256; 9 C. L. J. 76, Fol ; 11 C. W. N. 190, Dist. 6 C. W. N. 919. Dist.

Arab Ali v Rachimuddi 13 C L J 656.

Bengal Acts-(Tenancy Act VIII of 1885) S.85-*Contd.*

311—S. 85—Lease to an under-raiyat for nine years—Stipulation to give a fresh lease on expiry of the term, whether valid—Under raiyat—Ejectment.

A stipulation in a lease executed by a raiyat in favour of an under-raiyat, to the effect that, after the expiry of the term of nine years, for which the lease was granted, the raiyat would grant the under-raiyat a fresh lease of the land is valid, and is not in contravention of the terms of S. 85 of the Bengal Tenancy Act.

Held further, that the under-raiyat could not, on the expiry of the term, be ejected without an offer of a fresh lease on a fair rent. **Ali Mahammad Bepari v Nayan Rajah Bhuiya. 15 C L J 122.**

312-S. 85-If a tenant leases out a portion of his holding in *ijara* for five years and the lessee is put in possession of that portion and there is nothing to show that the lessor intended to abandon the holding, the lease granted to the lessee is one which the lessor was within his rights in granting, and the lessee is entitled to recover possession from the landlord who had ejected him from the land. 10 C W N 499; 3 C L J 222 Dist: **Mahomed Tagu v Choa Lal. 7 Ind Cas 750.**

—S. 85 & S. 86 cls (5). (7)

See Bengal Tenancy Act s. 22. Case No (116) **2 C L J 570.**

—S. 85 (2).

See Bengal Tenacy Act s. 48. Case No (172) **2 C L J 540.**

—S. 85 (2).

See Bengal Tenancy Act s. 22. Case No (111) **31 Cal 932.**

—S. 85.

See (1) Bengal Tenancy Act s.167.Case No(521) **28 Cal 205.**

(2) Bengal Tenancy Act s. 22 (1). Case No (110) **28 Cal 205.**

(3) Bengal Tenancy Act s.49-Case No(180). **6 C W N 919.**

Bengal Acts-(Tenancy Act VIII of 1885) S. 85-*Concld.*

(4) Bengal Tenancy Act s.22. Case No (114) **13 C W N 913.**

(5) Bengal Tenancy Act s.49.Case No (190) **8 Ind Cas 65.**

—S. 86.

See Landlord and Tenant—Liability for Rent. **19 Cal 790.**

—86, 87, 88:—

See Landlord and Tenant **8 C W N 315.**

313—S. 86—Occupancy-holding, surrender of.

There may be valid surrender of an occupancy holding without a written document. S. 86 does not prohibit such procedure. **Khanker Abdur Rahman v. Ali Hafez.** **28 Cal 256= 5 C W N 351.**

314—Ss. 86, 171—Surrender by raiyat—Under raiyat in possession having paid rent due by raiyat—Mortgage—Ejectment.

Where a raiyat surrendered his holding at a time when the holding was in possession of the under-lessee of the raiyat under S. 171 of the Act.

Held that the superior landlord's claim to *Khas* possession by virtue of the surrender should be post-poned, till the amount due to the under-lessee by virtue of the mortgage under the operation of law under S. 171 is satisfied.

Nabadip Chandra Pal v. Bhairab Chandra Dhar. **13 C W N 97=4 Ind Cas 325.**

315—Ss. 86, 161-Sale of a part of a occupancy holding is not an incumbrance within the meaning of S. 161.

A part surrender of a holding by arrangement with the landlord as provided by cl. 7 of S. 86 is valid.

Defendant No. 2 sold a portion of his non-transferable occupancy holding to defendant No. 1 who did not pay rent for the part purchased, and defendant No. 2 surrendered the portion sold to the plaintiff, his landlord, who brought a suit for ejectment of defendant No. 1.

Held, that the landlord plaintiff was entitled to *khas* possession. 5 Ind Cas 116 11 C L J 16; 14 C W N 229 Fol: **Ananda Mohan Roy Chowdhury v Guru Dayal Saha.** **7 Ind Cas 19.**

Bengal Acts-(Tenancy Act VIII of 1885) S. 86-*Concld.*

Bengal Tenancy Act S. 86 (7)—"Incumbrance." meaning of—Transfer of non-transferable holding—Effect. **See** Landlord and Tenant **11 C L J 16=14 C W N 229.**

—S. 87.

See Landlord and Tenant—Abandonment—Relinquishment or Surrender of Tenure.

316—S. 87—Construction of s. 87.—

The provisions of s 87 of the Transfer of Property Act are not exhaustive.

Samujan Roy v. Mahaton, **4 C W N 493.**

Notes:—Ref: 11 C W N 811; 34 Cal 689; 12 C W N 599=7 C L J 72. Fol. 7 C L J 78; 33 Cal 1219.

317—S. 87-not exhaustive — Abandonment, a question of intention—Mortgage of non-transferable holding.—

The first sub-section of section 87 of the Act shows that abandonment is the effect of the act of the tenant in vacating the holding without making arrangement for payment of his rent as it falls due, and for cultivating the land.

Whether there is abandonment or not in any individual case is a question of intention to be determined upon the facts of the particular case.

In order to effect a legal abandonment and to allow a valid re-entry by the landlord, service of notice under sub-section 2 of section 87 of the Act is not necessary. The only effect of the service of notice is to make it obligatory upon the tenant to have a speedy determination of the question whether there has been an abandonment or not.

Section 87 of the Act is not exhaustive and a landlord is not a wrong-doer merely because he re-enters upon the holding before he has followed the procedure laid down in that section.

When the holding is a non-transferable one, and the ryot executes a mortgage, the mortgage is inoperative as against the landlord, but as between mortgagor and mortgagee, the mortgage is operative. 4 C W N 679 Ref:

Where the mortgagee of a non-transferable occupancy holding purchases the holding in execution of his mortgage decree and takes posses-

Bengal Acts-(Tenancy Act VIII of 1885) S. 87-*Contd.*

sion, the possession of the tenant mortgagor completely ceases, and the holding passes into the occupation of the mortgagee. As against the landlord, the mortgagee auction-purchaser is a trespasser. The landlord is entitled to sue him and to obtain a decree for ejectment; in suit the tenant who is not in occupation is not a necessary party.

Under the circumstances of the case, the abandonment of his holding by the tenant, although due to the execution sale, is a voluntary one.

Ram Pershad Koeri v. Jawahir Roy, 7 C L J 72=12 C W N 899.

Notes:—Ref: 11 C L J 433.

318—S. 87—Ejectment, suit for—Occupancy-raiyat, sale by—Non-transferable right of occupancy—Abandonment, what amounts to — Possession of original tenant — Khas possession—Sub-lease from purchaser.—

Mere sale of a right of occupancy to a third person, notwithstanding that the vendors remain in occupation of the land under a sub-lease from the purchaser, does not amount to abandonment in law and the landlord is not entitled to re-enter by ejecting the original tenants. (9 C W N 379, 9 Cal 648, Fol.; 22 W R 22 *Ref;* 4 Cal 925, 24 Cal 212 Dist.). **Madar Mandal v. Mahima Chandra Muzumdar. 3 C L J 343=33 Cal 531.**

Notes.—Ref: 33 Cal 1219=10 C W N 1033, 12 C W N 899=7 C L J 72, 13 C W N 220; Dist: 34 Cal 689=11 C W N 811=7 C L J 78.

319—Section 87—Under-lease—Forfeiture.

Where a raiyat holding a non-transferable holding transfers it to a third person, but remains in occupation of the land as his vendee's under-raiyati, repudiates his relation as tenant, refuses to pay rent to the landlord of the raiyati holding and maintains his right to transfer a non-transferable holding and seeks by suit to re-occupy the land not as his (landlord's) tenant, but as the under-tenant of his vendee, his suit must fair. The case is not one of abandonment under *Section* 87.

If the raiyat transferee is willing to revert to the former state of things, to reoccupy the land and pay rent to the landlord, then a suit for possession is maintainable against the landlord.

Bengal Acts-(Tenancy Act VIII of 1885) S. 87-*Concld.*

The transferee of a non-transferable raiyati holding is not a tenant of the landlord and has no legal connection with the land.

The provisions of section 87 are not exhaustive. **Rajani Kanta Biswas v. Ekkari Dass. 7 C L J 78=34 Cal 689=11 C W N 811.**

Notes—Ref 7 C L J 72=12 C W N 889. Expl. 13 C W N 220=5 M L T 276.

320—S. 87—Due course of law.

A landlord, who proceeds to take possession of a holding after service of notice under s. 87 of the Bengal Tenancy Act, on the allegation that there has been an abandonment by the tenant, does so at his own risk He cannot be said to take possession in due course of law, so as to bar a suit by the tenant for recovery of possession under s. 9 of the *Specific* Relief Act. **Suresh Chandra Mookerji v Srimati Nesa Bibi. 11 C L J 433=6 Ind Cas 553.**

321—S. 87—Whether applicable to land partly horticultural and partly homestead —Ejectment—Transferee of non-transferable holding.

S. 87 of the Bengal Tenancy Act contemplates cases in which there is cultivation of the holding by the tenant, and consequently a holding, consisting of land partly horticultural and partly homestead, does not strictly come within the purview of that section.

When the tenant of a non-transferable holding executes a usufructuary mortgage of it, places the mortgagee in possession, abandons the holding and leaves the village, the landlord is entitled to treat the mortgagee as a trespasser and to ask for ejectment, although the case does not come within the purview of S. 87 of the Bengal Tenancy Act. 10 C W N 499; 3 C L J 223; 10 C W N 719; 4 C L J 306; 33 Cal 1094; 10 C W N 878, Fol:

Sashi Mohan Sutradhar v. Bepin Behary Karmokar. 9 Ind Cas 20.

See-S. 88–Landlord and Tenant-Transfer by tenant. **21 Cal 433.**

322—Bengal Tenancy Act (1885) Ss. 88, 153-Rent-*Suit*-Subdivision of tenancy-Rent receipts signed by one of several co-sharers.

Held, that the dakhilas or rent receipts did

Bengal Acts-(Tenancy Act VIII of 1885) S. 88-*Contd.*

not amount to written consent as required by S 88 of the Bengal Tenancy Act. **Aubhoy Churn Maji v Shoshi Bhusan Bose. 16 Cal 155.**

Notes:—Appl: 17 Cal 489 F B. Ref: 25 Cal 531 F B; 31 Cal 1026. Fol: 8 C W N 923.

233—S. 88—Suit for rent—Sub-division of tenancy—Evidence of consent of landlord to—Rent receipt signed by the agent.

A receipt for rent granted by a landlord or his agent containing a recital that a tenant's name is registered in the landlord's sherishta as a tenant of a portion of the original holding at a rent which is a portion of the original rent does amount to a consent in writing by the landlord to a sub division of the holding and a distribution of the rent payable in respect thereof, within the meaning of s. 88 of the Bengal Tenancy Act. **Pyari Mohun Mukhopadhya v Gopal Paik, 25 Cal 531=2 C W N 375. Jagadishur Bhuttacharji v Joymoni Devi 25 Calc 533 note=2 C W N 378 note.**

Notes.—Dist: 10 C W N 216; 8 C W N 923, 31 Cal 1026.

324—S.88—Transfer of a portion of occupancy holding—Custom—Ejectment—Possession.

The transfer of a portion of an occupancy holding is contrary to the spirit, if not the letter, of s. 88 of the Bengal Tenancy Act, VIII of 1885. and the existence of a custom in a particular place by which such a holding is transferable is immaterial, and gives no right to the transferee as against the landlord. **Kuldip Singh v Gillanders Arbuthnot & Co. 26 Calc 615=4 C W N 738.**

Notes.—Ref: 27 Cal 545; 9 C W N 843. Doubt: 8 C W N 55; 9 C W N 134: 2 C L J 369. Dist: 8 C L J 161.

325—O 21, r. 89 (1882 S. 310-A)—Purchaser of share in occupancy holding.

The purchaser of a share of an occupancy holding transferable by custom can apply under s. 310, as being a person whose immoveable property has been sold in execution of a decree for arrears of rent due in respect of the holding. 23 Cal. 393 foll. 26 Cal. 615 dist. **Benodini Dassi v Peary Mohan Holdar 8 C W N 55.**

Bengal Acts-(Tenancy Act VIII of 1885) S. 88-*Contd.*

Notes.—Fol: 32 Cal 107; 11 C W N 742; 8 C L J 161. 7 C L J 282. Ref: 9 C W N 134; 13 C W N 224; 2 C L J 369.

326—S. 88—Division of tenure or holding—Writing, consent in.

The consent in writing by the landlord to the division of a tenure or holding has the effect of substituting a new contract for the old. It should therefore be complete in itself and embody distinctly the terms of the new contract. Should it fail to do so no extraneous evidence to prove the terms of the contract would be admissible having regard to the terms of s. 91 of the Evidence Act, 25 Cal 531 dist. *Held* upon a construction of the dakhila in the present case that it did not amount to a contract in writing by the landlord to the division of the holding within s. 88 of the Bengal Tenancy Act. The fact of some of the joint occupiers of a joint tenure paying portions of the rent due from all, corresponding with the sharers for which the joint occupiers are liable, cannot prevent the landlord from suing them all or making all answerable for the joint debt. 21 W R 256 (1874); and 22 W R 334 (1874 and 22 W R 295 (1874) Relied on. 6 C W N 823 (1902) Referred to. **Gnanendra Mohan Chaudhury v Gopal Das Chowdhury. 8 C W N 923= 31 Cal 1026.**

Notes:—Appl 10 C W N 216.

327—S. 88—Sub division of tenancy—Rent receipts how far evidence of sub-division—Joinder of parties—Receipts for rent granted separately by the landlord's Tahsildar to the tenants of a holding, whose names were also entered in the landlord's sherista in the place of that of the tenant who held the tenancy before them, does not amount to a consent in writing on the part of the landlord to a sub-division of the tenancy within the meaning of s. 88 of the Bengal Tenancy Act. 2 C W N 375,=25 Cal 531 F B. distinguished 8 C W N 923,=31 Cal 1026 applied : 6 C W N 823 referred to. The Tahsildar who granted the receipts separately cannot be added as a defendant in the landlord's suit for rent brought jointly against the tenants. **Sri Maharani Beni Pershad Koeri v Ramadhin Pandey. 10 C W N 216= S C 33 Cal 444.**

328—S. 88—Collection of rent by co-sharer-Fraud.

Bengal Acts-(Tenancy Act VIII of 1885) S. 88-*Contd.*

Where several co-sharer landlords who had been collecting the rent due to them separately, from the dar-mourashidars, united in bringing an action against the intermediate mourashidars for arrears of rent so as to obtain a decree which would be binding upon and would pass the tenure.

Held, that the landlords were not bound to continue to collect rent in this manner unless they had given their consent in writing under sec 88 of the Act, and that the action of the landlords in bringing a joint action did not amount to fraud. **Girish Chandra Mukhopadhyaya v Chhatradhar Ghose. 3 C L J 379.**

Notes.—Fol: 33 Cal 1010=10 C W N 952.

329—Sec. 88-Sub-division of holding-Rights of purchaser—Landlord's title not questioned.

Where the landlord's rights are not questioned and he does not appear in the suit, a transferee of a share of a holding may maintain a suit against persons who claim under an inferior title, even though they may set up a recognition by the landlord. (26 Cal 615 Dist: 8 C W N 55; 9 C W N 134 Foll). **Gour Kaibarta v Srimati Tarajan Bibi. 8 C L J 161.**

Bengal Tenancy Act S. 89:—See Limitation **7 C W N 218.**

330—Receipt of rent by tehsildar or gomastha—Division of holding.

Where a holding is in the occupation of several tenants at one entire rental, the fact that the landlord's *tehsildar* has accepted from the various tenants proportionate parts of the rent does not bind the landlord to recognise a separation of the tenancy in absence of evidence to connect the landlord with the receipt of any proportionate rate of rent by the *tehsildar*. **Maharani Beni Pershad Koeri v Goberdhan Koeri. 6 C W N 823.**

331—s. 88—Permanent raiyati holding—Sale of part—Landlord aware of sale though transferree not recorded in his sherista—Suit for rent—Transferree necessary party Sub-division of holding—Decree against recorded tenant, effect of—Purchase of part of tenure if an incumbrance.

When raiyats having permanent interest in a holding sold a portion of it and the transferrees again sold a portion of their purchased interest to one R., and R. obtained settlement from the landlord, *Held*—That although the transferees took no steps to get their names registered in the landlord's *sherista* and had paid no rent since their purchase, inasmuch as the landlord had notice of the purchase, under sec 17, Bengal Tenancy Act, he was bound to bring a suit against the transferrors and the transferees jointly. A sale of the holding in execution of a decree for rent obtained against the transferrors, only did not therefore affect the transferrees' interest in the holding. The landlord was bound to recognise the transfer though in the absence of his written consent as required by sec 88 of the Bengal Tenancy Act, he was not bound to recognise the sub-division effected by the transfer. The interest of the transferees was not an incumbrance which could be avoided by a purchaser at a rent sale. **Baistab Charan Chowdhury v Akhil Chandra Chowdhury. 11 C W N 217.**

Bengal Acts-(Tenancy Act VIII of 1885) S. 88-*Concld.*

—S. 88 (2).

See Bengal Tenancy Act s. 49 (b). Case No (177). **3 C L J 155.**

—S. 88.

See Bengal Tenancy Act Ss. 11 & 12. Case No (61). **32 Cal 279.**

—S. 88.

See Bengal Tenancy Act s. 17. Case No (86). **11 C W N 217.**

—S. 88.

See Bengal Tenancy Act s. 11. Case No (60). **10 C W N 270.**

332—s. 89—Service tenure—Suit for ejectment.

Service tenures are excepted from the operation of s. 89, of the Bengal Tenancy Act. **Mokbul Hossain v Ameer Sheikh. 25 Cal 131.**

333—Ss. 89, 155-Ejectment—Notice-Tenant-Transferee from tenant.

The defendant No 4 plaintiff's tenant having alienated the land to defendants Nos 1 to 3 against the conditions of the lease, the plaintiff sued for ejectment, which was decreed. The defendants Nos 1 to 3 appealed;

Held, that Ss. 89 and 155 of the Act were of no assistance to the appellants as they were not

Bengal Acts-(Tenancy Act VIII of 1885) S. 89-*Concld.*

tenants, and that therefore, they were not entitled to any notice. **Budhimanta Pramanik v. Sarat Chandra Banerjee. 6 Ind Cas 147.**

334—Ss. 90, 91—Measurement proceeding, Form of, order on.

In a proceeding under s. 90 the order should be limited to one directing, in the words of s, 91, that the tenants do attend and point out the land, and a declaration made in such order that the petitioner is entitled to make the measurement with a pole of a certain measure is bad in law and without jurisdiction. **Dya Gazi v Ram Lal Sukul. 2 C W N 351.**

335—S. 90—Suit for measurement of area and increased rent—Right of suit—Right of landlord to measure when there is an intermediate tenant—Contract executed between landlord and tenant before the passing of the Bengal Tenancy Act-Estoppel—Joint landlords who are.

A kabuliyat executed before the passing of the Bengal Tenancy Act by Defendant No 1, the holder of a *dar-mourasi patta* in favour of his immediate landlord a *mokuraridar*, provided that the former should have his name entered in the zemindar's *sherista* in place of the *mokuraridar's*, and pay rent to the Zemindar, and also in case the area of the tenure should exceed certain bighas, that he should pay rent on each excess bigha at the rate of 12 annas and 2 annas to the zemindar and the *mokuraridar* respectively. The agreement was ratified by the zemindar. On the zemindar suing Defendant No 1 for measurement of the tenure and increased rent, it was objected that under the *kabuliyat* only the *mokuraridar* was entitled to sue for such measurement; *Held*,—That every landlord has a right under sec. 90 Bengal Tenancy Act to sue for measurement: *Held, further*—That by accepting the zemindar as landlord, Defendant No I had made himself liable to be sued by the zemindar. When it was further objected that the zemindar and *mokuraridar* were joint landlords and the zemindar could not sue alone: *Held*,—that though they were both landlords of Defendant No 1 they were not joint landlords within the meaning of sec, 188. That even if they were joint landlords, by their subsequent conduct, in collecting rent and suing separately, they had ceased to be so, 22 Cal 658 (1895) followed.

Bengal Acts-(Tenancy Act VIII of 1885) S. 90-*Concld.*

That further as the *kabuliyat* upon which the suit is based was executed prior to the passing of the Bengal Tenancy Act, the suit was not under sec 52 Bengal Tenaney Act and so would not be barred by the provisions of sec 188 Bengal Tenancy Act. 19 Cal 610 (1892 followed.). Also that as the rate of rent was already fixed under the *kabuliyat* and the suit was for measurement only the suit could not be regarded as one under sec. 52 Bengal Tenancy Act, and sec 188 of the Bengal Tenancy Act would not apply in bar of it.

Matungini Dassi v Ram Das Mullick 7 C W N 93.

336,—Ss 91 and 188—Joint-owner—Joint-landlord.

If one set of landlords obtains separate kabuliat for rent such landlord becomes a joint owner and not a joint landlord.

Such a landlord may apply under s. 91 of the Act for a measurement of land included in his estate. (7 C W N 93 and 7 C W N 670 ref. to).

Jognesh Prokash Ganguli v Maniraddi. 35 Cal 417.

337.—s. 91—One application against several tenants.

Under s. 91 of the Act, a landlord can, in one application, include the lands of several tenants having holdings in the land which the landlord desires to measure. **Haji Shah Momtaz Hossain v Raghu Nandan Sahu. 11 C L J 216 =14 C W N 231=5 Ind Cas 153.**

—S. 93.

See Appeal—Acts—Bengal Tenancy Act.—Case No (38). **14 Cal 312.**

338—s. 93—Manager—Co-sharers—Practice in making applications under s. 93 of Act VIII of 1885 where the co-sharers hold various and complicated shares in the property—Notice.

Where a property consisted of 243 estates or tenures, 60 of which were entered under separate numbers in the Land Register of the Collector, other portions of the property being talukhs, dependent tenures, and raiyati holdings, and a single application is made by 12 of the co-sharers in such property (many of whom held shares in several of the tenures and estates) calling upon

Bengal Acts-(Tenancy Act VIII of 1885) S. 93-*Contd.*

the remaining four sharers in the property to show cause why a common manager should not be appointed under s. 93 of the Bengal Tenancy Act, the Court should, before granting the application, call upon the applicants to state whether all of them are entitled in common to the various estates and tenures, and, if not so entitled, should call upon them to divide themselves into as many groups as there are properties held by them in common; and in the latter case each group of shareholders should put in separate applications on which separate Court fees should be levied. The notice in the case of tenures should be as provided by s. 93 of the Act, and should be of the same character and to the same effect as in the case of estates. **Fazel Ali Chowdhry v Abdul Mozid Chowdhry. 14 Cal 659.**

Notes.—Disap: 20 Cal 665.

339.-S. 93-Common manager, if can sell and mortgage—Right of co-owner to deal with his own share during management—Liabilities incurred by co-owner, subject to those incurred by manager.

Under section 98 (3) of the Bengal Tenancy Act, a manager appointed under sec 93 of that Act has power to sell and mortgage. The appointment of manager does not take away from a co-owner his power of a dealing with his own share. Any interest which a mortgagee or a purchaser would acquire from a co-owner during the period of management would be subject to any charge on the estate that might be properly incurred by the manager during that period. **Amar Chunder Kundu v. Shoshi Bhusan Roy (P C) 18 C W N 225= 31 Cal 305=31 I A 24.**

340 —Bengal Tenancy Act (VIII of 1885), Sec. 93—Common Manager—Consent order by-C P C s 875.

A District Judge has no jurisdiction to appoint a common manager under Sec 93 of the Bengal Tenancy Act by consent of parties. Before he can make the order, he must find that there is a dispute likely to cause inconvenience to public or injury to private rights existing between the co-sharers. *Quære.* Whether a proceeding under Sec 93 of the Bengal Tenancy Act is a suit within the meaning of Sec 375 of the Civil Procedure Code? **Kali Charan Ash v Parbati Charan Ash. 4 C L J 564**

Bengal Acts-(Tenancy Act VIII of 1885)-S. 93-*Contd.*

341—S. 93—Common manager, irregular appointment of—Suit to set aside appointment, maintainability of.

A common manager was appointed under the Bengal Tenancy Act in respect of property which was neither an estate nor a tenure. Some of the co-sharers upon whom notice had not been served, sued to recover possession upon a declaration that the appointment was invalid:

Held, that the suit, as framed, was maintainable, and that it was not obligatory upon the plaintiffs to apply in the first instance to the District Judge who has appointed the common manager. **Indu Bhusan Bose v Annapurna Mitra. 6 C L J 216.**

342—Secs 93, 95-Common manager, appointment of, when complete—Manager resigning, effect of Judge, power of.

The appointment of a common manager under section 95 of the Bengal Tenancy Act is only complete when the required security has been given and possession has been taken under the order.

Semble:—The powers of a Judge under section 95 are not exhausted by the appointment of a person who has entered upon the duties of his office and has subsequently vacated the same by death, voluntary relinquishment or otherwise. The abdication of the manager has not the effect of restoring the estate to the owners. **Dwarka Nath Mitter v Bankutesh Lal Mitter. 7 C L J 109=10 C W N 437.**

Notes.—Ref: 2 Ind Cas 597.

343.—Ss. 93, and 94—Common manager—Separate appointment for separate estates or groups of estates belonging to same co-owners-District Judge may reconsider question of necessity of appointment at any stage—Discretion judicial—Position of co-owner who has separated his share but not by metes and bounds.

Where a District Judge made an order for the appointment of a common manager, in respect of several revenue-paying and revenue free estates, of which the co-owners were not the same.

Held that the District Judge should have separately considered each property or group of

Bengal Acts-(Tenancy Act VIII of 1885) S.93-*Contd.*

properties belonging to the same co-owners and made separate appointment in regard to each property or group, though the same common manager might be appointed in all the cases. (14 Cal 659 foll.)

Where, on being directed to deal with the case in the above manner, the District Judge, instead of starting proceedings *de novo* and issuing notices on the co-owners under S. 93 Bengal Tenancy Act, to show cause why a common manager should not be appointed issued notices under S.94 of the Act asking them to appoint a common manager.

Held, that, in the circumstances of the case, the proceedings should have been commenced *de novo* and the co-owners given an opportunity of showing that, owing to the altered state of things, there was no longer any necessity for appointing a common manager.

A District Judge can in the exercise of his discretion, consider the propriety of the appointment of a common manager, whatever be the stage at which the proceedings may have arrived. This discretion is not, however, to be exercised arbitrarily but according to well established rules.

A co-owner, who has opened a separate account in the Collector's register or makes separate collection for his share, is, nevertheless, liable to have his share taken over by a common manager, although the dispute may not have extended to his share. His remedy, if any, is to have his share demarcated by metes and bounds. 14 Cal 659, Foll. **Kumar Saradindu Roy v The Collector of Rungpur. 11 C W N 1143.**

344.—Ss. 93, 98–Common manager—Suit for —Suit for account—Limitation–Arts 89, 115.

The common manager appointed under S. 93 of the Act can sue the former common manager for an account even if the latter is himself a co-owner.

The rule that the same man cannot be plaintiff and defendant in the same suit, loses much of its force in India, where the Courts are Courts of Equity, when all the parties are before the Court and their rights can be determined and adjusted.

Bengal Acts-(Tenancy Act VIII of 1885) S. 93-*Concld.*

To such an account suit, Art 89, Limitation Act 1877, is applicable, and not Art. 115.

A manager should get his commission on the sums decreed against him; for the estate cannot recover more from him than it has lost, and if he had collected these sums, the estate would not have recovered them in full, but subject to the deduction of the commission. (10 Bom 358; 25 Bom 605, Ref 12 C W N 820; 24 All 27 (P C) =28 I A 227, Ref: 1 C L J 211, not Fol.

Mahomed Faiz Chowdhury v Upendra Lal Singh Roy. 2 Ind Cas 597.

345.-Bengal Tenancy Act (Act VIII of 1885). Ss. 95 and 99—Minor co-sharers—Court of Wards —Jurisdiction of District Judge.

An application by one of the co-sharers in an estate made on 8th June 1891 for the appointment of a common manager was withdrawn as it was objected to by the other co-sharers on the 4th March 1891. The same co-sharer again applied to the Court asking that proceedings might be taken under s. 93 of the Bengal Tenancy Act, and that the management of the estate might be taken over by the Court of Wards. Objection was taken by others against the appointment of a manager but consent was given as regards the Court of Wards. On the 30th March 1892 the District Judge, without making any enquiry to satisfy himself as to the necessity of the appointment of a common manager, ordered that the estate should pass into the hands of the Court of Wards. The Court of Wards at first accepted the management, but subsequently declined to act, and the Board of Revenue directed that the estate should be released. On the 13th August 1892 the Court issued notices to show cause why a common manager should not be appointed. All objected to the appointment but the representative of the minor-cosharers stated that they had agreed to appoint a private person manager of their shares. Thereupon the District Judge temporarily appointed such person as manager, until the co-owners should take steps under S. 99 to satisfy the Court that they were in a position to manage the estate property. On the 24th March 1893, the District Judge passed two orders on two applications made by two of the cosharers for the release of the estate, refusing to release it, on the ground that the management of the estate could not be conducted without injury

Bengal Acts-(Tenancy Act VIII of 1885) S. 95-*Contd.*

to the rights of the minor. *Held* that these orders of the 24th March 1893 were *ultra vires*.

Ganoda Kanta Roy v. Probhabati Dasi. 20 Cal 881

Notes:—Dist: 23 Cal 532.

346-S. 95-Manager of estate-Obligation of manager to have his name registered before he can collect rent of estate—Land Registration Act (Bengal Act VII of 1876), s. 78.

A person who has been appointed manager of an estate under the provision of s 95 of the Bengal Tenancy Act must have his name registered under the provisions of s.78 of the Land Registration Act before he can recover rent from the tenants of the estate of which he has been appointed manager. **Maqbul Ahmed Chowdhry v Girish Chunder Kundu. 22 Cal 634.**

347.—Bengal Tenancy Act (VIII of 1885) s 95-Appointment of a common manager, consent of parties—Rights of patni holders formerly under ijara—C P Code 1882 s 622.

The co-owners consented and a common manager was appointed under s 95 of the Bengal Tenancy Act VIII of 1885. $\frac{3}{16}$th portion of the land was let out by the owner in izara to the other co-owners. The izara expired and while the lands were under the common manager the owner gave a patni of it to A who tried to collect rents as a patnidar. *Held* that A was bound by the order appointing a common manager and could not himself collect rent as he was in no better position than the share holder from whom he obtained the patni. 20 Cal 881 distinguished. **Jugut Chunder Chowdhry v Golack Chunder Ghose 23 Cal 522.**

348—S. 95-Right of common manager to sue for recovery of possession of land-Custom-Transfer of occupancy holding.

A common manger appointed under S 95 of the Bengal Tenancy Act is competent on behalf of the co-owners to sue for recovery of possession of land.

Srimutty Sibo Sundari Ghose v. Rai Mohun Guho. 8 C W N 214.

Bengal Acts-(Tenancy Act VIII of 1885) S. 95-*Concld.*

Notes:—Ref 12 C W N 1086=8 C L J 261.

—S. 95—Receiver. if may be appointed, of property in hand of common manager See. **Receiver 15 C W N 672; 13 C L J 487.**

349—Ss. 95 and 98—Right of common manager to defend a suit for possession—Whether the co-owners ought to be brought on the record as defendants within time.

The common manager appointed under the provisions of the Bengal Tenancy Act fully represents the co-owners for the purposes of defending a suit for declaration of title to and recovery of possession of immoveable property brought against them, and it is immaterial whether the heirs of some of the co-owners were brought on the record too late for a suit against them. **Chowdhury Kirtibash Das v Umesh Chandra Datta. 14 C L J 61.**

350-351—Ss. 98, cl. (3), and 100——Rules made by the High Court under s. 100—Power of common manager to mortgage—Power of co-owner during existence of common management.

A common manager, appointed under the provisions of the Bengal Tenancy Act, has power to mortgage property with the permission of the District Judge. While the common management exists, the powers of the co-owners must be regarded as in abeyance, and therefore a mortgage created by a co-owner during the existence of the common management cannot in any way interfere with, or derogate from, the rights created under any transaction made by the common manager with regard to the joint property.

Amar Chandra Kundu v Roy Goloke Chandra. 4 C W N 769.

Notes:—Ref: 29 Cal 63.

Bengal Acts-(Tenancy Act VIII of 1885) S. 98-*Concld.*

352—Ss. 98 (3), 93, 100—Common manager's power to sell and mortgage—Co-owner's right to deal with his own share during management.

Under s. 98 (3) of the Bengal Tenancy Act, a manager appointed under s. 93 of that Act has power to sell and mortgage.

The appointment of a manager does not take away from a co-owner his power of dealing with his own share.

Any interest which a mortgagee or a purchaser would acquire from a co-owner during the period of management would be subject to any charge on the estate that might be properly incurred by the manager during that period.

Amar Chunder Kundu v Shoshi Bhusan 8 C W N 225=31 Cal 305=31 I A 24 P C.

353—Ss. 101, 115 (ch X)—Lakhiraj land-Power of Settlement Officer to resume and assess. The Settlement Officer is not empowered under ch. X to resume and assess Lakhiraj Lands.

Padmanand Singh v Bajo 20 Cal 577.

354—Record of rights—Settlement officer's dicision—Subsequent Civil suit—Res Judicata. —A Settlement officer decides under chapter X of the Bengal Tenancy Act as to which of two persons claiming to be tenant ought to be recorded as such. In a subsequent civil suit between the same parties concerning the title to the land such a decision would not operate as res judicata.

Pandit Sardar v Meajan Mirdha. 21 Calc 378.

Notes:—Fol: 27 Cal 364: 8 C W N 741. Dist: 2 C W N 491. Ref. 5 C W N 421.

355—Bengal Tenancy Act (VIII of 1885) Chapter X—Dispute as to right of way between two neighbouring tenants—Jurisdiction of Settlement Officer to decide the dispute.

The dispute is as to the existence of a right of way between two neighbouring tenants. A settlement Officer had no jurisdiction under the old Chapter X of Bengal Tenancy Act (VIII of 1885 to decide civil dispute between tenant and tenant. The dispute in this case is undeniably a dispute of a civil nature and the existence of a right of way cannot be regarded as a condition

Bengal Acts-(Tenancy Act VIII of 1885) S. 101-*Contd.*

or incident of a tenancy. 21 Cal 378 followed.

Haro Mohun Roy Churamoni v Pran Nath Mitter. 27 Cal 364=4 C W N 127.

Notes—Fol. 8 C W N 741.

356—Ss. 101, 117. 118, 119, 143, 158, 189—Jurisdiction of Revenue Officer to make a record of rights without order of Government.—S. 104 of the Bengal Tenancy Act (before the amendment of 1898) applies to proceedings taken under s. 103 as to those under S. 101. On an application under S.103 a Revenue Officer can make a survey and prepare a record of rights without any order of the Government under s. 101.

Dharani Kanta Lahiri v Gaber Ali Khan. 30 Cal 339=7 C W N 33.

Notes.—Rel: 32 Cal 518=9 C W N 504 =I C L J 239; 12 C W N 122.

357—Bengal Tenancy Act (VIII of 1885)—Ss. 101, 102, 103-A, 105—Record of rights—Jurisdiction of Revenue Officer.

Per Ghose J.—S. 101 of the Bengal Tenancy Act applies where the record of-rights is required for reasons of state, while s. 103 applies where a proprietor or tenure holder or a large proportion of the raiyats require for their own purposes an authoritative official ascertainment and record of the same particulars as would be recorded under an order made under s. 101.

The particulars specified in s. 102, when recorded and compiled under s.103, amount to a "record of rights" as contemplated in ch. X of the Act, and therefore the proceedings of the Revenue Officer settling the rent under s. 103,are legal and not void for want of jurisdiction.

Per pariter, J.—Material difference between the old s. 103 of the Bengal Tenancy Act, and the present section is that under the former the Revenue Officer recorded the particulars specified in s. 102, *i.e.* all the particulars, since no option was given to the applicants to select among those particulars, which under the present section, the applicants can select. 7 C W N 33=30 Cal 339 Ref.

Shudhendu Narain Acharja Chowdhury v Tarini Kanta Nath. 1 C L J 239=9 C W N 504=32 Cal 518.

358.—Ss. 101 (2) (d) 104, Sub-S. (2), 107—Record-of-rights—Fixing fair rent—Contract before record-of-rights to prevail.

Bengal Acts-(Tenancy Act VIII of 1885)-S. 101-*Concld.*

In a Government *khas mahal*, the defendant was an under-tenant of the plaintiff. By a contract made previously to the record-of-rights, the defendant had agreed to pay to the plaintiff rent at Rs. 10-2-0. The Revenue Officer fixed the fair rent payable by the defendant at Rs. 12, in preparing the record-of-rights.

Held, that, under S. 104 of the Bengal Tenancy Act, the Revenue Officer had jurisdiction to settle a fair and equitable rent, that his decision had the force of a decree and was *res judicata* between the parties. and that the plaintiff was entitled to a decree at the rate of Rs. 12. 1 C L J 310 Ref: **Girish Chandra Biswas v Indra Kumar Kaibarta 9 Ind Cas 360.**

859.-Ss. 101,167-Rent charge-Purchase of the tenure by charge-holder in execution of his rent decree—Subsistence of the charge—Intention to keep the charge alive.

That the landlord when he made the purchase in execution of the rent decree might be taken to have become absolutely entitled to the property and it followed from sec 101 Transfer of Property Act, that the landlord's charge for rent which was for his benefit continued to subsist after his purchase.

That the plaintiff (mortgagee) might be regarded as a second mortgagee. **S M Meher Unnissa v Sham Sunder Bhuiya. 6 C W N 834.**

360.—Bengal Tenancy Act (1885) Ss. 102, 106 108—Powers of settlement officers—Record-of-rights.

A Settlement Officer has no power, under the Act, to entertain any dispute between the persons interested in neighbouring estates as to the title of any land. **Norendro Nath Roy Chowdhry v Srinath Sandel 19 Cal 641.**

Notes.—Fol: 19 Cal 643. Ref; 21 Cal 378.

361.—Ss. 102 and 101—Record-of-right—power of Revenue Officer to declare land claimed as lakhiraj liable to rent—Held by the Full Bench—in preparing a record of-rights under section 102 of the Bengal Tenancy Act a Revenue Officer is not competent to determine the validity of rent free titles set up by persons occupying lands within the area under enquiry

Bengal Acts-(Tenancy Act VIII of 1885)-S. 102 *Contd.*

so as to resume such lands and to declare them liable to settlement of rent. 17 Cal 721, referred to. **Secretary of State for India v Nitye Singh. Secretary of State for India v. Baikunt Nath Prodhan. Secretary of State for India v. Ram Taruck Das 21 Cal, 38.**

362.—Power of Settlement Officer—Decision of Special Judge—Res judicata—Question whether land is mal or lakhiraj.

The plaintiff had been proprietor of an estate which was sold for arrears of Government revenue and repurchased from the then purchaser by the plaintiff in 1886. He applied under Ch X of the Bengal Tenancy Act for the measurement of the estate and the preparation of a record-of-rights, and the Revenue Officer deputed for these purposes found that a portion of the estate held by the defendant was mal land, though it was held as lakhiraj under certain sanads, and as he also found that no rent had ever been paid for it, it was entered on the record-of-rights as mal land held under those sanads as lakhiraj. The Special Judge, on appeal by the plaintiff, held that the land, having been found to be mal, should have been entered as mal land unassessed with rent. In a suit to have the land assessed with rent, it was found that the sanads, under which the defendant claimed to hold, were granted not by any predecessor, in title of the plaintiff, and were of a date anterior to the Permanent Settlement. *Held* (reversing the decision of the lower Appellate Court) that the Special Judge had no jurisdiction to determine whether the land was mal or lakhiraj, and that his judgment as to its being mal did not therefore operate *as res-judicata*. 21 Cal 38, referred to 17 Cal 721, distinguished. The case was remanded for a finding whether the land was mal or lakhiraj. **Karmi Khan v Brajo Nath Das 22 Cal, 244.**

Notes:—Dist: 13 C W N 407. Fol: 25 Cal 167. Ref: 12 C W N 528.

363.—"Every settlement of rent or decision of a dispute by a Revenue Officer"—Act VIII of 1885 (Bengal Tenancy), ss. 102, 104—Jurisdiction of Settlement Officer—Decision as to *Lakhiraj* title.

Bengal Acts-(Tenancy Act VIII of 1885)-S. 102-*Concld.*

As the words "every settlement of rent or decision of a dispute by a Revenue Officer," in s. 9, Act III of 1898 (Bengal), amending Act VIII of 1885 (Bengal Tenancy). can apply only to those cases. which the Revenue Officer has jurisdition to try, and as, under Act VIII of 1885, a Settlement Officer has no jurisdiction to decide whether a land is *Lakhiraj* or otherwise (*vide* s. 104), a decision of such Settlement Officer that a particular land is not *Lakhiraj* has not the force of a decree of a Civil Court, and is not final between the parties. **Rada Kishore Manikya v Dirganath Bhuttacharjee 32 Cal 162.**

364.—Bengal Tenancy Act (1885) S 103—Powers of an executive officer-Record-of-rights.

An executive officer has no power while acting under S. 103 of the Act to determine the boundaries between conterminous estates as to which a *bona fide* controversy exists between the owners of such estates. 19 Calc 641, relied on.

Bidhu Mukhi Dabi v. Bhugwan Chunder Roy Chowdhry. 19 Cal 643.

Notes:—Ref: 21 Cal 378.

365.—Bengal Tenancy Act s 189—Proceedings under s. 103 of the Bengal Tenancy Act—Code of Civil Procedure (1882)—Review of judgment.

Proceedings taken under s. 103 are suits between landlord and tenant within the meaning of s. 148 by virtue of the rules framed under s. 189 of the Bengal Tenancy Act; therefore the provisions of the Code of Civil Procedure relating to review of judgment are applicable to such proceedings. **Achha Mian Chowdhry v Durga Churn Law. 25 Cal 146=2 C W N 137.**

Notes.—Dist: 28 Cal 28; 30 Cal 339. Ref: 33 Cal 837=4 C L J 138; 7 C L J 152.

366.—Ss. 103, 111-Ss. 11,12, C. P. C. 1882—Suit for possession and mesne profits—Pendency of proceeding before Revenue Officer—Amended by Act III of 1898, *B. C.*—Civil Court's jurisdiction.

The pendency of a proceeding before a Revenue Officer under s. 103, Bengal Tenancy Act is no bar to the maintenance of a suit, in a Civil Court, for possession and mesne profits, in

Bengal Acts-(Tenancy Act VIII of 1885) S. 103-*Contd.*

respect of certain lands, of which a survey and preparation of record-of-rights have been ordered under Ch. X of the Act. (25 Cal 146, Dist).

Troylokhyanath Bose v Macleod. 28 Cal 28.

367.—Ss. 103 *a*, (2), 103*b*, 104*a*. 104—Entry in a record of rights-Rebutable presumption.

Where in a certain khewat finally framed and published under S. 103A (2) of the Bengal Tenancy Act it was stated that certain persons were joint holders of a tenure.—*Held*, that the entry was correct until the contrary was proved and that this presumption was rebutted when it was shewn that the tenants had for 60 years separately held possession of their respective plots on payment of separate rents. **Rajnarain Mitra v Anant Tarai 10 C W N 908.**

368.—S.103A. 111A—Draft record of rights objection to—Entry made on objection final—Publication of recbrd of rights—Presumption as to correctness of entry—Suit to declare entry erroneous—Limitation—Limitation Act, Sch. II, Art 14—Decree not produced—Recital in later decree produced, if evidence.

A suit by a party whose objection under S. 103 A. Bengal Tenancy Act, to an entry in the draft record of rights has been rejected by the Revenue Officer for a declaration of his rights is not governed by Art, 14, Sch. II of the Limitation Act. The order rejecting the objection under S. 103A. Bengal Tenancy Act, having no finality is not an order of a Government officer within the meaning of Art. 14, Sch. II of the Limitation Act. Further the final publication of the record of rights merely raises a presumption of the correctness of the entry and it is not necessary to bring a suit to avoid a presumption. Nature of remedy under S.111 A of the Bengal Tenancy Act discussed. 30 Cal 20 followed. 28 Cal 676 referred to. *Semble*—The recital of the purport of a previous decree not produced, in a later one which has been produced is evidence.

Ramgulam Singh v Bishnu Pargash Narain 11 C W N 48.

369—S. 103—Chap X—Record-of-rights—Khewat—Prima facie evidence.

If there is no settlement of rent under Chap

Bengal Acts-(Tenancy Act VIII of 1885) S. 103-*Contd.*

X of the Bengal Tenancy Act the entry in the record of rights, if it was duly published would be only *prima facie* evidence in favour of the landlord—evidence which may be rebutted by the tenant. **Abdul Rasheed v. Jogesh Chundra Roy. 11 C W N 153.**

370.—Secs. 103 A, 104 E, 104 H and 111A—Rent suit for judicial order—Record of rights—Res-judicata.

An order striking off a petition of objection under section 103 A of the Act for default is not a judicial order; nor does not it operate as *res-judicata* in a subsequent suit for rent brought by the objector, against the recorded tenant.

The first part of section 111 A of the Act prohibits suits which seek to take undue advantage of mere technical defects in the procedure leading up to or involved in the settlement proceedings.

The section further prohibits the alteration of rent once settled except to the extent was allowed by section 104H, and the proviso, in virtue of which suits of a declaratory nature may be brought, cannot be read as prohibiting suits for the recovery of arrears of rent alleged to be due from tenants.

Section 104H of the Act is designed mainly to safeguard the Government revenue and to attach reasonable finality to the fixation of the rental assets upon which the assessment of revenue is based. It does not bar a suit like the present brought against the recorded tenant for rent due. (28 Cal 471 Fol.). **Nasarulla Mia v Amiruddi 3 C L J 133.**

371—S. 103 (b)—No limitation as to the nature of the suit—Presumption as to correctness of entry.

There is no limitation as to the nature of the suit to which the provisions of S. 103 (b) apply. The presumption as to the correctness of the entries in the record of rights will operate even in a suit to declare the entries incorrect. **Takhi Sahu v. Tasi Munda. 13 C W N 111. 9 C L J 83=1 Ind Cas 689.**

372—S. 103 (b)—Presumption, scope of:

The presumption under S. 103 (b) of the Bengal Tenancy Act is a presumption that the

Bengal Acts-(Tenancy Act VIII of 1885) S.103-*Contd.*

entries were correct at the time of the preparation of the record.—**Luchmi Pershad v Ekdeshwar Singh. (1906), 13 C W N 181.**

373—Ss. 103 B., 104-F.—Temporarily settled estate—Record of-Rights—Settlement of rent—Entries, if final or only presumed to be correct.

When settlement of rent has been made under Part 11 of Chap X of the Bengal Tenancy Act, no evidence is admissible to prove that a different rate of rent is payable from that entered in the rent roll, such entries being conclusive under S. 104-F. **Ambica Charan Chakravarti v Joy Chandra Ghosh. 13 C W N 210 =4 Ind Cas 470.**

374.—Record of rights,entry in, presumption —Bengal Tenancy Act (VIII of 1885), Sec. 103B —Antecedent evidence—Chitti bandobasti, entry based on, if to be proved.

Evidence of facts,documentry and oral, of a date prior to that of the publication of the record of rights, is admissible and should be taken into consideration in determining whether the presumption under section 103 B of the Bengal Tenancy Act as amended has been rebutted or not.

The fact that an entry was made in the record of rights is not sufficient to save the person relying on the entry from the necessity of producing and proving a *chitti bandobasti* on which the entry was based and by which he held settlement as a raiyat. **Sheonandan Persad Sukul v Bacha Raut. 9 C L J 284= 4 Ind Cas 54**

Notes.—Rel. on. 5 Ind Cas 266.

375,—S. 103 B—Presumption-Record of rights, entry in and publication of.

The presumption referred to in S.103B of the Bengal Tenancy Act is applicable to a suit which has been instituted before the publication of the record of rights in which the entry is contained. **C R Macdonald v Babu Lal Purbi. 4 C L J 519.**

Notes.—Ref: 13 C W N 1149 F B. Foll; 13 C W N 148,

376.—Ss. 103-*B* (3), 106-Record-of-rights—Presumption of correctness—Establishment of contrary—*Onus*—*Mal*—*Malik*—Limitation—

Bengal Acts-(Tenancy Act VIII of 1885)-S. 103-*Concld.*

Court closed on last day of period for bringing suit under S.106-Institution of suit on re-opening —Saving of limitation.

In a record-of-rights, *mal* lands may be recorded as *malik*, in the sense that lands which are part of the revenue-paying lands of an estate are held rent-fee.

Where a suit is instituted under S. 106 of the Bengal Tenancy Act. the plaintiff has not only to start a *prima facie* case, but to *prove by evidence* that the entires in the record of rights are incorrect.

When a fixed period is given to do a certain act, and the person bound to perform it, is, from no act of his own but from some act or order of the Court, prevented from carrying it out, he gets the advantage of the next open day. Therefore, where a record-of-rights was finally published on September 25, 1907, and a suit under S. 106 of the Bengal Tenancy Act was instituted on January 2, 1908, *Held*, that the suit was in time, as December 25th to January 1st were holidays. 18 Cal 231, Fol.

Lachmi Narain Marwari v Sukhraj Rai.
9 Ind Cas 181.

Bengal Tenancy Act sec. 103 B—See Chhota Nagpore Tenancy Act s. 164.
13 C W N 111.

—s. 104.

See (1) Appeal—Acts-Bengal Tenancy Act. Case No. 37.
17 Cal 326.
(2) Special or Second Appeal—Orders subject or not to Appeal.
(3) Superintendence of High Court—Civil Procedure Code, s. 622.
(4) Valuation of Suit—Appeals.

377.—S.104 and ss. 38, 58, sub-s. a cl. (a), Ch. X s. 101, sub-s. 2 cl. (a)—Ancient holdings—Additional rent for excess lands—Onus of proof—Permanent deterioration of lands—Liability to pay enhanced rent——Duty of Settlement Officer.

S. 104, sub-s. (2), is subject to the provisions of s. 54 of the Bengal Tenancy Act. The mere fact that on a measurement made by a zemindar under the authority of government given under

Bengal Acts-(Tenancy Act VIII of 1885)-S. 104-*Contd.*

Chapter X of the Act, it is found that the tenants generally are in possession of lands in excess of the areas entered in his zemindari papers and their rent receipts, does not necessarily prove that he is entitled to additional rent for the excess areas. In case of very old holdings where the boundaries are not actually ascertained by actual survey, it would be incumbent upon the zemindar who seeks an enhancement of rent on excess lands very many years after the original settlement of the ryots to show that the lands held by the tenants fall within that description; that is to say, that they are in excess of the lands originally let to them in consequence of some encroachment or some alluvial increment, or that the previous settlement was made on the basis of a measurement and the rates of rents as applied to the area then determined, while on a fresh measurement made by the same length of measure it has been found that he is entitled to receive additional rent which by carelessness or neglect or some other cause he had hitherto lost. A more liberal interpretation should be put upon the word "permanently" and it should be construed with reference to existing conditions. A deterioration is permanent even if it is capable of being removed by the application and skill. It is the duty of the Settlement Officer while determining the liability of additional rent, to consider the length of time during which the tenancy has lasted without dispute as to rent or area. No doubt it is only an occupancy ryot who is authosised by the Act to bring a suit under section 38, but the principles laid down in that section ought clearly to be taken into consideration in all proceedings for the settlement of rent, whatever the status of the ryots. **Gouri Pattra v Reily.**
20 Cal 579.

Notes.—Rel· 10 C W N 46. Dist: 2 C L J 125. Ref: 5 C L J 538.

378.—Bengal Tenancy Act (VIII of 1885) s. 104 cls. 2 & 3, s. 105, 107—C. P. Code, 1882 s. 13-Objection—Dispute.

A Settlement Officer of his own motion settled a fair and equitable rent on the lands of the plaintiffs and other tenants under s. 104 cls. 2 & 3 of the Bengal Tenancy Act. The plaintiff objected under s. 105 cl. (1) of the same act to the records containing the enhancement of the rent. The objection was disallowed and the record was

Bengal Acts-(Tenancy Act VIII of 1885) S. 104 *Contd.*

published. *Held* that the proceedings of the Settlement Officer being of an executive rather than of a judicial character did not operate as res judicata under s. 13 C. P. Code or as a final decree under s. 107 estopping the plaintiff from having the same matters tried by a regular Civil Court. The words objection and dispute are not synonymous terms. **Secretary of State for India v Kajimuddy. 23 Cal 257.**

Notes —Dist; 29 Cal 252.

379.—Ss.104 (2), 107–Enquiry by settlement officer-Order-Force of decree-Res judicata.

A decision in a proceeding under the second clause of S. 104 of the Bengal Tenancy Act, in consequence of an application made by a landlord for the settlement of rent has the effect of a decree and the matters decided by such a decision can only be re-opened on an appeal to the Special Judge 23 Cal 257 dist. **Durga Charan Lal v Basir Mandai. 6 C W N 238= 1 C L J 310=29 Cal 252,**

Notes —Ref: 12 C W N 122.

380.—Ss. 104 to 108, 117, 118, 119, 145, 158, 189—Application under s. 103–Power of Revenue Officer to make survey and prepare Record-of-Rights without order of Government under s. 101.—S. 13, C. P. C., 1882 (=s. 11, new Code)—Proceeding under s. 103, Bengal Tenancy Act, 1885—Decision of Revenue Officer—Effect in subsequent suit for title and ejectment.

Ss 104 to 108, Bengal Tenancy Act, 1885, (before its amendment by Act III of 1898) applied to proceedings instituted under s. 103, in the same way as to proceedings taken under s. 101. On an application made by a proprietor or tenant of an estate under s. 103 of the Act for the preparation of a record-of-rights the Revenue Officer is competent to make a survey and measurement of the land (without the orders of Government under s. 101) and the procedure to be adopted by him shall be the same as in the case of a proceeding under s. 101 of the Act. In order to constitute *res judicata* under s 13 (C P C 1882), the issue with respect to which the rule is to operate must have been heard and finally decided by a Court of jurisdiction competent to try the subsequent suit in which it is sought to

Bengal Acts-(Tenancy Act VIII of 1885) S 104 *Contd*

raise the same issue. In a proceeding under s. 103, Bengal Tenancy Act, 1885, there being a denial of the relation of landlord and tenant either by the landlord or the tenant, it is absolutely necessary for the Revenue Officer to deal with the question in order to enable him to make the necessary entries under s. 102 of the Act; but the decision of the Revenue Officer is not *res judicata* in a subsequent suit by the landlord in a Civil Court for title and ejectment. 17 Cal 721 Fol; 2 C W N 491, 20 Cal 249, 27 Cal 167 Dist.
Dharani Kanta Lahiri v Gaber Ali Khan. 30 Cal 339=7 C W N 33.

Notes —(Rel. 32 Cal 518=9 C W N 504= 1 C L J 239)

381.—S, 104-Every settlement of rent or decision of a dispute by a Revenue Officer.

The words 'every settlement of rent or decision of a dispute by a Revenue Officer' can only apply to those cases which the Revenue Officer has jurisdiction to try and therefore such decision does not operate as a decree of a Civil Court.
Radha Kishore Manikya v Durganath Bhutta Charjee. 32 Cal 162.

382.—Ss. 104 (2) 107—Before amendment by Act III of 1898 B C—Decision of Settlement Officer settling rent, nor 'res judicata' but evidence.

Where a settlement of rent was made under S. 104 (2) of the Bengal Tenancy Act before its amendment by the Amendment Act of 1898, the decision of the Settlement Officer had the effect of a decree under S 107 of the Act (before amendment) and is evidence in a suit for a rent subsequently bought by the landlord even though it may not operate as *res judicata*. **Mohin Chandra Roy v Srimati Kali Tara Debyee. 11 C W N 1028.**

—s. 105.

See (1) Res Judicata — Competent Court —Revenue Courts.
(2) Special or second appeal—orders subject or not to appeal.
(3) Superintendence of High Court—Civil Procedure Code, s 622.

383—Special Judge, jurisdiction of—Publication of record-of-rights—Bengal Tenancy Act, ss. 55, 105, 106.

There is nothing in s. 108 of the Bengal Tenancy Act which restricts the jurisdiction of a

Bengal Acts-(Tenancy Act VIII of 1885) S. 105-*Contd.*

Special Judge to deal only with matters of objection taken after publication of the record-of-rights. **Durga Charan Laskar v Hari Churn Dass 21 Cal 521.**

384.—Ss. 105, 106—Res judicata—Settlement—Proceeding—Entry of rent.

S. 105 of the Bengal Tenancy Act lays down that during the pendency of the draft publication any person affected by an entry in the record may raise an 'objection' with regard to it, which the Revenue officer is to 'receive' and 'consider' and dispose of in a summary manner. From an order disposing of such an objection there is no appeal and no second appeal, and the order cannot have the effect of res judicata. A dispute under S. 106 is to be 'heard' and 'decided' by the Revenue Officer under the procedure laid down in the Civil Procedure Code for the trial of suits and is subject to appeal and second appeal, and an order disposing of such a 'dispute' will have the effect of res judicata. 24 Cal 462 considered and explained. **Karban Ali v Jafar Ali. 5 C W N 798=28 Cal 471.**

385.—S. 105 Ss. 103 A, 106A and 109A.

A settlement officer settled a fair rent, and the Special Judge on appeal confirmed that decision. *Held*, that under S. 109 A. no second appeal lay. **Ram Bishen Raut v Rajaram. 33 Cal 832.**

386.-Chapter X Secs 105,109 (3)-Second appeal—Decision settling a rent meaning of—Sections, 30, 37, 52, 104, 109, 113—Act III (B C) of 1898.

The words "not being a decision setting a rent in section 109 (3) of the Bengal Tenancy Act refer not only to a decision by which existing rents are varied, but also to a decision by which existing rents are maintained as fair and equitable. The words "settle a fair and equitable rent" in section 105 (1) do not exclude a case in which the existing rent is not varied.

When, therefore, a Special Judge, on appeal from the decision of a Settlement Officer on an application by the landlord under section 105 (1) holds that no case has been made out for an enhancement of rent on any of the grounds stated in the application.

Held, that this is a decision settling a rent within the meaning of section 109 (3) of the Act and consequently no second appeal lies to the High Court from this decision.

Sections 37, 105 and 113 of the Act discussed with reference to the question as to what is meant by a settlement of rent. 16 Cal 596; 17 Cal 326; 25 Cal 146 Ref). **Rameswar Singh v Bhooneswar Jha. 4 C L J 138= 33 Cal 837.**

Notes.—Ref: 13 C W N 1149 F B. Dis: 5 C L J 532.

387.—Ss. 105, 115, 50, 102 (b), 103-A, 103-B, 106, 107, 109-A, 111—As amended by Act III (B C) of 1898, and before amendment by Act I (B C) of 1907—Record-of-rights, final publication of—Landlord's application for settlement of rent of tenant entered as occupancy raiyat—Raiyat if may plead fixity of rent under s. 50—Question of status if may be raised in such proceeding—Second appeal.

In proceedings by the landlord for settlement of rent under s. 105 of the Bengal Tenancy Act as it stood before its amendment by Act I (B C) of 1907, the tenants were in practice allowed to take objections which would properly come under s. 106 of the Act; and when, in such a proceeding, the lower Courts decided any such matter, a second appeal would be entertained by the High Court. A tenant in such a proceeding is entitled to the benefit of the presumption of fixity of rent arising under s. 50 of the Bengal Tenancy Act from proof of uniform payment of rent for twenty years, s 115 of the Act not displacing such a presumption in a proceeding under s. 105 or s. 106. *Quere*:—Whether the words "recorded under this chapter" in s. 115 mean "recorded after all chances of amendment of the, record under any other provision of the chapter are over, including a suit as contemplated by s. 111." The view expressed in 26 Cal 617, that "s. 115 contemplates a case in which a raiyat is seeking to get the benefit of the presumption for a period subsequent to the time when the record-of-rights was framed" disapproved, as being opposed to the plain terms of the section. **Pirthi Chand Lal Chowdhry v Sheik Basarat Ali. 13 C W N 1149 F B=10 C L J 343= 3 Ind Cas 449=37 Cal 30.**

388.—Secs. 105, 106, 108, 109A (3)—Record of rights—Decision settling rent—Appeal.

Bengal Acts-(Tenancy Act VIII of 1885) S. 105-*Contd.*

A draft record of-rights was published on the 31st March 1903. the parties being asked to lodge their objections, if any, within one month. No objection was lodged and the record was finally published on the 9th June 1903. The Settlement Officer then proceeded to settle fair and equitable rents. and on an application by the tenants, dated 14th August 1903, altered the record as regards some of them entering their lands as 'lakheraj' instead of 'mal'. He refused their prayer to be recorded as raiyats at fixed rates of rent. He also imposed a limitation as regards enhancements of rent.

Held, that the Settlement Officer had no jurisdiction, in the absence of the presentation of a plaint on a regularly stamped paper. to make the alterations in the record. **Sambhu Chandra Hazra v Purna Chandra Pal. 7 C L J 103= 12 C W N 122=35 Cal 176.**

389.—Secs. 105, 109 as amended by Act III (B C) of 1898—Civil Court, jurisdiction—Act creating new jurisdiction—Interlocutory order.

Under section 109 of the Bengal Tenancy Act, as amended by Act III (B C of 1898) and as it stood before the changes made by the Eastern Bengal and Assam Tenancy Amendment Act of 1908 came into force the jurisdiction of the Civil Court is ousted only in respect of any matter which is or has already been the subject of a proceeding under any of the four sections 105 to 108. 8 C L J 322, 35 Cal 1013 Diss.

A proceeding under section 105 of the Bengal Tenancy Act, which deals solely with the question of fair and equitable rent, does not bar a Civil suit in which questions are raised as to the area and other incidents of the holding of the tenant.

In the case of an Act which creates a new jurisdiction, a new procedure, new forms or new remedies there prescribed and no others must be followed.

When a party has elected to take the benefit of an interlocutory order, he cannot at the same time by an appeal against such order nullify the final decree which he omits to challenge directly. When a final decree has been made, the party aggrieved, ought, at that stage to prefer an appeal against that decree, as in such appeal the propriety of an interlocutory order also may be questioned. But this principle does not bar a civil suit for determination of questions of area and title of a holding because an order under the settlement of fair and equitable rent has been allowed to become final. **Pandab Dowari Das v Ananda Kishun Chakrabutty. 12 C L J 195=14 C W N 897= 7 Ind Cas 102.**

390—Ss. 105 and 106—Maintainability of suit to avoid intermediate tenures by lessee from Government—Conditions of the settlement—Record of rights, finality of.

The defendants were recorded in the *khatian* of the cadastral survey as intermediate tenure-holder. The plaintiff did not take the remedy mentioned in section 105 of the Tenancy Act. He subsequently took a settlement from the Government and is now the zeminder. In a suit by him to avoid the tenures of the defendants:

Held, that the suit is not maintainable. The settlement holder is bound by the terms of his settlement to recognise intermediate tenure-holders mentioned in the settlement papers.

Tapanidhi Raghunath Puri v Pitambar Gajendra. 5 C L J 67.

Notes.—Ref: 14 C W N 470.

391—Ss. 105, 106—Second appeal—Special Judge—Settlement Officer.

A second appeal may lie in a proceeding under section 106, but there is no right of second appeal in a proceeding for settlement of rents under section 105 of the Bengal Tenancy Act.

Where the Settlement Officer as well as the Special Judge tried matters coming under sections 105 and 106 of the Bengal Tenancy Act without discriminating them in their judgments, a second appeal lies.

A Special Judge has jurisdiction to hear appeals from the decision of a Settlement Officer in his district regarding dispute and settlement of rent relating to land outside the district but included in an estate recorded in the Collectorate books of the district.

The officer who entertained the dispute regarding settlement of rents having jurisdiction to do

Bengal Acts (Tenancy Act VIII of 1885) S. 105-*Contd.*

so, and the final orders having been passed by a person competent to do so. the irregularity in the intermediate proceedings not being material, did not affect the jurisdiction of the Settlement Officer who passed the final orders. **Kali Kishore Pal v Gopi Mosun Roy Chowdhry. 9 C L J 574=4 Ind Cas 62.**

Notes.—Ref: 14 C W N 897=7 Ind Cas 102= 12 C L J 195.

392—S. 105—Settlement of rent—Co-sharer landlord, maintainability of application by.

It is not competent to a co-sharer landlord to make an application for settlement of rent under either sub-section (1) or sub-section (2) of section 105 of the Bengal Tenancy Act. **Krishna Das Law v Poresh Sardar. 10 C L J 458= 3 Ind Cas 472.**

393—Ss. 105, cl (2). 52. 109-A Cl 3—Second appeal.

Where under s. 105, cl (2) fair rent was settled by the Settlement Officer, but on appeal the Special Judge dismissed the application *Held* a second appeal is not barred under s. 109-A, cl (3) of the Act.

Before the passing of the amending Act I of 1907 (B C), it was not open to the Court, in dealing with an application under s. 105, to consider the question whether or not the land was subject to rent. When the tenant took no independent step to dispute the entry in the record of rights by a suit under s. 106, it is not open to him to raise the question of his liability to pay any rent in answer to an application under s. 105.

An application under s. 105 of the Act is none-the-less an application under that section, even if a reference is made in it to s. 52 of the Act. 12 C W N 122; s. a No 2082 of 1906 unreported Fol.

Probarat Narain Singh v Murat Rai. 2 Ind Cas 263.

394—Ss. 105, 109 (3)—Second appeal.

When in a proceeding under S. 105, the Special Judge has held that the plaintiff has failed to establish his grounds for asking for a settlement of rent at a higher rate, no second appeal lies to the High Court.

When the lands of tenancy have been subdivided, if a question arises whether new tenancies

Bengal Acts (Tenancy Act VIII of 1885) S. 105-*Concld.*

have been created, the answer must depend upon the intention of the parties; no inflexible rule apart from intention can be laid down. 4 C L J 138; 33 Cal 837, Fol: 3 Ind Cas 306: 14 C W N 335; 11 C L J 56 Appr: 1 Ind Cas 4; 36 Cal 387; 13 C W N 411; 2 Ind Cas 415; 10 C L J 45: 13 C W N 962 Ref. **W M Grant v Ram Rakhar Bhagat. 6 Ind Cas 501.**

395—Ss. 105, 106, 109—Decision of matter under s. 106 given in proceeding under S. 105, whether *res judicata*.

A defence taken to an application under S 105 of the Act that a certain land is *lakheraj* is not the subject matter of an application made under S 105 or 106 within the meaning of S 109 as it stood before 1907; and a subsequent suit for declaration that the land was *mallik lakheraj* of the tenant-plaintiff is competent and not barred under S. 109.

If the tenant pleads a bar to the settlement of rent, which can properly come under S. 106, without any apparent objection by the landlord, who is making the application, the decision is a competent one, but is open to second appeal. But the decision operates as *res judicata* so far as the question under S. 105 is concerned, that is, the question of the settlement of rent, and does not operate as *res judicata* in regard to the question whether the tenant has a *mallik lakheraj*. **Misri Chowdhury v Rameshwar Singh Bahadur. 7 Ind Cas 71.**

—S. 105.

See Bengal Tenancy Act s. 50. Case No (208). **5 Ind Cas 453.**

—Ss. 105 & 106.

See Bengal Tenancy Act s. 50. Case No (197). **37 Cal 30 (F B).**

—Ss. 105, 106.

See Bengal Tenancy Act s. 50. Case No (206). **5 Ind Cas 160.**

—S. 106.

See (1) Res Judicata—Competent Court—Revenue Courts.

(2) Special or Second Appeal-Orders subject or not to Appeal.

(3) Superintendence of High Court—Civil Procedure Code, s. 622.

Bengal Acts-(Tenancy Act VIII of 1885) S. 106-*Contd.*

396—Ss. 106, 109 A—" Decision settling a rent"—Second Appeal.

The word "settling a rent" in s 106 are used in a technical sense and not in what might be their ordinary signification. They do not mean and include any decision upon the question what is or what ought to be the rent. They mean only a decision settling a rent in the sense of settling a fair and equitable rent in place of the existing rent. So a second appeal lies from the decision of a Special Judge in appeal deciding whether the rent payable was the one recorded in the Record of Rights or the one entered in the plaintiff's certificate of sale. 25 Cal 34 foll. **Ramani Pershad Narain Singh v Mahanth Adaiya Gossain. 31 Cal 380.**

397—S. 106—Bengal Tenancy Act, Chap. X —Record of rights—Alteration of entires—Regular suit, maintainability of—Special procedure—Secs. 106, 108,

No regular suit can be maintained for the alteration and correction of entries in a record of rights. The special procedure in sections 106, 108 of the Bengal Tenancy Act must be followed. **Jogendra Nath Roy v Krishna Pramada Dasi. 8 C L J 322=12 C W N 1032= 35 Cal 1015.**

Notes.—Ref. 3 Ind Cas 100.

398—Ss. 106, 109-A—Appeal from Order.

Where an appeal under s 109-A was dismissed for default, and a petition for revival of the appeal was filed, but was rejected.

Held, that S 588 of the Civ Pro Code 1882, does not apply to proceedings under s. 106 of the Bengal Tenancy Act.

S. 109—A sub sec (*3*) confines the power of the High Court to the hearing of second appeals and not appeals from orders either under s. 558 or 560, C P C. 12 C W N 888 Ref. **Mathura Nath Roy Choudhuri v Basanta Kumar Chakravarthi. 36 Cal 510=2 Ind Cas 572.**

399—s. 106 (before amendment)—Decision—Parties—*Res judicata.*

Plaintiffs initiated proceedings under sec. 106 of the Bengal Tenancy Act against the landlord and the Defendants Nos. 2 to 9 who claimed to be rival tenants of the land, to have their names recorded as tenants in the settlement proceedings. The Settlement Officer held that the Plaintiffs were the tenants and made an order in Plaintiffs' favour. On appeal by Defendants Nos. 2 to 9, and not by the landlord, the Special Judge reversed the decision and ordered that the names of Defendants Nos. 2 to 9, who he held were the tenants, be registered The Plaintiffs thereupon brought the present suit to have their rights declared as tenants of the land: *Held*—That the previous decision of the Special Judge not having been a decision between the parties, *i.e.*, as between the tenants on the one hand and the landlord on the other, it could not operate as *res judicata* in the present suit **Mohunt Jagannath Ramanuj Das v. Chandra Kumar Bose. 5 C. W. N. 421.**

Bengal Acts-(Tenancy Act VIII of 1885) S. 106 *Contd.*

400—Ss 106, Sub-S 2, 188—Zerait—Admission subsequent to 2nd March 1883—Joint landlords—"Anything which the landlord is under this Act required or authorized to do."

The mere fact of a certain land having been taken lease of as Zerait by the defendant would not give to that fact any evidentiary value when the letting was not-as s. 120. Sub-S 2, requires to make it—evidence before the 2nd day of March 1883. One of the several joint landlords instituted proceedings under Ch X of the Bengal Tenancy Act disputing certain entries made by the Settlement Officer: *Held*—That disputing an entry made in the course of a record-of-rights proceeding under S 106 of the Act does not come within the meaning of the words "anything which the landlord is under this Act acquired or authorized to do" as used in S. 188. **Sher Bahadur Singh v Mackenzie. 7 C W N 400.**

Notes.—Ref: 1 C L J 456; 13 C W N 135: 10 C L J 458; 13 C W N 661. Dist: 9 C L J 15.

401—S 106—Bengal Tenancy (Amendment) Act—S 9 Effect—Revenue officer, decision of, on question of title—Decision before amendment—Finality,

The effect of s. 9 of the Amending Act III of 1898 B C is to make final the decision of a Revenue officer, made under s. 106 of Act VIII of 1885 before the commencement of the Amending Act only in regard to disputes which could be

Bengal Acts (Tenancy Act VIII of 1885) S. 106-*Contd.*

decided by the Revenue officer under s. 106 of Act VIII of 1885 A question of title between rival purchasers of a tenure could not be dealt with and determined under s 106 of Act VIII of 1885, as it stood before its amendent by Act III of 1898 B C. 21 Cal 378;27 Cal 364 fol. A decision on such a question passed by a Revenue Officer before the commencement of the Amending Act does not prevent the question from being now litigated in the Civil Court. **Donay Dass v. Keshub Pruhti. 8 C W N 741.**

402—S. 106—Suit between rival proprietors —Scope of suit—Question of possession or title—Limitation——Limitation Act (XV of 1877). S. 22—Substitution of executor in place of supposed legal representative—New defendant.

In a suit under S 106 of the Bengal Tenancy Act certain lands were alleged to have been erroneously recorded as part of *mouzah* P, and it was prayed that the record-of-rights be amended and the disputed lands entered as part of plaintiff's own *mouzah* R from the record of which the same had been omitted. This suit was instituted more than two months after the final publication of the record of-rights for *mouzah* R. but within two months of the final publication of the record of rights for *mouzah* P.

Held, that the suit was not time barred.

In such a suit the Reveue Officer and in case the suit is transfered to the Civil Court, the Civil Court is confined to question of possession and cannot be asked to adjudicate upon the title of rival proprietors.

The suit was originally instituted against the person whose name was entered in the record-of rights. But it appeared that this person was the widow of the deceased proprietor, and her name was entered as representing the estate of her deceased husband.

Held, that the executors to the estate of the deceased proprietor who were substituted as defendants were not new defendants within S. 22 Limitation *Act*. **Mohunt Padmalay Ramanuja Das v. Lakmi Rani. 12 C W N 8.**

403—S. 106—Record-of rights—Applications to correct entry made before Amending Act of 1898-Reference to Civil Court under Amending Act

Bengal Acts-(Tenancy Act VIII of 1885) S 106 *Contd.*

—Jurisdiction—Interpretation of Statute. Change of procedure during pendency of proceeding.

A record-of-rights having been prepared in 1896 the landlord applied in 1897 for the correction of an entry under S, 106 of the Bengal Tenancy Act as it then was. After the Amending Act of 1898 was passed the case was referred to the Civil Court under the proviso to S. 106 of the Act as amended.

Held, that the Court has jurisdiction to try, notwithstanding that the proceedings were commenced prior to the passing of the Amending Act which first empowered a reference to the Civil Court.

In matters of procedure, an Amending Act would affect legal proceedings instituted under the repealed provision **Rahimuddin Sarkar v. Jagat Kishore Acharya. 12 C W N 987.**

404—As amended by Act III of 1898-Trespasser in possession of holding—Name erroneously recorded—Suit to declare him trespasser under S. 106—Amending of entry.

The terms occupier" and "occupant" in cls, (*a*) and (*c*) of S. 102, presumably added to cover the case indicated in clause (*i*) added at the same time. A purchaser of a non transferable occupancy holding being a trespasser is not entitled to have his name entered in the record of rights under cl (*a*) or (*c*) of S. 102 of the Bengal Tenancy Act

Where such a person's name was recorded, *Held*, that the Revenue Officer proceeding under S. 106 acted properly in adding a note to the effect that he was a trespasser. **Umedulla Sardar v. Ramchandra Bhaduri. 14 C W N 812.**

405—S. 106-Suit under proper scope of—Suit for ejectment if can be brought under this section.

Where plaintiff not only seeks for the correction of an entry in the record-of-rights in favour of the defendant but also for recovery of possession from the latter, who, he concedes, has been in possession from before the date of final publication; *Held*,—That these reliefs could not properly be secured by suit under S 106 Bengal Tenancy Act and the proper course for the plaintiff was to bring a civil suit.

Bengal Acts-(Tenancy Act VIII of 1885) S. 106-*Concld.*

As between landlords of neighbouring estates the only question that can be raised in a proceeding under S. 106 is as to possession at the date of the final publication. 10 C W N 8 (1907); 12 C W N 1032 (1908), Ref. **Kalisundari Debya v. Girija Sankar Sanyal.** **15 C W N 974.**

406—Ss. 106, 109, 111 (a)—Record-of-rights—Suit under S. 106, whether exclusive remedy—

Although it may be that a suit solely for alteration and correction of certain entries made in a record of rights would not lie in the Civil Court, yet a suit in which other reliefs also are claimed is maintainable in Civil Court. 12 C W N 1032;35 Cal 1013;8 C L J 322 dist;6 Ind Cas 217; 12 C L J 107; 14 C W N 884, 7 Ind Cas 102; 14 C W N 879 Appr. **Mukti Nath Thakur v Honorable Maharaja Rameshur Singh Bahadur** **7 Ind Cas 340.**

407—S. 106—Suit for declaratory decree—Court Fees Act, VII of 1870, Sch. II, Art. 17, cl (3) and S. 7, sub-sec. IV, cl. (c).—A suit under s. 106 of the Bengal Tenancy Act is a suit for a declaratory decree, and the Court-fee payable is Rs 10, in all cases. 5 Ind Cas 141; 11 C L J 158, Diss. **Satis Chandra Giri Mohant v Gopal Chandra Rai,** **7 Ind Cas 627 = 12 C L J 638.**

408—S. 106 — Decision in Settlement proceedings—Finality—Civil Court, jurisdiction of, in re-opening matters decided.

Where proceedings have been taken before a Settlement Officer, in respect of any matter under S. 106 of the Bengal Tenancy Act, a Civil Court is precluded from entertaining a suit concerning such matter. 12 C W N 1032, 8 C L J 322, Ref: **Kamlanand Singh v. Prem Lal Ganesh,** **9 Ind Cas 651.**

Bengal Acts—S. 106—Suit under — Fresh suit in regular Civil Court. **See** Civ. Pro Code, (1882), **9 Ind Cas 4.**

Bengal Tenancy Act—S. 106—Decision of Settlement Officer—Res judicata—Decision between parties:—**See** Res judicata. **8 C W N 421.**

Bengal Tenancy Act, S. 106.

See Bengal Tenancy Act, S. 50, Case No. (209). **6 Ind Cas 217.**

Bengal Acts-(Tenancy Act VIII of 1885) S. 107-*Contd.*

—S. 107.

See (1) Res Judicata — Competent Court—Revenue Courts.

(2) Special or Second Appeal — Orders subject or not to Appeal.

409—S. 107—Civil Procedure Code (1882), Section 13-Ex parte decree—Party against whom decree pleaded as bar, exparte—An ex parte decree may not be res judicata:—

In this case the person against whom the plea was taken was *ex-parte* in the previous suit.— **Ashutosh Nath Ray v. Abdool,** **28 Cal 676. See also 24 All 138 and 10 C W N 839.**

Notes:—Ref: 6 C L J 670.

410—Bengal Tenancy Act (VIII of 1885) secs. 107, 109—Undisputed entry—Presumption of accuracy—Rebutted by decree—Res judicata.

An undisputed entry in a record of rights prepared under the provisions of Chap X of the Bengal Tenancy Act VIII of 1885 (before amendment) did not fall under sec. 107 of that Act. The presumption in favour of its accuracy raised by sec. 109 of the Act would be sufficiently rebutted by a decree passed in a contested suit between the parties. Sec. 109 of Act VIII of 1885 laid down a rule of evidence, and could not override the rules of res-judicata which are of general application. **Ghaneshyam Misser v. Padmanand Singh,** **1 C L J 134 = 32 Cal 336 = 9 C W N 610.**

Notes:—Ref: 10 C W N 274. Dist: 5 C L J 92.

411—Ss. 107, 109—Record of rights—Decision of Revenue Officer, uncontested proceeding—Effect of—Decree—Presumption of accuracy.—

The proceedings referred to in S. 107 of the Bengal Tenancy Act mean contested proceedings in which there is an adjudication on disputed points. The decision of a Revenue officer in an uncontested proceeding has not the effect of a decree under that section and the entry in the Record-of-rights pursuant to such decision cannot override the effect of a contested Civil Court decree between the same parties. The effect of such a decision and entry would be that, under S. 109 of the Act, there would be a presumption in favour of their accuracy until the contrary

Bengal Acts-(Tenancy Act VIII of 1885) S. 107-*Concld.*

was proved. The effect of S. 109 of the Bengal Tenancy Act which lays down a rule of evidence is not to override the rule of *Res judicata.*

Rajah Pudmanunda Singh v. Ghaneshyam Misser, 9 C W N 610=32 Cal 336 =1 C L J 134.

—S. 107.

See Bengal Tenancy Act, S.55. Case No.(233) 11 C W N 939.

—S. 108.

See (1) Special or Second Appeal — Orders subject or not to Appeal.
(2) Superintendence of High Court — Civil Procedure Code, s. 632.
(3) Valuation of Suit—Appeals.

412—Ss. 109, 110, O. 44 r. 3 (1882—Ss. 595, 596, 600)—Privy Council, leave to appeal—Certificate.

Under S. 98 (3) of Bengal Tenancy Act, a manager appointed under s. 93 of that Act has power to sell and mortgage.

The appointment of a manager does not take away from a co-owner his power of dealing with his own share.

Any interest which a mortgagee or a purchaser would acquire from a co-owner during the period of management would be subject to any charge on the estate that might be properly incurred by the manager during that period.

Amar Chundra Kundu v. Shoshi Bhushan, 8 C W N 225=31 Cal 305=31 I A 24.

413—S.109-A—Appeal from order of remand passed by a special Judge—C.P.C., s. 588.—

An appeal does not lie from an order of remand passed by Special Judge under the Bengal Tenancy Act. **Mothurchundra Majumdar v. Tarasunkar Ghose,** 7 C W N 440.

Notes:—Rel: 36 Cal 510.

414—S. 109, Cl 3—Appeal — Decision settling rent.—

Where the decision of the Judge does not settle a fair and equitable rent, but merely proceeds on the ground that there was no excess land and therefore no rent to be settled,an appeal lies. 4 C L J 138, dist: **Rajkumar Pratap Sahay v. Ram Lal Singh,** 5 C L J 538.

Bengal Acts-(Tenancy Act VIII of 1885) S. 109-*Concld.*

Notes: —Ref: 10 C L J 343 F B.

—S. 109 A.

See Bengal Tenancy Act S.106.Case No.(398). 36 Cal 510.

—S. 109 (3).

See Bengal Tenancy Act S.52. Case No. (226) 5 C L J 538.

—S. 109.

See Bengal Tenancy Act S.105.Case No.(386). 32 Cal 837.

—S. 109 A.

See Bengal Tenancy Act S.106.Case No.(396). 31 Cal 380.

—S. 109.

See Bengal Tenancy Act S.105.Case No.(389). 14 C W N 897.

—Ss. 109 & 109 A.

See Bengal Tenancy Act S. 55.Case No.(233). 11 C W N 939.

—S. 109 (a).

See Bengal Tenancy Act S.106.Case No.(406). 7 Ind Cas 340.

—S. 109 (3).

See Bengal Tenancy Act S.105.Case No.(394). 6 Ind Cas 501.

—S. 109 A (3).

See Bengal Tenancy Act S. 105, (2). Case No. (393). 2 Ind Cas 263.

—S. 109-A cl. 3.

See Bengal Tenancy Act S.50. Case No. (206). 5 Ind Cas 160.

415—S. 111—Agreement to pay additional rent for excess land—Suit for arrears.—

Where a tenant agreed to pay additional rent for excess land found in his possession, and a suit was brought for the recovery of such rent,—*Held* that such a suit is a suit for arrears of rent under S. 111 of the Bengal Tenancy Act, as being a suit for alteration of rent within the meaning of cl. (a) of that section, merely because, subsequent to the accrual of the rent, there have been Settlement proceedings under the Act, and the land has been measured accordingly.

Ramjan Ali v. Amjad Ali, 20 Cal 903.

Bengal Acts-(Tenancy Act VIII of 1885) S. 111-*Concld.*

Bengal Tenancy Act — Ss. 111, 111-A—Holding over—Acquiescence—Suit for *khas* possession—**See** Landlord and Tenant — Holding over. **3 Ind Cas 100.**

416—S. 111, Cl. (a)—'Suit for the determination of the status of any tenant,' meaning of—Suit for ejectment and mesne profits—Defence of tenancy—Applicability of section:—

S. 111, Cl. (a), of the Bengal Tenancy Act does not apply to a suit for ejectment and mesne profits on the ground that the defendant is a trespasser and where the allegation of the defendant that he is a tenant is altogether denied. It is not a suit for the determination of the status of any tenant within the meaning of the section.—

Troylokhyanath Bose v. Macleod, (1900) 28 Cal 28 at 31, 32.

417—S. 111-Arts. 14-120-Settlement of rent by Settlement Officer—Bengal Tenancy Act, S. 111—Suit for alteration of rent—Bengal Act I of 1895—Public Demands Recovery Act, S. 7—Certificate under—Suit to amend certificate—Nature of suit.—

Where the rent payable by a tenant is fixed by Settlement Officer after inquiry and the landlord is a ward of the Court of Wards, and a certificate is issued under S. 7 of Bengal Art. 1 of 1895, the suit by a tenant to correct the amount of rent mentioned in the certificate and to receive excess paid is really a suit for the alteration of rent under S. 111 of Bengal Tenancy Act and is governed either by Art. 14 or Art. 120 of the Limitation Act. **Ashutosh Nath Roy v. Abdool, 28 Cal 676.**

Notes.—Ref: 11 C W N 48; 5 C L J 670.

—S 111 A.

See Bengal Tenancy Act s 103A. Case No (368) **11 C W N 48.**

—Ss 111 & 111 A.

See Bengal Tenaney Act s 50. Case No (207) **5 Ind Cas 266.**

—S 111 A.

See Bengal Tenancy Act s 103 A. Case No (370) **3 C L J 133.**

—S 113.

See Bengal Tenancy Act s 105. Case No (386) **33 Cal 837.**

Bengal Acts-(Tenancy Act VIII of 1885) S. 113-*Concld.*

418.—S. 113—and ss 115, 104 (sub-ss 2 and 3), 113-Record-of-rights—Presumption as to fixity of rent-Settlement of fair and equitable rent—Enhancement for excess land-Enhancement for rise in price of crops.

The provision contained in s 115 of the Bengal Tenancy Act against the presumption as to fixed rent under s 50 (2) of the Act arising in certain cases has no application in a suit brought by a tenant for the purpose of contesting the the correctness of the decision of a Revenue Officer in regard to the entry as to the status of a raiyat in a record-of-rights prepared under Ch. X of the Act. In such a suit the tenant is entitled to the benefit of the presumption. Given the circumstance of an increase or decrease in the area of the land for which a tenant is paying rent, it is competent to the Revenue Officer under s. 104 (2) of the Bengal Tenancy Act to settle a fair and equitable rent in respect of the whole of the land of the tenant, including the excess area, and the Revenue Officer can in such a case enhance the rent under the provisons of Tenancy Act, e g. on the ground of the rise in the prices of the food crops, and so forth. **Secretary of State for India in Council v Kajimuddi 26 Cal 617.**

Notes.—Ref: 12 C W N 122; 904; 10 C L J 343 F B; Disap: 13 C W N 1149 F B.

—S 115.

See Bengal Tenancy Act s 50. Case No (197) **37 Cal 30 (F B).**

—S 115.

See Bengal Tenancy Act s 30. Case No (151) **12 C W N 904.**

—S 116.

See Right of Occupancy-Acquisition of Right -Person by whom Right may be acquired. **26 Cal. 546; 3 C W N 326.**

419.—Ss 116, 178—suit for ejectment—Zerait proof of land being-Onus-Admission in the lease —Estoppel.—

In a suit by a landlord to eject a tenant on the ground of the land being the former's zerait land the onus is on the landlord to prove that the land was zerait, so as to bring it within the proviso of s 116 of the Bengal Tenancy Act. (9 C W N 144 Dist).

Bengal Acts-(Tenancy Act VIII of 1885).S. 116-*Contd.*

The mere fact that, in the lease, the land is described as khudkust land, would not be sufficient, in itself, to prevent the tenants from acquiring occupancy rights, regard being had to the provisions of s 178 and would not shift the onus on the tenant. **Ajodhya Prosad Singh v Ram Golam Singh** **13 C W N 661.**

420.—S. 116—as amended by Act III of 1818 (B C)-Decision by Revenue Officer-Lakheraj or no Lakheraj—Res-judicata.—

The question whether the land is *lakheraj* or not is one which the Revenue Officer is not competent to decide under s 106 of the Bengal Tenancy Act as amended by Act III of 1898 (B C); and therefore, his decision on that question being without jurisdiction, does not operate as a decree and is not binding as *res judicata* between the parties in a subsequent suit. (21 Cal 38 F B Fol. 17 Cal 721 Dist). **Rowland Hudson v Mahibir Tewari** **5 Ind Cas 133.**

420A.—S. 116—Landlord and Tenant Act (VIII B C of 1869), sec 6—Kamat land—Right of occupancy Tenant, holding over

Where the rights of the parties were governed by Act VIII, B C of 1869, lands which were *kamat* did not cease to be so by virtue of a *mokurari* settlement of the same. A tenant of *kamat* land does not acquire a right of occupancy by holding it over after the expiry of the lease. **Syed Khalilur Rahman v Rupan Mahton** **12 C W N 436.**

421.—Ss 116, 120, Cl 2, 178—Occupancy right acquisition of—Zerait or Kamat land—Act X of 1859 s 6; VIII of 1869 (B C) s 6—Lease for term or from year to year—Inception of the tenancy—Admission by tenant.—

Acquisition of occupancy or non-occupancy rights by a tenant in an alleged *Kamat* or *Zerait* land cannot be prevented unless the landlord proves that when the holding was first created, it was held under a lease for a term or from year to year. If the land is not so initially let out the execution of a kabuliat for a term by the tenant during the continuance of the tenancy, does not affect his status or bar the application of the provisions of Chs. V and VI of Act VIII of 1885. *Quære.*—Whether an admission by a tenant as to the *Zerait* or *Kamat* character of the land of his holding, made after the 2nd March 1883 is conclusive as against the tenant on the question of the tenure of the land. 12 W R 277; 23 W R 288 Ref.; 17 Cal 476: 7 C W N 400; (Unreported) Sp. Ap No 2129 of 1901 decided by Mitra J Ref.

Masudan Singh v Goodar Nath Pandey **1 C L J 456.**

Bengal Acts-(Tenancy Act VIII of 1885) S. 116-*Concld.*

—S 116.

See Bengal Tenancy Act s 2 (2) Case No (13) **1 C L J 310.**

422.—S 117, sub-sec (3)—Purchase of a tenure, right, deposit decretal amount of—Interest of purchaser void or voidable.—

When a tenure is advertised for sale, the purchaser of the tenure has no right to make a deposit under sub-sec (3) of s 170 of the Act and prevent the sale, as he is not a person having an interest in the tenure voidable upon the sale.

Where a tenure was advertised for sale and the purchaser of the tenure from the tenant-against whom the decree for rent was obtained, was allowed by the lower Court to deposit the decretal amount under sub-sec. (3) of s 170 of the Act to prevent the sale, the High Court on revision did not set aside the order on the ground that, on a former occasion under similar circumstances, the purchaser had made a similar deposit and the decree-holder had withdrawn the deposit. **Jotindra Mohan Tagore v Durga Dabe** **10 C W N 438.**

—Ss. 117, 118, and 119.

See Bengal Tenancy Act s 101. Case No (357) **30 Cal 339.**

423.—S. 120, sub s. 2—Record of proprietor's land as private land—Grounds for determining land as to be private—Evidence.

In enacting sub-s. (2) of s. 120 of the Bengal Tenancy Act, the Legislature had before it the attempts which might be excepted on the part of landlords to frustrate the intention of the Legislature, as asserted in the draft Bill laid before the Council for consideration, to extend the occupancy-rights of tenants before the measure then declared to be in contemplation became law: and therefore the particular date, the 2nd day of March 1883, the date on which the draft Bill was published in the *Gazette*, and leave was obtained to introduce the Bill into the Council, was declared to be the latest date on which

Bengal Acts-(Tenancy Act VIII of 1885) S. 120-*Contd.*

there should be free action on the part of zamindars to assert their private rights so as to prevent the accrual of special tenant rights. From the wording of that sub-section, it was intended that, in determining whether land is the private land of the proprietor, regard should be had to any declaration made before the 2nd March 1883 by the landlord, and communicated to the tenants in respect to the reservation of the proprietor's right over the land as his private land : the words "any other evidence that may be produced in that sub-section mean, therefore, any other evidence tending in the same direction that may be produced to show the assertion of any title on the part of the proprietor and communicated to the tenant before that date. **Nilmoni Chuckerbutty v. Bykant Nath Bera. 17 Cal 466.**

Notes—Ref: 1 C L J 456.

424—S. 120—Zerait land—Admission—Recital in a deed—Estoppel.

The last sub-section to S. 120 of the Bengal Tenancy Act does not exclude evidence which under the Evidence Act is otherwise admissible.

In determining the question whether a piece of land is *Zerait* or not, *held*, that an admission in a *kabuliyat* as to character of the land is relevant evidence. **Bhagtu Singh v Raghunath Sahai 13 C W N 135=9 C L J 15=1 Ind Cas 571.**

Bengal Tenancy Act—Several holdings. **See** Bengal Tenancy Act S. 121 Case No (427). **28 Cal 364**

425—120—Ejectment, suit for—Tenant, holding over—Indigo factory—Notice to quit.

Indigo zerait lands, in the absence of evidence to show that the lands were ever in the khas poseession of the land-lord, or their ancestors, do not come within the definition of proprietor's private lands contained in S. 120 of the Act.

The presumption arising under S. 5 (5) of the Act is a rebuttable one.

A raiyat of at least 10 years' standing and now holding over is not a trespasser and can not be ejected until his tenancy has been determined by a notice to quit or in some other legal manner. 24 Cal 272 & 10 Cal 45 Ref : **H B Dalgilish v Damodar Narain Chowdhury 8 C L J 533.**

Bengal Acts-(Tenancy Act VIII of 1885) S. 120-*Concld.*

425A—S. 120—The mere fact of a certain land having been taken lease of as *zerait* by the Defendant would not give to that fact any evidentary value when the letting was not—as sec. 130, sub-sec. 2 requires to make it evidence-before the second day of March 1883. **Sher Bahadur Sahu v M H Mackenzie. 7 C W N 400.**

—s. 120 cl (2)

See Bengal Tenancy Act S. 116. Case No(421) **1 C L J 456.**

426—Bengal Tenancy Act (1885) Ss. 121 and 140—Suit for compensation for illegal distraint.

Held that, a suit for compensation for illegal distraint under S. 121 of the Act by one of the two persons jointly entitled to the crops was not excluded by S. 140 of the Act. **Jagdeo Singh v Padarath Ahir. 25 Cal 285.**

427—Ss 121, 122—Several holdings-One distraint—Legality of.

Under this Act a land-lord cannot by one application apply for distraint for the rent of more than one holding. So also he cannot distrain for damages for non-payment of rent, for he was not entitled to damages at all unless he was awarded damages in a regular suit. **Sheobarat Singh v Nowrangdeo Narain Singh. 28 Cal 364.**

428—S. 140—Distraint by a registered proprietor—Suit for damages—Land Registration Act (Bengal Act VII of 1876), s. 78.

A suit for compensation for illegal distraint under s. 140 of the Bengal Tenancy Act is maintainable only on the ground that the distraint was made in violation of the provisions of s. 121 of that Act. A tenant cannot deny the right of a registered proprietor to distrain and plead payment of rent to a third person whose name is not registered. **Hanuman Ahir v Gobind Koer. 1 C W N 318.**

Notes.—Ref: 8 C W N 695.

429—S. 140—Suit for damages for illegal distraint—Measure of damages.

Where a distraint by a landlord of the crops of a tenant is found illegal, the measure of damages is (1) the excess over the rent due, (2) the value of damage caused by way in which crops were sold. **Sheobarat Singh v Nowrangdeo Narain Singh. 28 Cal 364.**

Bengal Acts-(Tenancy Act VIII of 1885) S. 140-*Concld.*

429A—S 140—Suit for wrongful distraint——Limitation Act (XV of 1877). Sch. II, Arts 2. 28, 29.

The limitation applicable to a suit for compensation for illegal distraint of crops by the landlord is one year from the date of the wrongful seizure. Art 28 or 29 and not Art 2 of the 2nd Schedule of the Limitation Act applies to such suits. **Jagatjiban Nando Roy v Sarat Chandra Ghosh. 7 C W N 728.**

430—Ss. 143, 170—as amended by s. 54 of Act I, B C of 1907—Bengal General Clauses Act (I, B C of 1899), sec. 8, cl. (c)—Right accrued previous to, but application after, repeal—Civil Procedure Code. s. 310A.

A raiyati holding having been sold on the 7th May 1907 in execution of a rent-decree, an under-raiyat applied to have the sale set aside under sec. 310A, C. P. C., on the 23rd May following. *Held*—That the application could not be entertained, the Bengal Tenancy (Amendment) Act I of 1907 having come into operation on the 22nd May 1907. Sec 54 of the amending Act by enacting that sec. 310A, C. P. C. shall not apply to a tenure holding attached in execution of a decree for arrears due thereon, does not repeal any portion of the Bengal Tenancy Act within the meaning of sub-sec. (c) of s. 8 of the Bengal General Clauses Act. **Asiruddi Mondol v Mukhodamoyee Dassi. 12 C W N 434=35 Cal 543.**

—S. 143.

See Appeal acts—Bengal Tenancy Act. Case No (32) **14 Cal 312**

—S. 143

See Bengal Tenancy Act S. 101 Case No (356) **30 Cal 339**

—s. 144.

See Special or Second Appeal—Small Cause Court Cases—Rent.

431—S. 144—Civil Procedure Code Ss. 15 and 17:

Ss. 15 and 17 of the Civil Procedure Code, control s. 144 of the Bengal Tenancy Act; a suit for rent should be instituted, subject to pecuniary limitations, in the Court of the lowest grade competent to try it. **Fazlur Rahim Abu Ahmed v Dwarka Nath Chowdhry, 30 Cal 453=7 C W N 402.**

Bengal Acts-(Tenancy Act VIII of 1885) S. 144-*Contd.*

432—Ss. 144, 184 and 193. Sch. III, Art. 2—Forest right, lease of—Suit for money due as price of trees—Damages for breach of contract—Suit for arrears of rent—Limitation, no admission raised in appeal—Grant to cut timber of a certain size, of limited rights, construction of.

A grant of the right to fell timber of a particular class and specified size during a defined period of time, though extremely restricted in its scope, which porhibited the lessee from doing any damage to the *bunkar mahal*, i. e, to the forest, and imposed upon the lessee a condition to notify to the Court any occurrence which might happen and though it obviously granted no interest in the soil itself, was obviously grant of the most valuable of the forest rights; it cannot be regarded as a sale of timber.

A grant of a fishery right or right of a pasturage or the like may be made independently of an interest in land.

A grant of trees as distinct from the land in which the grantor reserves every forest right except the one which is granted is nevertheless the grant of a forest rights within the meaning of S. 193 of the Bengal Tenancy Act, and a suit for the recovery of money payable in respect of such forest rights is governed by the three years' rule of limitation laid down in Sch. III, Art. 2, cl. (b) of the Act.

The provisions of the Bengal Tenancy Act applicable to suits for the recovery of arrears of rent are, having regard to the phraseology of S. 193 of the Act, designedly made applicable to suits for the recovery of sums that are not rent; and money payable in respect of forest rights is not rent within the meaning of S. 3 (5) of the Act.

The question of limitation, raised in the written statement but abnadoned in the Court of first instance, is a clear question of law, and it could be raised in the Court of Appeal.

Under S. 184, sub-S. 1 of the Bengal Tenancy Act, it is obligatory upon the Court to dismiss the suit on the ground of limitation, although limitation has not been pleaded.

Bengal Acts-(Tenancy Act VIII of 1885) S. 144-*Concld.*

Refusal by a counsel or pleader to urge a question of law is a mere admission of law which is not binding upon the party, and the party may raise the question in appeal although not raised in the lower Court, specially where the question of limitation obviously arises upon the admitted facts of the case.

Although standing timber is moveable property within the meaning of S. 3 of the Indian Registration Act, yet under S. 3, cl. 25 and S. 4 of the General Clauses Act of 1897, standing timber is immoveable property within the meaning of the Civ. Pro. Code.

Growing trees may be regarded as part of the soil and consequently immoveable property.

But where under a contract the grantee has no right to the soil, takes no interest in the land and obtains a right to the trees with a view to fell them immediately or within a reasonable time without any stipulation for the beneficial use of the soil but with a license to enter and take the trees away, the transfer may be regarded as one of moveables. 23 W R 458. Dist: 33 Cal 601; Ref: 28 Cal 86; 6 C L J 237; 33 Cal 257; (263). 26 I A 216=27 Cal 156, 29 I A 75=25 Mad 367; Ref: Punj Rec, 112, 7 A W N 59; 19 Bom 207; 11 Mad 193; Ref; 7 Exch. 77=86 R R, 576; Ref: 9 Bom. and Cal 561=33 R R 259, Ref: **Abdulla Sarkar v Asraf Ali Mandal. 7 C L J 152.**

433—S.148-Decree for arrears of rent, Assignment of—Execution of decree by assignee.

The fact that an assignment of a decree for arrears of rent was made before the Tenancy Act will not protect from the provisions of s. 148 (h) an assignee who proceeds to execution afterwards; but execution cannot be refused where, before that Act came into operation, the assignment had been recognized by a Court of execution under s. 232 of the Civil Procedure Code. **Koilash Chunder Roy v Jodu Nath Roy. 14 Calc 380.**

Notes: —Ref: 1 C L J 500.

434—*S.* 148— Rent-decree——Decree for arrears of rent—Application for execution by the assignee of such a decree-Code of Civil Procedure (Act XIV of 1882), s. 316.

An application for execution by the assignee of a decree which was obtained by a landlord against a defaulting tenant, for arrears of rent which accrued due between the date of the sale of the tenure in execution of a previous decree for arrears of rent and the date of the confirmation of such sale, is barred by cl. (h) of s. 148 of the Bengal Tenancy Act, as being one for the execution of a decree for arrears of rent. **Karuna Moyi Banerajee v Surendra Nath Mookerjee 26 Calc 176.**

Bengal Acts-(Tenancy Act VIII of 1885) S. 148-*Contd.*

Notes:—Ref: 1 C L J 500; 10 C W N 44.

435-Assignee of decree-Trustees applying for benefit of assignor's heir.

The word "assignee," as used in s. 148, cl. (h) of the Bengal Tenancy Act, does not include trustees who execute decrees under an assignment which is not for their own benefit, but for the benefit of the heir of the assignor. **Chhatrapat Singh v Gopi Chand Bothra 26 Cal 750=4 C W N 446.**

Notes:—Dist: 8 C W N 531. Ref: 31 Cal 550. 35 Cal 737=7 C L J 652; Appr: 33 Cal 566 F B.

—S. 148.

See Sale for arrears of Rent—Incumbrances. **22 Calc 364.**

436-S. 148—Issue in suit for arrears of rent.

In a suit for arrears of rent where the plaintiff claims a certain rent as payable in respect of certain lands mentioned in the plaint, and the defendant denies the occupation of the lands at the rents alleged by the plaintiff, but admits that he holds other lands at different rents, the proper issue to be tried is whether the defendant holds the lands set forth in the plaint at the rent specified. Having regard to the provisions of s 148, cl. (b), of the Bengal Tenancy Act, a simple issue as to whether the defendant holds the jamas set forth in the plaint under the plaintiff is not sufficient. **Bhai Chal Nasya v Sham Nuyasi Mahomed Balu Nasya v Sham Nuyasi Mahomed. 1 C W N 152.**

Notes.--Dist: 5 C W N 191. Ref: 10 C L J 196.

437—Bengal Tenancy Act (VIII of 1885), s. 148, cl. (h)—Rent decree, Assignment of, reco-

Bengal Acts-(Tenancy Act VIII of 1885) S 148 *Contd.*

verable as a Civil demand—Landlord's interest vesting in the assignee.—

Unless the assignee of a rent decree has the landlord's interest in the land, he cannot execute it, and the rent-decree so assigned to a person in whom the landlord's interest is vested ceases to be a rent decree and becomes only an ordinary Civil demand recoverable under the Code of Civil Procedure. **Deno Nath Dey v Golap Mohini Dasi. 1 C W N 183.**

Notes:—Ref. 1 C L J 500, 10 C L J 396.

438-s.148—Execution, Application for, by assignee of decree for arrears of rent-Civil Procedure Code (Act XIV of 1882), s. 232.

When, after the expiration of an ijara lease, an ijaradar assigns to the superior landlord a decree he had obtained for rent, the transferee cannot apply for the execution of the decree, as s. 148, cl. (h), of the Bengal Tenancy Act is a bar to such an application. **Dwarka Nath Sen v Peari Mohun Sen. 1 C W N 694.**

Notes.—Dist. 10 C L J 396 Ref 31 Cal 550, 8 C W N 531; 1 C L J 500, 10 C W N 14.

439—Bengal Tenancy Act (VIII of 1885), Sec. 148, cl. (b) Rent suit issue in—Plaint, whether to contain extent and boundaries of the lands.—

In a suit for recovery of rent whether the allegation was that the defendant held a tenure consisting of 61 odd bighas of land within certain boundaries as specified in the plaint and the defence was that the area was only 36 bighas within certain boundaries as mentioned in the written settlement at a certain rate of rent per bigha, and the lower appellate Court decreed the suit without deciding the question as to the area of the lands and keeping the question open.

Held, that the decision of the Subordinate Judge was correct and did not contravene the provision of Sec. 148, cl. (b) of the Tenancy Act.

Per Banerjee, J—That in a rent suit it is not absolutely necessary for the plaintiff to give the extent and boundaries of the lands in respect of which rent is claimed where there is any difficulty in giving those particulars and that in such cases it is enough if a description sufficient for identification is given.

Bengal Acts-(Tenancy Act VIII of 1885) S. 148-*Contd.*

That the Court is not bound in every suit for arrears of rent, to determine the extent and boundaries of the Defendant's or tenure (Dist: I C W N 152, 24 Cal 433). **Pijraddi Naskar v Ambika Churn Mittra. 5 C W N 121.**

Notes:—Ref. 10 C L J 196.

440—Sec. 148, cl. (h)—Decree for rent obtained by a landlord who ceases to have interest in the land—Execution of decree—Assignment—Construction—Strict interpretation.

A decree obtained in a suit for rent brought by a landlord who ceases to have interest in the land during the pendency of the suit, is not a decree for rent and the provisions of S 148, cl. (h) of the Bengal Tenancy Act do not apply to such a decree.

When therefore such a decree is assigned by the decree-holder and is afterwards resigned to him Sec. 148, cl. (h) is no bar to the execution of the decree. Sec. 148. (h) should be interpreted strictly. **Nagendra Nath Bose v Bhuban Mohan Chakravati. 6 C W N 91.**

Notes.—Cons. 7 C L J 653=35 Cal 737=12 C W N 123.

441—S. 148 (b)—Identification of land in suit Description.

Case where it was held that the description of the tenure given in a plaint in a suit for rent, was *prima facie* sufficient for identification, and that the plaint ought not to have been rejected in a summary way. **Durga Churn Lal v Kala Chand Biswas. 7 C W N 615.**

442—S. 148, cl (h)—Sale in execution at the instance of assignee of rent decree—Sale in execution of mortgage decree—Rights of purchasers—Superior title.—

A sale held in execution of a decree for arrears of rent on an application by the assignee of the decree, when the landlord's interst in the property itself was not transferred to the assignee, passed no title to the auction purchaser under cl. (h), S. 148 of the Bengal Tenancy Act. A purchaser of the same property at a sale held in execution of a mortgage decree obtained after the first sale acquired a good title as against the first purchaser. **Guru Charn Nath Bepari v Kartik Nath. 10 C W N 14.**

Bengal Acts-(Tenancy Act VIII of 1885) S. 148-*Contd.*

443—S. 148 cl. (h)—Execution of decree for rent by superior landlord—Conveyance of rent decree to superior landlord upon annulment of tenure—Execution-Validity.—

J was the Zemindar; N the Patnidar under him, K was the Dur-putnidar, and he obtained a decree for rent against the respondent and applied for execution thereof on the 26th. June 1906; meanwhile the *putni* was sold in execution of a decree for rent and the Zemindar having purchased it on the 15th August 1906, served a notice upon the *Durputnidar* under S. 167 of the Bengal Tenancy Act and annulled his encumbrance; the *Durputnidar* conveyed to J. the Zemindar, amongst other properties, all decrees for rent and authorized J. the purchaser, to carry on all execution proceedings. J. having applied for leave to proceed with the execution it was objected that in view of cl (h) of S. 148 of the Bengal Tenancy Act J. was not entitled to execute the decree: *Held*- That s. 148, cl (h) of the Bengal Tenancy Act did not debar the superior landlord (i. e. J.) from executing the decree for rent in the same manner as the *Durputnidar K* might have done. **Manmotha Nath Mitter v Rakhal Chandra Tewary.**

(1908) 14 C W N 752
=10 C L J 396=3 Ind Cas 324.

444—Ss. 148-A, 148-B, sub s (2) 170—Suit by co sharer for his share of rent,-Decree for arrears-Claim not allowable C P C (Act XIV of 1882), s 278-C P C (Act V of 1908). O XXI, r. 58-

Certain co-sharer landlords in suit for rent stated that they had not been able to obtain precise information as to what might be due to their co-sharers whom they made proforma defendant, but they believe that nothing was due to him, and that they consequently sued for what was due to themselves but they offered to increase the valuation of the suit if it should turn out in the end that rent was still due to their co-sharer. Neither the co-sharer nor the tenant entered appearance and an *exparte* decree was passed.

Held, that, as the co-sharer did not appear, the plaintiffs were entitled to proceed on the assumption that nothing was due to him, and the decree, therefore, was a decree for the whole sum then due to the entire body of landlords, and the plaintiffs were entitled to treat the decree as one for arrears of rent in respect of the entire holding within the meaning of s. 170, sub s. (1) so as to exclude the application of r. 58 of O XXI of the C P C 1908. **Nunda Lal v Kala Chand.** **8 Ind Cas 50.**

445.—Sec. 148, clause (h),—Application subsequent to the Act for execution by assignee.

Section 148, clause (h) of the Bengal Tenancy Act governs an application for the execution of a rent decree by an assignee of the decree, unless the landlord's interest in the land has become and is vested in him, when such application is made after Act VIII of 1885 came into force, even though the decree was made before the Act.

When an assignee of a rent decree, obtained against the recorded tenants, has brought to sale the tenure in arrears and the execution Court has erroneously overruled the objection of the judgment debtor that section 148 clause (h) was an effective bar to the proceedings, such erroneous order, though binding upon the judgment debtors is not binding against their unrecorded co-sharers who are consequently competent to question the legality of the sale.

Quære.—Whether section 148, clause (h) absolutely bars an execution at the instance of an assignee of a rent decree who is not also an assignee of the landlord's interest in the land, or whether it merely prevents the execution proceedings from having the effect of proceedings in execution of a rent decree. The history of this provision and conflicting decisions as to its scope and interpretation reviewed.

Quære further.—Whether the provisions of section 148 of the Bengal Tenancy Act are inapplicable to suits by co sharer landlords. 10 Cal 696 26 Cal 677 Dist. **Manurattan Nath v Hari Nath Das.** **I C L J 500.**

Notes.—Ref: 10 C W N 176=4 C L J 68.

446.—Sec. 148—Suit for rent-Aggregate rent—Aggregate area-Single suit-Maintainability of suit-Execution of decree.

A landlord is entitled to bring one suit for the total rents of three separate holdings giving the total area as the sum of the three holdings. He is not bound to bring three separate suits, (34 Cal 298 Fol:).

Bengal Acts-(Tenancy Act VIII of 1885) S. 148-*Concld.*

The suit is maintainable, though the landlord may have difficulty in executing the decree obtained in it under the special procedure prescribed in the Bengal Tenancy Act (34 Cal 258. Fol:) **Nanda Lal Mukherji v, Sadhu Charan Khan.** **7 C L J 96**

Notes.—Ref: 3 Ind Cas 306=11 C L J 56=14 C W N 335

447.—Rent, action for—Tenant holding over rights of—Reduction of rent—Bengal Tenancy Act (VIII of 1885) Sec 148 cl (b)—Area of the tenancy, determination of, if necessary in a suit for rent. It is not possible to lay down any inflexible rule of universal application upon the question whether the precise area of the tenancy should or should not be determined in a suit for rent. The only general principle which can be formulated is that where there is a substantial dispute as to the identity of the tenancy set up by the parties to the suit the question in controversy must be decided (1 C W N 152 Ref to.) **Ramdev Rai v Newaj Prosad Singh.** **10 C L J 196=1 Ind Cas 379**

—S 148 (h).

See (1) C P C O 21 r 16. **10 C L J 396**

(2) Bengal Tenancy Act S. 170. Case No (554). **10 C W N 547. F B**

448.—s. 149—Suit by third party claiming rent paid into Court in rent suit, Nature of—Title suit—Institution stamp.—

A suit by a third person under cl (3) of s. 149 of the Bengal Tenancy Act is not a title suit, and need not be stamped as such. *Per* Tottenham, J. Such suit is in the nature of a suit, for an injunction under the Specific Relief Act, or else a declaratory suit. **Jagadamba Devi v Protap Ghose.** **14 Cal 537.**

Notes.—Ex: 17 Cal 829. Ref: 11 C W N 380.

449.—Suit by third party claiming rent paid into Court in rent suit, nature of—Title suit.

The object of s. 149 of the Bengal Tenancy Act is to prevent tenants being harassed when disputes arise between rival claimants to the land in respect of which the rent is due. In a suit, therefore under cl. (3) of s. 149 the plaintiff is entitled to have the question of title as well as that of possession tried, and to obtain the injunction therein mentioned. 14 Cal 537, referred to and explained. **Rubiunnessa v Gooljan Bibee.** **17 Cal 829.**

Notes—Ref, 8 C W N 248, 11 C W N 380.

450—S. 149—Suit by third person for money admitted to be due as rent-Plaintiff claiming only by right of possession-Maintainability—Procedure—Question of title, how may arise—Question of possession to be tried first.

A suit brought under S 149, Cl 3, of the Bengal Tenancy Act in which the plaintiff claims the right to receive rent by reason of his being in possession of the land (as shown by the receipt of rent for a reasonably sufficient period) is maintainable, though the decision of the suit may or may not ultimately rest on the question of possession merely without reference to the question of title. The question of possession should be tried first in the suit and the suit dismissed if that question be decided against the plaintiff as he does not rely on his title, but is decided in the plaintiffs' favour, the defendant would be put to the proof of his title and the question of title would have to be tried. 17 Cal 829 referred to.

Jadaub Laul Roy Chowdhury v Srimutty Kheman Kari Debya. **8 C W N 248.**

Notes—Ref: 11 C W N 380.

451.—Ss. 149 153-Scope of suit.

A suit contemplated by S 149 of the Bengal Tenancy Act is a suit with reference to the money deposited in court and for an injunction restraining the payment of the money. The section does not contemplate a suit for establishment of the relationship of landlord and tenant between the parties. **Horananda Banerjee v Ananta Dasi.** **9 C W N 492.**

Notes—Ref: 7 C L J 40.

452—S. 149, Cl. 3—Onus—Title-Competency to try question of:

Where a suit was brought under the provisions of S. 149, Cl (3), of the Bengal Tenancy Act, and the plaintiff made out a very strong case in support of his title to the rent in deposit :—*Held*, that the onus was then shifted on the defendant and that plaintiff was entitled to succeed although he was not in a position to prove realization of rents from the tenant, the plaintiff's case being that the defendant had been preventing her from realzing them. **Trailokya Mohini Dasi v Kali Prosunna Ghose.** **11 C W N 380**

Bengal Acts-(Tenancy Act VIII of 1885) S. 149-*Concld*

453—*Ss* 149, sub-*S.* (*3*), 153 — Question of title if to be decided in suit under S 149-Appeal —Bengal Tenancy Act, S. 153—Suit framed as for determination of title.

S. 149 of the Bengal Tenancy Act provides a very simple and expeditious machinery for the purpose of protecting a tenant against the harassment of litigation consequent on rival claims of title to the reversion of the tenant's interest.

Sub-S. (3) of S. 149 of the Act contemplates a suit which culminates not in a decree but in an order of a limited kind, an order restraining payment out of the money. It is not necessary to decide the question of title in issuing an injunction under that section.

In a suit brought under S. 149, sub-S. (3) of the Act, in which the plaintiff keeps within the terms of the section and asks only for the relief contemplated by it, no question of title can be decided. It would be otherwise if the suit be framed as one for determination of the plaintiff's title.

Semble.—An appeal would lie under S. 153 of the Act against an order under S. 149, sub-S. (3) of the Act. **Tirthabasi Singh v. Purna Chandra Nag.** 16 C W N 558.

454—455—S. 150—Admission by defendant of rent due to landlord.

S. 150 of the Bengal Tenancy Act highly penal in its character, and is such as cannot be enforced against a defendant unless he has intentionally admitted money to be due and has not paid it. The admission intended by the section must be an admission in the action; *Held*, that the defendant had made no such admission.

Ali Ahammad Sirdar v Bepin Behari Bose 20 Cal 595.

456—Suit for redemption—Construction of mortgage—deed–Mortgagee in possession—Extent of his liabilities.

Held on the contstruction of a mortgage deed —That the mortgaee in possession was not responsible for the amount of the gross rental as shown in the jamabandi but for such sums only as were actually received by him or on his behalf and such sums, if any as might have been received by him but for his own neglect or fault.

Banarsi Parshad v Ram Narain. 7 C W N 514=30 Cal 947.

Bengal Acts-(Tenancy Act VIII of 1885) S. 150-*Concld.*

—S. 150.

See Bengal Tenancy Act *S.* 50. Case No (197) 37 Cal 30 (F B)

457—Ss. 152, 153—Appeal-Title. question of as between parties having conflicting claims—Plaintiff and defendant both claiming under the same landlord, and under the same title—Rent Suit.

In a suit for rent not exceeding Rs. 100 in value plaintiff and defendant both claimed under the same landlord–plaintiff claiming as a *jotedar* and defendant as a *paragdar*, the settlement with the defendant having been prior to that with the plaintiff. The lower appellate Court held that plaintiff's position as tenant was not superior to that of defendant and there was no proof of an assignment of plaintiff's lessors's right to collect rent from defendant. The suit was accordingly dismissed. *Held* (*by Mitra, J.*) That a second appeal was not barred by the proviso to *S.* 153 of the Bengal Tenancy Act as the question of title was between parties having conflicting claims thereto. That the decision of the lower appeal Court as regards the status of the plaintiff in relation to the defendant was foreign to the object of the suit and quite irrelevant and that the plaintiff's position was that of an intermediate holder with a right to receive rent from defendant. On L P A *Held* (by *Maclean*, C J and *Pargiter*, J.) that upon the finding of fact by the lower appellate Court the High Court had no right to interfere in second appeal.

Ram Kanai Dass v Fakir Chand Dass. 8 C W N 438.

—S 153.

See (1) Cases under Appeal—Acts—Bengal Tenancy Act, s. 153.

(2) Right of Appeal.

(3) Special or Second Appeal—Orders subject or not to appeal.

458.—Bengal Tenancy Act (1885), s. 153—Judicial Officer—Revisional Power of a District Judge.

The words "Judicial Officer as aforesaid" as

Bengal Acts-(Tenancy Act VIII of 1885) S. 153-*Contd.*

used in proviso to s, 153, have reference to the "Judicial Officer" spoken of in clause (b) of the section and to such an officer only, and the District Judge has no jurisdiction to revise decrees or orders passed by a District Judge, Additional Judge, or Subordinate Judge referred to in cl (a) of the section. **Sankarmani Debya v Mathura Dhupini. 15 Cal 327.**

459—S. 153—The word 'suit' in S. 153, includes execution proceedings.

An order setting aside a sale in execution of a rent decree for less than Rs. 100 when passed by a District Judge is not appealable. 27 Cal 484 foll. **Monmohini Dasi v Lakhi Narayan Chandra. 28 Cal 116.**

Notes.—Dist: 32 Cal 572=9 C W N 722. Foot Note=1 C L J 255; 9 C W N 725. Foot Note=1 C L J 454 Over: 32 Cal 957 F B =9 C W N 721=1 C L J 476 F B.

460—S. 153—Order deciding a question relating to title to land or some interest in land as between parties having conflicting claims thereto—Appeal—Jurisdiction.

When in a proceeding under Ss. 244 and 311 C P C., on an application by a prior purchaser of a holding, the sale thereof in execution of a rent decree in a suit valued at below Rs. 50. is set aside, the order setting aside the sale decides a question relating to the title to the land. or to some interest in the land as between parties having conflicting claims thereto (the applicant and the auction purchaser) within meaning of s. 153 of the Bengal Tenancy Act, and an appeal lies against such order. In such a case, the Court is to consider, not what the original decree decided, but what the order appealed against did decide, and in such a case, the *ex parte* character of the original decree would not make the slightest difference.

Ganga Charan Bhattacharjee v Sashi. Bhusan Roy. 1 C L J 255=32 Cal 572.

Notes.—Fol: 32 Cal 957 F B=9 C W N 721= 1 C L J 476.

461—*S.* 153—Non-appealable rent-decree—Sale in execution of decree set aside under ss. 244 and 311, C P C—Appealability of order—Title to or interest in land,

A decree for rent was passed in a suit for a

Bengal Acts-(Tenancy Act VIII of 1885) S.153-*Contd.*

sum below Rs. 50. In execution of the decree, the judgment-debtors' holding was sold and purchased by the decree-holder himself. The judgment-debtors applied under ss. 244 and 311, C P C to have the sale set aside on the ground of irregularity and fraud. The sale was set aside by the Munsiff. On appeal, a preliminary objection was taken that, under s. 153, Bengal Tenancy Act, no appeal lay against such order. The question was referred to the Full Bench for its opinion. *Held*, the order of the Court below was to the effect that the landlord acquired no title to the property in question under his purchase. That was a decision of a question relating to title to land or to some interest therein, and as such, was appealable under the proviso to s. 153 of the Act. *Per Rampini, J.*-The order under reference did not decide a question relating to an interest in land as between parties having conflicting claims thereto within the meaning of s. 153. Consequently, no appeal lay against the order. (28 Cal 116, Overruled, 1 C L J 255=9 C W N 722. Foot note, 9 C W N 725, Foot note, Fol) **Kali Mandal v Ram Sarbasya Chakravarti. 9 C W N 721= 1 C L J 476 F B=32 Cal 957.**

462—S. 153—Value of suit—Withdrawal of portion of claim—Transfer of officer specially empowered—Power, if ceases.

Where, in a suit for rent, the claim originally made exceeded Rs. 50, but, when the suit came on for trial, the claim was reduced to Rs. 7-8-0, a certain portion of the claim having been withdrawn.

Held—That, for the purpose of an appeal under S. 153 of the Bengal Tenancy Act, the amount claimed in the suit should be considered to be less than Rs. 50.

When a Munsiff is empowered to exercise final jurisdiction under S. 153, he does not cease to have the power by reason of his transfer from the station. **S M Shailabati Debi v Mr M Y Roderigues. 12 C W N 448=35 Cal 547.**

463—*S.* 153—Rent—Tenancy—denied—No question as to rate—*S*econd appeal.

In a suit for rent for less than Rs. 100 the defendant pleaded that he was the tenant, not of the plaintiffs but of some other persons at a rate

Bengal Acts-(Tenancy Act VIII of 1885)-S. 153-*Contd.*

lower than that claimed in the suit, no issue was raised as to the rate of rent and the lower Court merely decided that the Defendant was plaintiff's tenant and decreed the suit. *Held*—that the question of the rate of rent not having been raised and decided no second appeal lay. **Baidya Nath Bahara v Dhon Krishna Sirkar. 5 C W N 515.**

464—S. 153—Appeal—Suit for rent by a co-sharer landlord.

—*S.* 153 of the Bengal Tenancy Act covers the case of a suit for rent by a co-sharer landlord. **Jogendra Nath Ghosh v Paban Chandra Ghosh. 7 C W N 908.**

Notes.—Ref: 11 C W N 1026.

465—S,153—*Suit* for arrears of rent of homestead land.

Where a suit is filed for arrears of rent of homestead land, and no issue is raised as to whether the land is homestead or agricultural, such a suit does not come within s. 153 of the Bengal Tenancy Act. **Mathura Mohan Pal v Amiruddi Shilaloo. 8 C W N 64**

466—S. 153—Suit by co-sharer landlord for recovery of rent—Question of title also determined—Appeal.

Where in a suit instituted by a co-sharer landlord for the recovery of rent the amount claimed did not exceed a hundred rupees, but the question raised and determined was not merely the amount of rent payable to the co-sharer but whether he had a title to recover a particular share of the rents of a particular mouzah:—*Held* that the suit came under the exception mentioned in S. 153 of the Bengal Tenancy Act. 17 Cal 487 ref to. **Srimutty Poresh Moni Dassya v Kishore Lahiri. 8 C W N 193.**

Notes:—Ref: 1 C L J 500; 8 C W N 196.

467—Claim by alleged tenant of a higher interest:

Where in a suit for rent not exceeding Rs. 100 in value, Plaintiff and Defendant both claimed under the same landlord and Plaintiff alleged that Defendant was his sub-tenant: *Held*—That an appeal and a second appeal lay and the question was one between parties having conflicting claims thereto. A tenant may prove his tenancy

Bengal Acts-(Tenancy Act VIII of 1885) S.153-*Contd.*

right without proving his lease even if he has any. 1 C W N 248 (1896), relied on. **Sita Nath Pal v Kartick Gharmi. 8 C W N 434.**

468—S. 153—Appeal.

Where in a suit for rent not exceeding Rs. 100 in value the question was one between a tenure-holder and a ryat and the latter set up the title of the superior tenure-holder who is not a party to the suit:—*Held*, that no second appeal lay under s. 153 of the Bengal Tenancy Act. **Ram Mohan Mohish v Badan Barai. 8 C W N 436.**

469—Bengal Tenancy Act, *S.* 153. — Where in a suit for rent the Defendant claimed to hold under the Plaintiff and his mother, under a right different from what was set up by the Plaintiff: *Held*,—that it was not a question as between parties having conflicting claims thereto and an appeal was barred by sec. 153 of the Bengal Tenancy Act. **Dena Bandhu Nandi v. Nobin Chundra Kur, 8 C W N 437.**

470—S. 153 — Suit for rent by co-sharer landlord.—

The provisions of *S* 153 of the Bengal Tenancy Act do not apply to the case of a suit for rent by a co-sharer landlord. **Jogendra Nath Ghose v. Paban Chandra Ghose, 8 C W N 472.**

Notes:—Ref: 5 C L J 235 F B; 10 C L J 629; 10 C L J 87, 1 C L J 500; 11 C W N 1026. Not Fol: 12 C W N 835; 13 C W N 793.

471—*S.* 153—Appeal—*Second* appeal—*Suit* for rent in kind.—

A question in a rent suit whether rent is payable in money or in kind is a question as to the amount of rent annually payable within the meaning of S. 153 of the Bengal Tenancy Act. **Apurba Krishna Roy v. Ashutosh Dutt. 9 C W N 122.**

472—S. 153, cl. (h) — Co-sharer landlord—*Suit* for share of rent without making other co-sharers parties—Appeal—*Second* appeal — Civ. Pro. Code (Act XIV of 1882), *S.* 622.

A suit by a co-sharer landlord for his share of the rent only without making the other co-sharers parties is a suit instituted by a landlord

Bengal Acts (Tenancy Act VIII of 1885) S. 153-*Contd.*

for the recovery of rent within the meaning of S. 153, Bengal Tenancy Act.

Where the rent claimed in such a suit did not exceed Rs. 50 and it was tried and dismissed by a Munsif who was specially empowered under cl. (b) of S. 153.

Held, that no appeal lay to the Subordinate Judge and hence no second appeal from his decision revising that of the Munsif.

But the decision of the Subordinate Judge being without jurisdiction was set aside under S. 622, Civ. Pro. Code. (12 C W N 249 applied and 8 C W N 472 not followed).

Bhagabati Bewa v. Nanda Kumar Chuckerbutty. 12 C W N 835.

Notes:—Ref: 5 Ind Cas 158.

473—S. 153—Right of appeal when a co-sharer landlord sues for his share of rent and makes his other co-sharers parties to the suit—Civ Pro. Code (Act V of 1908), S. 115—Revision.—

The suit of a co-sharer landlord for his share of the rent falls within the purview of S. 153, Bengal Tenancy Act.

Where the plaintiff, a co sharer landlord, brought a suit for his share of rent amounting to less than Rs. 50, and he made his co sharers, *pro forma* defendants to the suit, *held*, that an appeal to the High Court from the decision of the lower Appellate Court is barred under S. 153, Bengal Tenancy Act 8 C W N 472, not Fol.

Sital Chundra Bhattacharjee v. Sheikh Aftluddin. 13 C W N 793=4 Ind Cas 20.

474—Ss. 153, 153-A—Rent-decree—Order in execution passed by officer not specially authorised, if appealable—Ex parte decree set aside on deposit—Money deposited to be applied in satisfaction of decree ultimately passed in landlord's favour.

A decree for rent was passed by an officer empowered to exercise final jurisdiction in the matter under S.153 of the Bengal Tenancy Act:

Held,—that the section is no bar to an appeal from an order passed in execution of the decree by an officer not so empowered.

Whether an appeal lies or not must be determined with reference to the qualification of the officer who passes the order against which the appeal is preferred.

Bengal Acts-(Tenancy Act VIII of 1885)-S. 153-*Contd.*

Although S. 153-A of the Bengal Tenancy Act does not specifically prescribe the mode of application of the money deposited by the person at whose instance the *ex parte* decree has been set aside, the Legislature clearly intended that the landlord, in whose favour a decree is ultimately made on the re-trial, should apply the sum deposited by the judgment debtor to his credit towards satisfaction of the decree and execute the decree for the balance left, if any.

Sheo Parsan Ray v. Bishen Pargash Narain Singh, 15 C W N 760.

475—S. 153—Appeal —

Where in execution of a decree for rent made in a suit valued at less than one hundred rupees, immoveable property has been sold, a second appeal against an order refusing to set aside the sale is not barred by s. 153 of the Bengal Tenancy Act, because the order determines a question relating to land or to some interest in land as between the applicant (mortgagee from the judgment-debtor) and the purchaser (decree holder).

Safar Ali v. Raj Mohun Guha, 1 C L J 454=9 C W N 722.

Notes.—Fol: 32 Cal 957; F B=9 C W N 721 =1 C L J 476.

476—S. 153—Simple mortgagee, if can apply —Civil Procedure Code, s. 311.—

A simple mortgagee of property which has been sold in execution of a decree for arrears of rent is competent to apply to have the sale set aside under s. 311 C. P. C. **Safar Ali v. Raj Mohwn Guha, 1 C L J 454=9 C W N 722.**

477—S. 153—Suit for rent including Road and Public Works Cess—Verbal assignment.—

Where in a suit for rent certain cesses are claimed as part of that rent, and the Courts decide whether such cesses are payable or not, a second appeal lies as the decree has decided a question of the amount of rent annually payable by a tenant. 16 Cal 638 and 20 Cal 254 followed.

Where under a verbal arrangement existing for a long time a darputnidar has been paying the rent due to the superior landlord from the putnidar, it is not open to the putnidar so long

Bengal Acts-(Tenancy Act VIII of 1885) S. 153-*Contd.*

as the arrangement subsists to sue the darputnidar for the full amount of the rent and treat the assignment as non existing. **Debendra Prosad Ghose v Paresh Nath Mitter, 4 C L J 119.**

478—Sec. 153—Co-sharer landlord—Separate landlord--Second Appeal.—

Held, by the Full Bench that when a tenant has contracted to pay rent to one of several persons interested in a zemindari in respect of his share separately from that of his co sharers, and such rent has been assessed without any reference to the rent payable, to the other sharers, and has been separately collected, the landlord is a separate landlord and to a suit for rent brought by him to recover his rent, sec. 153 of the Bengal Tenancy Act applies. **Bhabatarini Dasi v. Ekabbar Malita (F B), 2 M L T 155= 5 C L J 235 (F B).**

Notes:—Ref· 12 C W N 835=10 C L J 629= 10 C L J 87.

479—Secs. 153, 192—Falkar rent.—

Falkar rent is rent within the meaning of the Bengal Tenancy Act and section 153 is applicable to a suit for recovery of such rent. **Kanai Mahaldar v Madhu Sudan Ghose. 6 C L J 669.**

Notes:—Ref. 7 C L J 152.

480—S. 153—Second Appeal-Rent, suit for.-

In a suit for rent, the defendant pleaded that the plaintiff was not, during the whole of the period for which the rent was claimed the owner of all the lands included in the tenancy as his interest in a portion had been sold at a sale under the Public Demands Recovery Act. *Held*, that the decision of the question thus raised was a question relating to the amount of rent annually payable and an appeal lay against the decree under S. 153 of the Bengal Tenancy Act. (21 Cal 722 Fol:) **Sasi Bhusan Rudra v. Beni Madhab Samanta, 8 C L J 519.**

481—Sec 153—Appeal—Suit by co-sharer for assessment of rent and arrears of rent—Court, duty of, in such suit—Co-sharer landlord realising rent separately-Assessment in proportion to lands belonging to one after partition.

A suit for assessment of fair rent on the basis of a *butwara* or partition between co-sharers and

Bengal Acts-(Tenancy Act VIII of 1885)-S. 153 *Contd.*

also for arrears of rent on that footing is a suit for assessment of rent independently of the prayer for recovery of rent from the tenant and is not a suit instituted for recovery of rent under section 153 of Bengal Tenancy Act, and that section has no application to such a case. It is not a suit by a co-sharer landlord, but a suit by one who seeks to establish his right as a separated landlord.

In such a suit it is for the Court to consider whether such separation has in fact taken place, if so on what terms, and then to assess the fair rent properly payable by the tenant and finally to decide whether there are in fact any arrears due and to give judgment accordingly. **Lala Dhanukdhari Lal v Baburam Ahir 10 C L J 629=4 Ind Cas 475.**

482—S. 153—Second appeal—Determination of annual rent—Decree not at admitted rate but as a lesser one—Admitted rate—Admission to be taken as a whole.—

A second appeal lies to the High Court in a case where the amount of rent decreed by the lower appellate Court is not that admitted by the tenant but some other amount.

In decreeing a rent suit at the admitted rate, it is incumbent on the Court to accept the admission of a tenant as a whole, regard being had to the question whether the land in the possession of the defendant is the same as it was when the tenancy was created, I C W N 711 Dist. **Shib Nath Dhar v Annoda Prosad Dhar. 5 Ind Cas 340=11 C L J 382.**

483—Ss. 153, 186-A—C P C (Act V of 1908) s 115—Landlord and tenant-Estoppel—Evidence Act (I of 1872) s, 116—Facts necessary to be found to constitute estoppel of tenant—Material irregularities under s. 115 C P C.

A suit for rent was valued at Rs 99. The first Court decreed the suit and also awarded Rs 25 damages against the defendant under s. 186-A (1) of the Bengal Tenancy Act.The defendant preferred a second appeal. *Held*, that it was doubtful whether a second appeal lay or not. A High Court can under s. 115 of the C P C interfere with an order of a subordinate Court of its own motion and without an application made to it by a party to the suit. Where, in such a case, it is clear upon the face of the judgment that there has been an

Bengal Acts-(Tenancy Act VIII of 1885) S. 153-*Contd.*

illegality and irregularity in the trial of the case, it is a proper one for interference under s. 115. In a suit for rent the defendant denied the title of the plaintiff saying that he was the *benamidar* for his daughter. There was no issue raised in the first Court as to whether the defendant was estopped from denying the plaintiff's title. The Court of appeal below held as a matter of law that the defendant was estopped from denying the plaintiff's title. *Held* that it was irregular on the part of the Court to hold this, in the absence of any finding whether or not the defendant was inducted into the land by the plaintiff, or if he was so inducted, into what land he was inducted or whether there was an attornment to the plaintiff and as to the question of *benami* as bearing upon the question of estoppel. *Held* further that it was a material irregularity on the part of a Court to come to a finding under a serious misapprehension as to actual facts. An admission without being aware of the circumstances is not binding. A previous deposition of the defendant who did not appear in a subsequent case was admitted without any proof whatever that it was his deposition. *held*, that this was an irregularity within s. 115. Before awarding damages under s. 186-A of the Bengal Tenancy Act, the Court should find as a fact as to whether there was reasonable or probable cause and state its ground for coming to that conclusion. **Sibu Sant v. Netai Charan Das. 9 Ind Cas 806.**

484-Ss. 153-A.199-Bengal Tenancy Act (VIII of 1885 and 1 of 1907)—Ex parte decree for rent of a jalkar (fishery). application to set aside—Deposit of amount due if necessary—S. 153 A provisions of, if applicable to suits for recovery of jalkar rent.

The provisions of S. 153-A of the Bengal Tenancy Act are, having reference to the words of S.193 of that Act, applicable to suits for recovery of rents of jalkar (fishery).

In an application to set asid an *exparte* decree for rent of a jalkar (fishery), it is the bounden duty of the next friend of a minor to put forward a statement of the injury sustained by the applicant by reason of the decree or judgment, that is to say he is bound to state that the rent which he was sued for, was not due from him or that it had been paid or paid in part, or that the

Bengal Acts-(Tenancy Act VIII of 1885) S. 153-*Contd.*

claim was excessive, or any other reason specifically connected with the claim which was decreed; he is also bound to deposit in Court the amount, if any which he admits to be due. **Annada Pr. asanna Mukerjee v. Nagendra Nath Biswas, guardian of Nilmadhab Parui. 15 C L J 52.**

485—Ss. 153, 193—Questions as to title—Bar of appeal—Suit for rent of tank—Fishery, meaning of—Civil Procedure Code (Act V of 1908), s. 115.—If an issue as to title is decided even incidentally between parties having conflicting claims, S. 153 will not bar an appeal.

A suit in respect of the rent of a tank, where the lease is not only of the water but of the land underneath and of the fruits of trees on the banks of the tank and of the right to rear fish, is not one governed by the Bengal Tenancy Act, and s 153 does not bar an appeal.

The right over fishery in s. 193 of the Act is the right to rear and to catch fish, without any reference to or connection with the land underneath or bordering on the water.

Where in an appeal from a decree of the first Court in a suit for arrers of rent in respect of a tank, the lower appellate Court passed a decree dismissing the appeal as not maintainable under s.153 of the Act, and a second appeal was preferred against that decree:

Held, that, although the appellant might have applied under s. 115, Civ Pro Code, 1908, there was nothing to prevent his coming in second appeal on the question of jurisdiction.

Gour Mohan Ghose v Chandi Charan Ghose. 5 Ind Cas 158.

486 S. 153—Second appeal—Decision of question relating to interest in and as between conflicting parties.

In a suit for rent below Rs. 100, the defence was that the land in suit appertained to another *jote* held by the defendant under the plaintiff's superior landlord who was no party to the suit. The decree of the lower appellate Court did not decide the question as to whether the plaintiff or the defendant was the *jotedar* under the superior landlord, but said that the plaintiff was entitled to recover so much money from the defendants in respect of the plaint land.

Bengal Acts-(Tenancy Act VIII of 1885)-S. 153-*Contd.*

Held, that a second appeal lay in the case. 8 C W. N. 434; 8 C W N 436, Ref:

Sri Charan Das v. Miryaullah Kazi, 8 Ind Cas 824.

487—S. 153—Second appeal—Patni Regulation (VIII of 1819), Ss. 11, 15—Annulment of intermediate tenure——Where tenure can be avoided otherwise than by suit—Intention to avoid—Overt act.

In a suit for rent the defendant No 1 was the tenant and the defendant No 2 was said to hold an intermediate tenure which the plaintiff alleged he had annulled under Ss. 11 and 15 of the Patni Regulation. The suit was dismissed by the lower appellate Court on the ground that the suit was not maintainable as the under tenure had not been previously annulled by a suit. The plaintiff appealed to the High Court:

Held, that it was a question such as is covered by S. 153 of the Bengal Tenancy Act, and that a second appeal lay.

Under-tenures are not *ipso facto* avoided by a sale under the Patni Regulation. But it is clear that they can be avoided otherwise than by a suit. They can be avoided when the purchaser by some overt act indicates his intention to exercise his power of avoidance. It is not necessary that the purchaser should give any notice or do any act before bringing his suit.

The present suit itself is sufficient annulment of the defendant No 2's under-tenure.

If the purchaser issues a proclamation under cl. 2 of s. 15 of the Patni Regulation, that would be an overt act indicating his intention to exercise his power of avoidance of any under-tenure mentioned in the proclamation.

An under-tenure cannot be avoided unless the intention of the purchaser is communicated to the under-tenant. 23 W R 268 Dist, 9 Cal 683, Fol:

Krishna Promoda Dasi v Parasulla, 11 Ind Cas 85

488—Ss. 153-A, 193—Jolkar—Arrears of rent—'Ex parte' decree—Deposit of money admitted to be due.

The words of sec. 193 of the Bengal Tenancy Act make the provisions of s. 153-A applicable to a suit for recovery of rent of a *Jolkar*.

Bengal Acts-(Tenancy Act VIII of 1885) S. 153-*Contd.*

Where, therefore, an *ex parte* decree was passed for rent in respect of a certain *Jolkar*, and the defendant applied to have that decree set aside, it was held the applicant must deposit the amount which he admits to be due from him to the decree-holder. **Annoda Prosonno Mukherji v Nil Madhab Parui. 11 Ind Cas 123.**

—s. 153.

See Bengal Tenancy Act s. 149. Case No (451) **9 C W N 492.**

—s. 154.

See Bengal Tenancy Act S. 52. Case No (216) **29 Cal 247.**

—s. 155

See Limitation Act Art 32. **24 Cal 160.**

489—Suit for ejectment—Notice, Sufficiency of—Omission from notice, of requisition on tenant to pay compensation—Alternative relief.

The words of s. 155 of the Bengal Tenancy Act "and in *any* case to pay reasonable compensation," etc., mean in *every* case; and a notice not containing a requisition to the tenant to pay such compensation is sufficient to support a suit for ejectment brought under that section. Where the suit was for ejectment from certain land, but the plaint contained other prayers, namely, for a declaration that the defendant had no right to build houses on the land, and for an injunction on him to remove houses he had built thereon, and the suit for ejectment failed from the insufficiency of the notice under s.155, the Court *held* that the plaintiff was not entitled to a declaration or injunction asked for. **Pershad Singh v Ram Pertab Roy. 22 Cal 77.**

Notes:—Dist: 30 Cal 1063.

490—S. 155—Notice—Ejectment suit.

A notice under s. 155 is not bad merely because the compensation is demanded in the alternative. 22 Cal 77 dist. **Boidya Nath Panday v Ghisu Mandal. 30 Cal 1063**

491—Section 155, Sub-sec. 2—Tenancy, misuse of—Decree for forfeiture, form of.

Where the land of a tenancy has been misused, the landlord is entitled under section 155 sub-section 2 of the Bengal Tenancy Act to have a decree compelling the defendant to remedy the

Bengal Acts-(Tenancy Act VIII of 1885)-S. 155- *contd.*

misuse where it is capable of remedy. A decree which merely directs the payment of compensation is not proper decree.

The phrase 'capable of remedy' means physically possible to remedy and does not mean possible remedy by compensation.

Where a tenant misused an agricultural holding by growing thereupon a mango orchard, the landlord is entitled to a decree directing the defendant to remove the trees within a specified time, and eject him if he fails to do so. He is entitled in addition to a decree for compensation. **Harak Singh v Kirat Narain Singh.**

10 C L J 595=4 Ind Cas 734

491A-s 155-Forfeiture of,by repudiation of tenancy—Ejectment, suit for-Notice, if necessary-Act shewing intention to determine the lease-Bengal Tenancy Act (VIII of 1885), Ss. 151, 181-Transfer of Property Act (IV of 1882), Ss. 106 and 111 cl. (g).

Where the holder of a service tenure renounced the title of his landlord and executed a *kabuliat* in favour of a third party in respect of the whole of the land comprised in the tenure, and the landlord brought a suit for ejectment.

Held, that the case falls within the Transfer of Property Act and not with the Bengal Tenancy Act: that no notice to quit was necessary, as the defendant forfeited his tenancy by denying the landlord's title ; but that the landlord, before he can eject the tenant, must do some act or other shewing his intention to determine the lease, and this intention must be shown at some time antecedent to the institution of the suit. (2 C L J 403 and 17 All 45). **Anandamoyi v Lakshi Chandra. 3 C L J 274=33 Cal 339.**

492—Bengal Tenancy Act (VIII of 1885) Secs. 155, 181--Practice--Remand--New point.

The tenant of a service tenure who refuses to perform his services, is liable to be ejected even without a notice to quit.

It is an incident of a service tenure that the holder thereof is liable to ejectment upon refusal to perform service, as this incident would be materially affected and practically destroyed, if

Bengal Acts-(Tenancy Act VIII of 1885) S. 155-*Concld.*

the provisions of Sec. 155 of the Bengal Tenancy Act relating to relief against forfeiture were made applicable, service tenures must be held to be excepted from the operation of Sec 155 by virtue of Sec 181 of the Act.

When a case has been remanded by an Appellate Court in an appeal against the decision given after the remand, fresh points which might and ought to have been urged before the remand, cannot be allowed to be taken. 4 Cal 67 ; 22 Cal 938 and (1857) S D A 1772 Fol: 25 Cal 131 Appl. **Ansar Ali Jemadar v C E Grey.**

2 C L J 403.

Notes—Fol: 2 C J 460. Ref. 33 Cal 339=3 C L J 274; 11 C W N 46 ; 5 C L J 53.

—s 155.

See Bengal Tenancy Act S. 25. Case No (126)

2 C L J 369.

—s. 155.

See Bengal Tenancy Act S. 89. Case No (333)

6 Ind Cas 147.

—s. 157

See Landlord and Tenant —Constitution of-Relationship Acknowledgment of tenancy

—s 158

See (1) Res Judicata-Matters in Issue.

(2) Bengal Tenancy Act s. 101.

30 Cal 339.

493.—Bengal Tenancy Act (1885) s 158—Application to determine the incidents of Tenancy—Validity of lease.—

In a proceeding under s 158 of the Bengal Tenancy Act,it is open to a petitioner,by acknowledging the tenancy, to dispute the validity of the lease under which he alleges his holding, and the Court is bound to go into and decide that question if raised. **Bhupendro Narayan Dutt v Nemye Chand Mundal 15 Cal 627.**

Notes:—Ap: 20 Bom 150. Ref: 20 Cal 249.

494-S. 158-Question as to boundaries-Standard measure of the district—Evidence taken by an Ameen under s 158 of the Bengal Tenancy Act.—

Under a proceeding under s 158 of the Bengal Tenancy Act, in which an enquiry was directed amongst other things, as to the boundaries of certain plots held by certain raiyats,the Ameen took

Bengal Acts-(Tenancy Act VIII of 1885) S 158-*Contd.*

evidence as to the standard measure of the district, and the Court decided the case on their evidence. *Held* that in determining the boundaries the question as to what was the standard measnre of the district arose, and that the evidence was rightly received and acted upon. **Deoki Singh v Seogobind Sahoo** 17 Calc 277.

495.—Bengal Tenancy Act (1885) s 158-Application to determine the incidents of tenancy and to set aside a lease—An application made nominally for the determination of the incidents of a tenancy, but substantially for the purpose of setting aside the lease under which the tenant came into possession, does not come within the scope of s 158 of the Bengal Tenancy Act. Per Petheram C J, Prinsep Pigot and Ghose JJ—An admission of Tenancy in order to give jurisdiction under s.158 does not bring the case within the section, the object of the section being to enable the Court to ascertain what are the incidents of the existing arrangement between landlord and his tenant, and not to enable the Court, in effect, to make a new contract for parties between whom no contract was in existence at and before the date of application. Per Norris J:—The true construction of the application was a question for the determination of a Division Bench. **Debendro Kumar Bundopadhya v Bhupendro Narain Dutt** 19 Calc 182.

Notes:—Ref· 20 Cal 249. Fol: 6 C W N 592.

496.—Bengal Tenancy Act (1885) s 158-Application to determine incidents of tenure against separate tenants—Form of petition—Procedure.

S 158 does not justify one application being made against different tenure-holders having separate and distinct tenures. The proper procedure is by separate applications against each tenure-holder. **Gopal Chand Nowlakha v Ashutosh Chatterjee** 21 Calc 602.

Notes:—Dist: 24 Cal 197.

497-S.158-Application for enhancement of rent when no settlement proceedings are going on.

The Court is not competent to pass a decree for enhancement of rent when dealing with an application under s 158 of the Bengal Tenancy Act. Where, therefore, a landlord seeks to enhance the rent of his tenant when no settlement

Bengal Acts-(Tenancy Act VIII of 1885) S. 158-*Contd.*

proceedings are going on, he must institute a suit for the purpose, and cannot do so by means of application under s. 158. **Rajeshwar Pershad Singh v Burta Koer** 21 Cal 807.

Notes:—Fol: 6 C W N 592.

498.-S.158-Incidents of Tenure-Form of petition against some tenant holding two or more tenancies.—*Held* by Petheram C J and Bannerjee,J (Rampini J dessenting).—The landlord is entitled to include in one application two or more tenancies held by the same tenant, under s 158 of the Bengal Tenancy Act. 21 Calc 602, referred to. By virtue of s 647 of the Civ. Pro. Code it was further *held*, by Bannerji J that the provisions of that Code may be applied to all proceedings under the Bengal Tenancy Act so far as they can be made applicable; and so the inconvenience resulting from the proceedings becoming complicated by the inclusion of more tenancies than one in an application under s.158 may be removed by following the course prescribed by s. 45, Civil Procedure Code.17 All 103; 22 I A 44 referred to. **Dijendra Nath Roy Chowdhry v Soylendra Nath Roy Chowdhry** 24 Cal 197=1 C W N 236.

499.—s.158-Transferability of holding,question as to—Rents paid by raiyats as holding adjacent lands-Inquiry under s 158, subject matter of.

The question whether the holding of the defendants is transferable cannot be gone into under s 158 of the Bengal Tenancy Act Where, in a proceeding under s 158 of the Bengal Tenancy Act,the Court sent the case to the Collector for the purpose of a local inquiry with a view to determine the matters referred to in that section, and it was directed among other matters, that the Revenue Officer should find out what may be the rents payable by raiyats holding lands in the vicinity of a similar description,—*Held* that the Revenue Officer ought not to have directed his inquiry to the question mentioned above, but the inquiry should have been directed to find out what was the rent that was being paid by the particular defendants or had previously been paid by them. **Purna Rai v Bunshidhur Singh** 3 C W N 15.

500.—S 158 Cl (d)—Determination of rent for excess area-Jurisdiction of the Court to determine:

Under S 158 Cl (d) of the Bengal Tenancy

Bengal Acts-(Tenancy Act VIII of 1885) S. 158-*Concld.*

Act a Court has to determine what the existing rent is and it has no jurisdiction to determine what the rent should be, and consequently, additional rent for additional area cannot be assessed in such a proceeding. 19 Cal 182 and 21 Cal 807 foll. **Sri Narain Thakur v Maharaja Sir Luchmeshwar Singh Bhadoor 6 C W N 592.**

—S 158.

See Bengal Tenancy Act s 101. Case No (356) **30 Cal 339.**

—S 158 cl (d).

See Bengal Tenancy Act s 52. Case No (220) **6 C W N 592**

501.—Ss 159, 161. 167—T P Act—S 73—Surplus sale-proceeds on sale of mortgaged property for arrears of Revenue, right of mortgagee to enforce his charge on —

Property which had been mortgaged to the plaintiff, in this case, was subsequently sold under a decree in a rent suit and a surplus was left, of the sale proceeds, after paying off the arrears of rent and it was *held*, that, under the provisions of s 73 of the Act, plaintiff had the right to enforce his charge on the surplus proceeds and that there was nothing in Ss. 159 and 161, to 167 of the Bengal Tenancy Act to prejudice such right of the plaintiff as mortgagees.

Gobind Sahai v Sibdut Ram 33 Cal 878.

502.—Bengal Tenancy Act, Chap. XIV—Different jotes or tenures—Suit for rent—Sale—Incumbrance—Auction-purchaser.

On examination of the several sections of Chap. XIV of the Bengal Tenancy Act commencing from section 159.

Held, that the landlord in order to take advantage of the special provisions relating to sales for arrears of rent, must cause the sale of each holding or tenure separately, having obtained a decree as regards the rent of each tenure of holding. Accordingly when a landlord having the same tenant holding different jotes or tenures under him instituted one suit for the rents of all the jotes or tenures and obtained a decree, the sales held in execution of the decree do not avoid incumbrances created by the tenant.

Semble—The landlord can institute one suit

Bengal Acts-(Tenancy Act VIII of 1885) S. 159 *Contd.*

for the rent of all the tenures, and the decree that may be passed in such a suit is good decree capable of execution in the ordinary way under the Code of Civil proceedure as a decree passed against the tenant.

The purchaser in execution of the decrees obtained by the landlords against the mortgagor as their tenant stands in the position of a purchaser of the equity of redemption. **Hridoy Nath Das Chowdhuri v. Krishna Prosad Sircar. 6 C L J 153=34 Cal 298=11 C W N 497.**

Notes.—Fol: 13 C W N 650; 7 C L J 96. Ref 36 Cal 765.

503.—Ss. 159, 160 (*9*)—"Protected interests"—Incumbrance.

P granted a permanent lease to B and authorised B to grant sub-leases. B granted a permanent lease to G and G granted a sub-lease to the plaintiff. *Held*, that the right and interest of G, and therefore of the plaintiff, are "protected interests", and cannot be interfered with by a purchaser under the Bengal Tenancy Act. **Afazuddi Khan v. Prasanna Gain, 39 Cal 138**

—S. 159—Co-sharer landlord, suit for rent by:—

See Co-sharer. **9 C W N 34.**

504.—Ss. 159, 161—Encumbrance—Adverse possession of part of tenure—Encumbrance, how annulled—Execution sale, what passed at.

To determine what passed to the purchaser at an execution sale, one must look to the sale certificate as a whole and examine, if necessary, the nature and scope of the execution proceedings.

Where one part of the sale certificate described the interest transferred as the right, title and interest of the judgment-debtor in the property mentioned in the Schedule, but in another part it was explicitly stated that the property transferred was one of which the rent was in arrear;

Held, that what was intended to be sold and was actually sold was the defaulting tenure described as the property of the judgment-debtor

Bengal Acts-(Tenancy Act VIII of 1885) S. 159-*Concld.*

The word 'encumbrance' as used in Ss. 159 and 161 of the Bengal Tenancy Act includes a statutory title and interest acquired by a trespasser by adverse possession of a part of the lands of the defaulting tenure.

Such encumbrance cannot be annulled in any manner other than what is provided in S. 167 of the Bengal Tenancy Act. 9 Cal 641 Exp. 29 Cal 813;2 C W N 251 Fol. **Gocool Bagdi v Debendra Nath Sen, 14 C L J 136.**

505.—Ss. 159, 160. 161.

A share in a tenure, which has been duly and effectively recognized by both the landlords and the tenants as a separated share, constitutes a distinct tenure and when such a tenure is sold in execution of a decree for arrears of rent due in respect thereof, the purchaser of an entire tenancy within the meaning of S. 159 of the Bengal Tenancy Act.

The burden is upon the purchaser to prove that the interest sought to be annulled is an incumbrance within the meaning of cl. (*a*) of S. 161, and if he proves this, he starts his case sufficiently; the burden then shifts upon the tenant to prove that he has a protected interest within the meaning of S. 160. (5 C W N 80 Rel. 9 C L R 449; 13 Cal 1; 9 C L J 490 1 Ind Cas 596; 13 C W N 720 Dist.) **Somir Jama v. Mahabharat Bakta. 7 Ind Cas 919**

—S 159.

See Bengal Tenancy Act S 22.Case No (113) **14 C W N 814.**

506.—S 160 (g)—Protected interest—Darputni—Mortgage:—

A mortgage of a darputni is not a protected interest within S 160 (g) of the Bengal Tenancy Act. **Akkoy Kumar Soor v Bejoy Chand Mohatap. 29 Cal 813.**

Notes:—Appr 32 Cal 911=9 C W N 803; Ref 7 C L J 202, 13 C W N 412=9 C L J 234.

507.—S 160, Cl. (g)—Protected interest—Incumbrance:

A putni kabuliyat contained the following clause: 'If I should let out this mehal in *durputni* to any person, such durputnidar shall act according to the terms of my kabuliyat." *Held*

Bengal Acts (Tenancy Act VIII of 1885) S. 160-*Contd.*

that even assuming that the putni pattah contained the counterpart of the clause the words did not amount to an express or implied permission to create a subtenure, and the knowledge of the proprietor of the creation of the sub-tenure and the acceptance by him of the rent of putni taluq through the sub tenure created a protected interest within the meaning of S 160 of the Bengal Tenancy Act. 29 Cal 813 Foll: **Mahammad Khan v. Nattar Chundra Pal Chowdry. 9 C W N803=32 Cal 911.**

Notes.—Ref 13 C W N 720=9 C L J 490.

508.—S 160—Raiyat holding at fixed rates if acquires occupancy right—His interest not "protected interest"—Per Mookerjee, J., agreeing with Doss. J, (Jenkins, C J not expressing any opinion.

That the interest of a raiyat at fixed rates is not a "protected interest" within the meaning of S. 160 of the Bengal Tenancy Act.

A raiyat holding at fixed rates does not after he has been in occupation for 12 years, become a 'settled raiyat," of the village and thus acquire a right of occupancy. **Bhut Nath Naskar v. Surendra Nath Dutt. 13 C W N 1025=2 Ind Cas 675=11 C L J 98.**

509—Ss. 160, cl. (g), 195-Protected interest—Mortgage by a putnidar if protedcted interest—Sale under the Bengal Tenancy Act—Putni Regulation (VIII of 1819), S. 11.

Where a *putni kabuliyat* provided as follows: "I in succession to my sons, grandsons, &c., heirs and representatives, shall, with felicity, hold and enjoy the aforesaid share, with right to make gift, sale, mortgage, &c., and *darputni mourasi, mokurari, qontidari*, &c., settements at a proper jama and to every way make alienations and create encumbrances," and the *putnidar* created a mortgage in favour of the plaintiff.

Held, that the recitals in the kabuliyat merely set out the ordinary incidents of a putni grant as laid down in S 3 of the Putni Regulation, and did not give the putnidar an express authority in writing by the landlords to create a mortgage, and the mortgage cerated in favour of the plaintiff by the putnidar was not a " protected interest " within the meaning of S 160, cl.(g) of the Bengal Tenancy Act.

Bengal Acts-(Tenancy Act VIII of 1885) S 160-*Concld.*

The right of a *putnidar* to give the tenure in mortgage is subject to the conditions imposed by S. 11 of the Putni Regulation

The ' express authority referred to in that section means such authority apart from the conditions of the lease.

The effect of S 160 cl (g) of the Bengal Tenancy Act would further be subject to the saving provisions of cl (e) of S 195 of the same Act **Krista Das Laha v Jotindra Nath Basu 16 C W N 561**

510—Ss 160, cl (c) 167—Protected interest —Boraj or betel nut plantation—' Permanent ' whether governs ' plantations —' Date of sale meaning of.

The term ' plantations ' in S 160, cl (c) of the Bengal Tenency Act, is not governed by the expression ' permanent, ' nor does the term necessarily mean permanency in the plant though it implies permanency in the nature of the work

Land on which a *boraj* or betel leaf plantation is made is a protected interest within the meaning of S 160 of the Bengal Tenancy Act

The words ' date of sale in S 167 of the Bengal Tenancy Act, mean the date on which the sale is confirmed, and not the date on which the sale is in fact held 7 C W N 552 6 C W N 776, Ref **Banko Behary Das v Krishna Chandra Bhowmik 9 Ind Cas 528**

—S. 160.

See Bangal Tenancy Act,S 49. Case No (190) **8 Ind Cas 65.**

—S. 161.

See Sale for Arrears of Rent—Incumbrances.

511—Sec 16—Incumbrance, suit to annul—Burden of proof.

A person seeking to annul a tenancy as an incumbrance shall make out a case that the tenancy is, in fact, an incumbrance within the meaning of section 161 of the Bengal Tenancy Act It is not for the defendant to prove that his tenancy existed before the creation of the tenure purchased by the plaintiff **Narmada Sundari Debi v Tarip Mollah 9 C L J 490=13 C W N 720 =1 Ind Case 596.**

Bengal Acts-(Tenancy Act VIII of 1885) S. 161-*Contd.*

512—S 161—Encumbrance

Where an absolute transfer of the interest of *raiyati* in a portion of the holding takes place, such transfer is not within the definition of the word "encumbrance' in S 161 of the Bengal Tenancy Act,a limitation of the tenant's interest,but a complete extinction of his interest in the portion transferred 11 C L J 16, 14 C W N 229, 5 Ind Cas 116 Fol **Bipin Behary Nandan v Jadu Nath Chatterji 6 Ind Cas 451.**

513—Ss. 161 166 167—Lien created by tenant whether incumbrance—Purchaser at execution of rent decree—Mortgage by tenant—Annulment of incumbrance—Transfer of Property Act (IV of 1882), S 73—Proof of annulment—Production of order sheet or proceeding before Collector not sufficient—Suit for possession-Plaintiff to succeed upon title as at date of suit

A lien created by a tenant on his holding is an incumbrance as defined in S 161 of the Bengal Tenancy Act

The purchaser of a holding at sale held in execution of a rent decree must, therefore annul any mortgage created by the tenant as provided by S 167, and the mortgage is not *ipso facto* annulled by the sale

If the purchaser does not take necessary steps to get the incumbrance annulled within the peirod limited the incumbrance stands and can be enforced against the purchaser A landlord who purchases the holding is in no better position than any other purchaser

Until the notice has been properly served under S 167 upon the incumbrancer, the incumbrance, stands.

S 73 of the Transfer of Property Act only gives a right to the mortgagee over the residues of the sale proceeds, and refers to cases where the law otherwise provides that the effect of the sale is to nullify a mortgage , it is not intended in any way to enlarge the interest of the purchaser at a sale for arrears of revenue of rent

The production of the order sheet of a proceeding under S 167 is not sufficient to prove the annulment of an incumbrance. The proceedings before the Collector are summary and not binding

Bengal Acts-(Tenancy Act VIII of 1885) S. 161-*Concld.*

upon the Civil Courts and it is open to the Civil Courts to go into the question

In a suit for the recovery of possession the plaintiff must succeed on the title as it stood on the date of institution of the suit

24 Cal 746, followed. 7 C L J 262, foll 7 C L J 262, relied upon

Chhatardhari Lal v Biranchi Lal 9 Ind Cas 248

—S 161

See Bengal Tenancy Act s 17 Case No (86) **11 C W N 217**

—S 161

See Bengal Tenancy Act ss 159 160, 161 Case No (505) **7 Ind Cas 919**

—S. 161

See Bengal Tenancy Act s 86 Case No (315) **7 Ind Cal 19**

—Ss 162, 163

See Sale in Execution of Decree—Setting aside sale General Cases **3 C W N 333**

514—Ss 163 164 165—Decree for rent against tenant in possession if one under Bengal Tenancy Act—Irregular sale effect of—Tenure if passes by sale not held strictly in accordance with the provisions of the Act—Right title and interest—In sale proclamation if may include the whole tenure—Mortgagee who purchases mortgaged property in execution, if may fall back on mortgage to protect it against purchaser at rent sale

A decree obtained in a suit for rent against a person in possession, who is also the legal representative of the last registered tenant, is a decree for rent within the meaning of the Bengal Tenancy Act

Where a tenure was sold in execution of a decree for rent, but on the first day the bidding did not come up to the decretal amount and the property was sold notwithstanding, without any fresh proclamation and sale under s 165

Held, that, as the sale could not in the circumstances be under S. 164, it was not a sale under the Bengal Tenancy Act and did not operate to transfer more than the right, title and interst of the judgment-debtor.

Bengal Acts-(Tenancy Act VIII of 1885) S 163 *Concld*

The special and stringent provisions of the Bengal Tenancy Act relating to sales is part of a public policy intended for the benefit of all parties concerned If the landlord wants special results to follow from it under the Act, he must proceed strictly in accordance with its provisions

Where a mortgagee of a tenure gets a decree and purchases the mortgaged tenure at a sale in execution of his mortgage-decree, and the tenure is subsequently sold again in execution of a rent decree against the original tenant, it is open to the mortgagee to fall back on his mortgage as a shield against the purchaser under the rent sale when that sale is not free from incumbrances (29 Cal 813, Fol 7 C L J 120 Ref).

Raja Ban Behari Kapur v Khetterpal Sinha Roy 16 C W N 259

515—Ss 164, 165, 167—Notice to annul incumbrance—Apportionment—Mortgage.—

S. 167 of the Bengal Tenancy Act applies in a case where the incumbrancer is a third party and not where the purchaser and incumbrancer are identically the same person Pending a suit to enforce a mortgage, one of the properties, *viz.* property No 4, was sold for arrears of rent and was purchased by the plaintiff in the mortgage suit the sale being apparently under *S.* 165 of the Bengal Tenancy Act *Held* that the purchaser being the incumbrancer himself no notice was necessary to be given under S 167 for annuling the incumbrance (28 Cal 12 reld on 4 C W N 268 Ref **Hem Chandra Chowdhury v Tafazzel Hossein Khan 8 C W N 302.**

516—Bengal Tenancy Act (VIII of 1885) Ss. 165, 167—"Purchaser," meaning of—Encumbrance annulment of when purchaser himself is the encumbrancer—Transfer of Property Act (IV of 1882) s 101 —

The purchaser contemplated by s 167 is ss. purchaser independently of the encumbrancer, and where the encumbrancer himself purchases the property encumbered to him in execution of a decree for arrears of rent, it is not necessary for him to give notice of annulment of his encumbrance under s. 167 of the Bengal Tenancy Act.

Under s 101 of the Transfer of Property Act, which is of general application, his encumbrance is extinguished unless he evinces an intention to keep it alive.

Bengal Acts-(Tenancy Act VIII of 1885) S.165 *Concld.*

Whether a mortgagee has purchased the mortgaged property in execution of a rent decree he is entitled to proceed against the other properties of the mortgagor 4 C W N 268 Dist.

Mastullah Mandal v Gyan Manund Sah. 4 C W N 735=28 Cal 12.

Notes:—Ref: 8 C W N 332, 1 N L R 39.

517—S. 165-landlord parting with his interest after the accrual of rent, if he has a first charge-Putni Regulation (VIII of 1819), S 13. cl. (4)—Durputnidar's lien.—

There is nothing in the law which disentitles a landlord to a first charge, because after the accrual of the rents he sued for, he parted with his interest in the zemindari.

The character of the decree a suitor obtains depends on the nature of the claim, and of his right to the relief sought for, and is not altered by any change in his position which may have taken place subsequent to the accrual of his right to sue.

A *durputnidar* in possession of putni under S. 13 cl. (4) of the Putni Regulation has only a lien, not a first charge, on the putni.

A landlord, who, though after the accrual of the rent sued for, parted with his interest in the zemindari, has a priority over a person having a lien under S. 13, cl. (4) of the Putni Regulation and can, under *S.* 165 of the Bengal Tenancy Act, sell it free of all encumbrances. (6 C W N 91 Cons;3 C W N 604 and 31 Cal 550 not fol:)

Maharaj Bahadur Singh v A H Forbes. 7 C L J 652=35 Cal 737.

518—Ss. 166 and 167—Occupancy-holding—Mortgage—Incumbrance. annulment of—Fraud.

Where an occupancy-holding which had been mortgaged by the raiyat of the holding was purchased by a person in execution of a decree for money obtained by him, and the purchaser repurchased it in execution of a rent decree against the old tenant for arrears which had accrued previous to his first purchase and annulled by a notice under S. 167 the mortgage, of which he was aware at the time of his re-purchase.

Held, that the purchaser did not commit any fraud in re-purchasing the property and was entitled to annul the mortgage, and the mortgagor was not entitled to get a decree upon the mortgage making the holding liable for the mortgage debt.

That the purchaser was not bound as representative of the old tenant to pay off the decree for rent obtained by the landlord.

Surendra Mohan Singh v Bansidhar Marwari. 12 C W N 114.

Bengal Acts-(Tenancy Act VIII of 1885) S. 166-*Concld.*

—S. 167.

See Sale for arrears of Rent—Incumbrances.

519.—S. 167—Notice of incumbrance—Notice to assignor of applicant—No notice to assignee—Right of assignee to apply after one year.

Where an assignee of a person entitled to apply under S. 167 applied to annul an incumbrance within one year after he received express notice of the incumbrance: *Held*, it was not immaterial whether the assignor of the applicant had or had not notice before that, and the application cannot be said to be in time in the absence of a finding that he had no such notice.

Mohabul Singh v Umahil Fatima. (1900) 28 Cal 66 at 68.

Notes.—*Fol*: 2 C L J 99: Ref. 29 Cal 813.

520.—S. 167—Collector's power to order amendment—Limitation.

An application under S. 167 for cancelling an incumbrance must state the correct name of the incumbrancer. Where the correct name is not given and after one year allowed by the section, an application is made to insert the correct name. *Held* that (1) the first application was not a proper application; (2) that the second application was time barred. A Collector acting under S. 167 is only a ministerial officer, and as such has no power to allow amendments of applications to cancel incumbrances. The applicant knew the correct name when the first application was made. 20 Cal 388, 396 dist. **Nritya Gopal Hazra v Golam Rasool. 28 Cal 180.**

520A.—Where plaintiff is both landlord and

Bengal Acts-(Tenancy Act VIII of 1885) S. 167-*Contd.*

tenant combined—Calculation of Costs.

(1) Where the plaintiff's both landlord and tenant combined, and the defendant a sub-tenant notwithstanding a notice served on him under S. 167 of the Bengal tenancy Act, withheld possession from the plaintiff, the mesne profits must be assessed on the value of the crops raised by the defendant and not on the basis of the rent, which the rightful owner had been realising from the tenants before dispossession. (2) Where there is no special reason for doing otherwise, costs should follow the event. **Gopal Chunder Mandal v Bhoobun Mohun Chatterjee. 30 Cal 536.**

Notes.—Appr. 35 Cal 1000=12 C W N 650.

521.—Bengal Tenancy Act (VIII of 1885) Ss. 167, 22, 85—Purchase of a raiyati holding by a landlord in execution of a decree for rent—Annulment of incumbrance—Notice if necessary—Annulment of incumbrance.

An under raiyati lease if created by an instrument which is not registered is invalid under s. 85 of the Bengal Tenancy Act, and a landlord purchasing the holding of the raiyat in execution of a decree for arrears of rent is entitled to take *khas* possession by ejecting such underraiyat without annulling the same by a notice under S 167. The rights under such an underraiyati lease are not protected by Sub S 1 of S 22 of the Act. **Peary Mohun Mukerjee v Bada Chunder Bagdi. 5 C W N 310= 28 Cal 205.**

Notes.—Dist: 3 C L J 155; 31 Cal 932; 34 Cal 104=3 C L J 155;13 C W N 913.

522.—Bengal Tenancy Act VIII of 1885, S. 167—Limitation Act Ss. 6, 8=(1877)—S. 7—Scope of—Minor——Application to bar encumbrance.

S. 7 of the Limitation Act extends the period of limitation prescribed by the Act itself, but does not affect the limitation prescribed by S. 167 of the Special Act, viz, the Bengal Tenancy Act. **Akhoy Kumar v Bejoy Chand Mohatab 29 Cal 813**

Bengal Acts-(Tenancy Act VIII of 1885) S. 167-*Contd.*

523.—S. 167—Incumbrance — Mortgage—Decree.

A mortgage which has ripened into a decree of Court cannot be treated as an incumbrance on the property which could be avoided under S. 167 of the Act. **Akhoy Kumar v Bejoy Chand. 29 Cal 813.**

Notes.—Appl: 32 Cal 911=9 C W N 803. Ref: 9 C L J 234=13 C W N 412; 7 C L J 262.

524.—S. 167—Suit by purchaser of certain *howla* to avoid incumbrances thereon—notices on all defendants except one, who disclaimed all interest in the tenure—Succession Act Ss 179, 187 and 260—Suit by executrix—Necessity of copy of will and grant of administration.

Held, that where probate of a will has been granted and an executor appointed, the executor, in order to bring a suit as such, is, under Ss 179, 187 and 260 of the Indian Succession Act, bound to prove his title. In order to prove her title as executrix, the plaintiff was bound to file, not merely the copy of the grant of the administration but also the copy of the will, of which probate was granted. On her failure to produce the complete probate, the plaintiff was not entitled to proceed with the suit. *Held*, also that notices were given to all the defendants except one, within one year. The fact that notice was served on that one defendant beyond the period of limitation could not be taken to prejudice the plaintiff in the present case or in any way to bar her present suit by limitation. For, the defendant disclaimed all interest in the tenure. *Held*, further, that the Courts below having found that the notices were not served on the defendants in accordance with law and that finding being one of fact, the High Court could not interfere in second appeal. Suit dismissed accordingly. **Delaney v Rohamat Ali. 32 Cal 710.**

525.—Ch. XIV, s. 167—Single decree for rent of several tenures held by same tenant—Sale—

Bengal Acts-(Tenancy Act VIII of 1885) S. 167-*Contd.*

Avoidance of incumbrance—Money-decree.

When there are several tenures held by the same tenant, the landlord may institute one suit for the rent of all the tenures. But he cannot put the tenures to sale under the procedure laid down in Ch. XIV of the Bengal Tenancy Act, in execution of the decree obtained in such a suit, so as to enable the purchaser to avoid incumbrances under s. 167, Bengal Tenancy Act. A sale under the provisions of that Chapter can take place only when a separate decree has been obtained for the arrears of each tenure or holding and the same is sold separately in execution of such a decree.

Hridoy Nath Das Chowdhury v Krishna Prasad Sircar. 11 C W N 497=34 Cal 298; =6 C L J 153.

Notes—Fol 7 C L J 96, 11 C L J 56.

526—S. 167—Sale of portion of tenure or holding — Annulment of encumbrances. — Per Geidt, J. (before the reference).

S. 167, Bengal tenancy Act, does not apply to a sale in execution of a rent-decree of a portion only of a tenure or holding, and the auction purchaser cannot proceed under that section, to annul encumbrances. **Ram Kinkar Biswas v Akhil Chandra Chowdhuri. 11 C W N 350=5 C L J 242=2 M L T 137 F B= 35 Cal 519.**

527—S.167—Notice,service of.—

Where an application for service of a notice under s. 167 of the Bengal Tenancy Act was made to the Collector and the application and notice were sealed with the Collector's seal, though it was signed by a Deputy Collector,"for the Collector' and was received by the Deputy Collector in charge, and the notice was thereafter issued from the Collectorate: *Held* that there was no irregularity in the service of the notice.

Mahammud Kazem v Naffer Chundra Pal Chowdhry. 9 C W N 803=32 Cal 911.

Notes.—*Ref*: 9 C L J 490=13 C W N 720,

Bengal Acts-(Tenancy Act VIII of 1885) S. 167-*Contd.*

528.—Bengal Tenancy Act (VIII of 1885), s. 167—Notice—"Final decree"—Order of remand—Suit to annual incumbrances—Dismissal of suit on the ground of non-service of notice-Appellate Court holding service proved and remanding case.

Where a suit to annul incumbrances by the purchaser of a *putni* at a sale for its own arrears was dismissed by the Subordinate Judge, on the ground that the plaintiff had failed to prove the service of notices under s. 167, Bengal Tenancy Act, but the High Court, on appeal held that the service of notices was proved and remanded, the suit for the trial of the other issues in the case.

Held, that though the order of the High Court was in form an order of remand, it finally decided the cardinal point in the case, *viz.*, whether the notices were properly served or not. The order was therefore a "final decree" within the meaning of s. 595 of the Civ. Pro. Code. (17 All 113 and 15 Bom 155,Ref.)

Ananda Gopal Gossain v Nafar Chandra Pal Chowdhury. 12 C W N 545= 35 Cal 618=8 C L J 168.

Notes.—Ref: 10 C L J 336.

529.—Bengal Tenancy Act (VIII of 1885) s. 167 Annulment of—Incumbrance, notice for—Notice, contents of Notice, joint, to several persons.

A notice to annul an incumbrance under s.167 of the Bengal Tenancy Act is not bad though it does not specify the particulars of the land held by the tenant or rent payable by him. Such a notice if addressed to several tenants jointly is not bad if it is served in accordance with the prescribed rules.

Jogabandhu Majumadar v Rasho Monjan Dassya. 5 C W N 272.

530-531.-S,167—Annulment of incumbrances

Bengal Acts (Tenancy Act VIII of 1885) S. 167-*Contd.*

Omission—effect of—Landlord having a charge for rent.

Where in execution of a decree for arrears of rent a raiyati holding was sold and purchased by the landlord, and the plaintiff, a mortgagee of the raiyati holding whose mortgage was not annulled, brought a suit to enforce the mortgage; *Held* that the mortgagee was entitled to enforce the mortgage on payment of the money due under the rent decree. S. M.

Meherunnissa v Sham Sundar Bhuiya. 6 C W N 834.

532.—S. 167—Rent-sale, with power to purchaser to annul incumbrances—Right of mortgagor to have his lien transferred to sale-proceeds.

In the case of a rent-sale (under the Bengal Tenancy Act), with express power to the purchaser to annul all incumbrances, so long as such power remains in the purchaser, the lien of a mortgagee is in jeopardy. In such a case the mortgagee may abandon his lien and ask to have it transferred to the surplus sale proceeds.

Nim Chand Baboo v Ashutosh Dutt. 9 C W N 117.

533.—S.167-Rent-sale—Annulment of mortgage by notice-Right of mortgagee to apply to set aside sale.

The service of notice under s. 167 of the Act annulling a mortgage is no bar to the mortgagee making an application to set aside a sale of the tenure. **Brij Kumar Roy v Dhanukdhari Raut 10 C W N 976.**

534.—S. 167——Annulment of incumbrances -Application-Notice issued by Deputy Collector, if valid.

Under Sec. 167 of the Bengal Tenancy Act, the application by a purchaser for the issue of a notice to annul incumbrances is to be made to the Collector by Sub-sec. (3), it is the Collector who must issue the notice on the incumbrancer.

Where, therefore, the application was made to the Deputy Collector who was not shown to be then acting for the Collector and the notice was issued by him though his action was subsequently approved by the Collector, after the lapse of the time limited by Sec.167 namely, one year from the date of sale, the notice was not a legal notice under the provisions of Sec. 167 and was invalid and the incumbrance was not annulled. (28 Cal 66 Foll)

Ram Dhon Dey v Surja Narain Mukhopadhya. 2 C L J 99.

435.—S. 167—Notice, proof of service of—Notice, validity of—Order sheet of the proceedings entries in, evidentiary value of.

Until the notice has been properly served under s. 167 of the Bengal Tenancy Act upon the incumbrancer, the incumbrance subsists. It is obligatory on the purchaser to show that the notice under s. 167 had been served in the manner prescribed. The entries in the order-sheets are not *prima facie* evidence against the incumbrancer that the notice was served.

The purchaser who relies upon the service of notice must prove it either by the production of the person who served the notice or by any other means recognised by law; and if a question arises as to the validity of the notice, it must be shown that it was a valid notice and was signed by a competent officer as required by cl. (1) of s. 167 of the Bengal Tenancy Act. 29 Cal 213 Fol. **Radhay Koer v Ajodhya Das. 7 C L J 262**

536. - *Ss.* 167 & 65-Mortgage decree-Decree for arrears of rent—*Sale* held subsequently-Position of Purchaser-Transfer of Property Act (IV of 1882) S. 73 The purchaser in execution of a rent decree has priority over the purchaser in execution of a mortgage decree.

A mortgagee obtained a decree upon his mortgage in May 1900. In June the landlord of the mortgagor filed a suit for arrears of rent, the suit was decreed and the property sold in execution in September 1901.

In 1904, the mortgage decree was executed and the purchaser in execution claimed to hold the land in preference to the purchaser in execution of the rent-decree, who had served a notice under s.167 of the Bengal Tenancy Act.

Held, the purchaser in execution of the rent decree was entitled to hold the land free of encumbrances. **Gopinath Mahapatra v Kashinath Beg. 9 C L J 234=13 C W N 412= 1 Ind Cas 35.**

Bengal Acts-(Tenancy Act VIII of 1885) S 167-*Contd.*

537.—Bengal Tenancy Act (VIII of 1885) Section 167-Title, priority of-Purchase at a sale in execution of a landlord's claims for rent-Purchase in execution of a mortgage decree for portion of the holding—Rent, right to claim—Encumbrance setting aside of—Limitation Notice served in a year from the date of confirmation of sale, if valid—Estoppel, conduct.

A purchaser at a sale in execution of the landlord's claim for rent acquires a title to the whole of the holding preferential to that which a mortgagee by his purchase in execution of his mortgage decree acquires in portions of the holding.

A purchaser of an entire durputni taluq at a sale in execution of a decree for arrears of rent made in a suit brought against the original durputnidars by the putnidar, acquires a good and preferental title to the whole taluq over the purchaser in execution of a mortgage decree obtained against some of the durputnidars who were encumbrancers on durputni to the extent of the shares covered by the mortgage encumbrances; and on the basis of that title the former can recover the full rents from the tenants of the taluq.

A person who claims to hold encumbrances and who disputed in a previous litigation, the right of the purchaser of the entire holding under the sale for arrears of rent and thus denied the right of the purchaser to issue notices to annul the encumbrances, involving the purchaser of the entire holding in litigation to prove his title, cannot, by reason of his having raised the dispute and caused the delay, in equity, be allowed subsequently to say that the title under which the purchaser claimed to issue the notice was perfected, for the purposes of section 167 of the Bengal Tenancy Act, on the date of his actual purchases, and not on any subsequent date, such as the date of the confirmation of his title by the decision in the previous litigation. 13 C W N 413 Foll **Bibi Taibatannessa Chowdhurani v Pravabati Dasi.** **10 C L J 640.**

538—S. 167—Incumbrance—Tenure—Occupancy right—Emblements, law of.

Where land was let out to a tenant for purposes of reclamation at a progressive rate of rent, which, when maximum, was fixed in perpetuity, and it was further provided that the land was to be held by the tenant from generation to generation who might transfer the same and construct houses &c.

Held, that tenancy was in the nature of a tenure and therefore not a protected interest under s. 167 of the Bengal Tenancy Act.

Per Mitra J.—(on second appeal).-There is no law emblements in this country. On the termination of the tenancy, the right of the landlord to re-enter accruing, he is entitled not only to take possession of the land but also of the standing crops on it. **Akhil Chandra Mandal v Surendra Nath Dutt** **11 C L J 87= 5 Ind Cas 306.**

Notes:—Foll: 11 C L J 98=13 C W N 1025 =2 Ind Cas 675.

539—S. 167-Incumbrance-Protected interest.

Where land was let out to a tenant for purposes of reclamation at a progressive rate of rent which, when maximum, was fixed in perpetuity, and it was further provided, that the land was to be held by the tenant from generation to generation who transfer the same and make gardens, houses and tanks.

Held, that the tenancy was in the nature of a tenure and therefore not a protected interest within the meaning of section 167 of the Bengal Tenancy Act.

Per Mookerjee J (affirming Doss J) A raiyat at a fixed rate of rent, though he may hold his land for twelve years, does not become an occupancy raiyat so as to make his holding a protected interest under section 167 of the Bengal Tenancy Act.

Bhut Nath Naskar v Manmatha Nath Mitra 11 C L J 98=13 C W N 1025=2 Ind Cas 675.

540—S. 167—Ch. XIV, Sale under—Decree for entire rent by co sharer landlord registered as sole proprietor—Incumbrance.

A sale in execution of a decree of the whole rent obtained by a landlord, who at the time of the suit is the sole registered proprietor and who has been placed and maintained in possession by a competent Court, operates as a sale under Ch. XIV of the Tenancy Act, even if it transpires ultimately, as the result of litigation in a title suit, that he is not the sole landlord and has co-shares in the property.

Bengal Acts-(Tenancy Act VIII of 1885) S. 167-*Contd.*

It is not competent to a purchaser at a sale held in execution of a decree for arrears of rent to annul, under S. 167 of the Bengal Tenancy Act, an incumbrance upon the property, without annulling at the same time a superior incumbrance directly subordinate to the interest purchased.

Mafizuddin v Asutosh Chakravarti
11 C L J 141=14 C W N 352.

541—S. 167—"Encumbrancer" means whole body of encumbrancers.

S. 167, Bengal Tenancy Act, provides that an application to the Collector should be to serve notice on the encumbrancer.

Held, that this means on the whole body of the encumbrancers, and if the notice is not served within time, upon any of several encumbrances, jointly interested in the encumbrances, the notice is bad in respect of the others also, and the encumbrance will not stand annulled by reason of its service.

In an ordinary case, notice to an ordinary *ammukteor* may not be a notice to his principal; but when the *ammuktear* is the husband of the principal and conducted proceedings on her behalf, notice to him of an encumbrance will be considered notice to her. (32 Cal 710. Fol:) **Srimati Khyanta Kali Dasi v Kedar Nath Kaji**
5 Ind Cas 652.

542.—S. 167—Incumbrance, annulment of—One year from date of sale—Incumbrancer involving purchaser in litigation to prove title—Estoppel.

A person, who claims to hold incumbrances and who disputed in a previous litigation the right of the purchaser of the holding at a rent sale, and thus denied the right of the purchaser to issue notices to annul the incumbrances, and caused the delay in issuing them, cannot in equity be allowed to say that the title under which the purchaser claimed to issue the notices was perfected on the date of the actual sale and not on the date of the confirmation of the sale 10 C L J 640; 4 Ind Cas 750, Foll. **Gobind Chandra Laha v Tara Pada Bhattacharjee. 9 Ind Cas 503.**

—S 167

See Bengal Tenancy Act s 22 (1). Case No (110)
28 Cal 205.

Bengal Acts-(Tenancy Act VIII of 1885) S. 167-*Concld.*

—S 167.

See Bengal Tenancy Act s. 3 (16). Case No (19) **28 Cal 66.**

—S 167.

See Bengal Tenancy Act s 164. Case No (515)
8 C W N 332.

—S 167.

See Bengal Tenancy Act Ch XIV
14 C W N 352.

—S 167.

See Bengal Tenancy Act s 49. Case No (189)
7 Ind Cas 17.

S 169.

See Sale for Arrears of Rent—Rights and Liabilities of Purchasers. **21 Cal 169.**

543.—S 169 (1) (c)—Surplus Sale proceeds—Mortgage—Transfer of Property Act (IV of 1882 S 73—Landlord's claim preferential.—

The landlord has a right under s 169 clause (1) subclause (c), Bengal Tenancy Act, to have the rent due to him in respect of the tenure between the institution of the suit for rent and the date of the sale, paid out of the balance, before any sum can go to the judgment-debtor or to his mortgagee. He has a preferential claim to that of the mortgagee of the holding, who stands in the shoes of the judgment-debtor. **Prabal Chandra Mukerji v Jadupati Chuckerbutty**
6 C L J 26=34 Cal 724.

544A.—Landlord and tenant—Jote (holding), sale of—Surplus sale proceeds, claim of, by purchaser—Transferability, question of.

A certain *jote* was sold in execution of a decree for arrears of rent obtained against the recorded tenant and the purchaser of a portion of the *jote* from the latter claimed the surplus sale proceeds representing the portion purchased by him; the defendant objected to the same on the ground that he was the purchaser of the *jote*. The lower Courts held that defendant could not prove his purchase and the landlord was not a party: *Held*, that the question of the transferability of the *jote* did not arise. **Ambika Nath Acharjee v Aditya Nath Moitra** **6 C W N 624.**

Notes:—*Ref*: 11 C W N 76. Fol: 12 C W N 1086=8 C L J 261; 13 C W N 630

Bengal Acts-(Tenancy Act VIII of 1885) S. 169-*Concl'd.*

544B.—S 169, Sub-s 1 cl (c)—"Date of sale," meaning of:—

The words "date of sale" in s 169, Sub-s (1) cl (c) mean the date of confirmation of sale and not the actual date of sale. **Matangini Chaudhurani v Sreenath Das. 7 C W N 552.**

Notes:—Ref: 8 C W N 476; 9 C L J 479 = 13 C W N 746.

545.—S 169—Rent—Interest—Pleading.—

Where a landlord applied under S 169, cl (c) of the Bengal Tenancy Act, for getting the rent and interest due to him, between the date of the institution of the suit and the date of the sale, from the surplus sale-proceeds, and the judgment-debtor raised no objection to it, but admitted the justice of the decree-holder's demand.

Held that the decree—holder was entitled to get interest on rent.

Per Ghose, J.—Rent as used in cl (c), S 169, does not exclude interest. **Moharajadhiraj Bejoy Chand Mohatab Bahadur v S C Mookerjee 11 C W N 1106.**

546.—Bengal Tenancy Act (1885) S 170-Bengal Act VIII of 1869—General clauses consolidation Act (I of 1868), s 6-Before the Bengal Tenancy Act of 1885 came into force, decree for rent was obtained under Bengal Act VIII of 1869. After the Bengal Tenancy Act of 1885 had become law, the tenancy in respect of which the rent decreed had become due was attached in execution of such decree. An application was put in for a claim to the attached property by a third person which was disallowed as being forbidden by s 170 of the Bengal Tenancy Act. *Held* that the provisions of the Bengal Tenancy Act of 1885 were applicable to the proceedings in execution, the term "proceedings" in s 6 of the Act I of 1868 does not include proceedings in execution after decree. **Deb Narain Dutt v Narendra Krishna 16 Calc 267.**

Notes:—Appl: 24 Cal 599. Ref 21 Cal 940; 22 Cal 767; 34 Cal 636; 5 C L J 550; 10 C L J 463. Ap: 1 C L J 500.

547.—Attachment of tenure in execution of decree for arrears of rent by a fractional co-sharer—Arrears of rent of separate share.

Bengal Acts-(Tenancy Act VIII of 1885) S. 170-*Contd.*

An attachment of a tenure or holding in execution of a decree obtained by a fractional co-sharer for arrears of the rent of his separate share is not such an attachment as is contemplated by s 170 of the Bengal Tenancy Act. **Beni Madhub Roy v Jaod Ali Sircar 17 Cal 390.**

See **Sadagar Sircar v Krishna Chunder Nath 26 Cal 937.**

Notes:—Ref. 29 Cal 54; 219; 5 C L J 235 FB Fol. 19 Cal 593; 26 Cal 937; 10 C W N 176 = 4 C L J 68. Dist: 26 Cal 677; 7 C W N 908. Ref: 4 C W N 508; 5 C W N 763. 8 C W N 472; 9 C W N 34; 1 C L J 500; 10 Bom L R 66 = 35 Cal 531 P C = 7 C L J 139 = 12 C W N 249; 12 C W N 835; 10 C L J 87.

548.—Bengal Tenancy Act (VIII of 1885) S. 170—Civil Procedure Code (Act XIV of 1882), S. 278—Claim adverse to the tenure or holding, if maintainable, when attached in execution of a decree for arrears of rent.—

Held by the Full Bench (Banerjee J dissenting) that S 170 of the Bengal Tenancy Act bars a claim under S 278, C P C to a tenure or holding attached in execution of a decree for arrears due thereon, in all cases, and the operation is not confined merely to claims to the tenure or holding but extend to claims based on the ground that the property claimed does not form part of the tenure or holding attached. 4 C W N 734 overruled; 4 C W N 732 approved of. **Amrita Lal Bose v Nemai Chand Mukhopadhya 5 C W N 474 = 28 Cal 382; F B.**

549.—S 170-"Rent decree"—Decree for arrears due on two holdings—Attachment of holdings—Claim under s 278, Civil Procedure Code (Act XVI of 1882) if admissible.

A decree for arrears of rent due in respect of two holdings, is not a decree for rent, as contemplated in Ch XIV of the Bengal Tenancy Act.

When the holdings are attached in execution of the decree, S. 170 of the Bengal Tenancy Act is no bar, to a person preferring a claim under s 278 of the Code of Civil Procedure (Act XIV of 1882). 11 C W N 497: 11 C W N 676 Fol. **Bipra Das Dey v Rajaram Bandopadhya. 13 C W N 650 = 36 Cal 765 = 3 Ind Cas 306.**

Bengal Acts-(Tenancy Act VIII of 1885) S. 170-*Contd.*

Notes:—Foll: 3 Ind Cas 306, 307=14 C W N 335=11 C L J 56.

550 —S 170—decree for rent obtained by one of several co-sharers, Effect of-Execution-Claim-Attachment—Civil Procedure Code (Act XIV of 1882), s 278 —

Where a decree for the entire rent of a tenure is obtained by one of several co-sharers by making the others party defendants,and is executed by him alone and the defaulting tenure is attached, no claim by a third person under s. 278 Civil Procedure Code, to the attached property is maintainable by virtue of s 170 of the Bengal Tenancy Act. The decree has in this case the same effect as if the decree has been obtained by all the co-sharers, and s 188 of fhe Bengal Tenancy Act has no application to a case like the present.

Chundra Sekhar Patra v Manjhee
3 C W N 386.

Notes:—Ref: 1 C L J 500.

551-Civil Procedure Code (Act XIV of 1882) s. 278—Claim, maintainability of—Attachment of defaulting tenure.

Where in execution of a decree for arrears of rent the defaulting tenure is attached, no claim under s. 278, Civil Procedure Code, is maintainable, whether the claim is to the tenure, or adverse to the tenure.

Makbul Ahmed v Rakhal Das Hazra.
4 C W N 732

Notes—Over: 5 C W N 326 ; 474. Diss : 28 Cal 289. Ap: 28 Cal 382 F B.

552—S. 170—Civil Procedure Code (Act XIV of 1882) s. 278—Claim, maintainability of

S. 170 of the Bengal Tenancy Act is confined to claims to the tenure, and not to claims adverse to the tenure and in which the nature of the question to be tried is whether the property claimed is part of the tenure or not.

Jagabundhu Chattopadhya v Deenu Pal.
4 C W N 734.

Notes:—Over: 28 Cal 382 F B. Appr: 5 C W 474 F B.

553—S. 170—Suit by co-sharer landlord for rent, maintainability of—Bengal Tenancy Act, Ss. 52, 178, 188.

Bengal Acts-(Tenancy Act VIII of 1885) S. 170-*Contd.*

Where a co-sharer landlord brings a suit against a raiyat for arrears of rent and for additional rent on the basis of a kabuliyat executed by the raiyat in which the right of the plaintiff to certain rent was admitted and his right to additional rent for lands found on measurement to be in excess of the area stated was also admitted, and the right of the plaintiffs and the liability of the defendant were distinctly set out as the basis of the agreement between the parties without any other co-sharer landlord. *Held*—That the suit is maintainable although the co-sharer is not made a party. *Held*.—That S. 188 of the Bengal Tenancy Act does not affect the co-sharer landlord's right under the kabuliyat unless the right to make such an agreement is otherwise forbidden by the Bengal Tenancy Act. S. 78 which is the only section which deals with the full action of landlords and tenants in the matter of contract, does not refer to such a matter. (2 C W N 44, 25 Cal 917 distinguished. 19 Cal 610 ; 1 C W N 521 : 25 Cal 917 ref to.

Gobind Chandra Pal v Hamidulla Bhuian.
7 C W N 670.

Notes:—Ref : 2 C L J 534. 35 Cal 417.

554—Ss. 170, 65, 118—Decree for rent—Execution—Claim under s. 278, C. P. C.—Admissibility—Landlord's interest in tenure sold after decree, if it continues to a first charge on tenure:

Where the plaintiff in a suit for rent is shown to have been the landlord at the date of the suit, and also at the date of the decree, both suit and decree would clearly be a suit and a decree under the Bengal Tenancy Act, as provided in s, 170 of the Bengal Tenancy Act. No claim can be preferred under s. 278, C, P C., when such a decree is put in execution. The fact that the plaintiff sold his interest in the tenure subsequently to obtaining the decree would not prevent him from obtaining the benefit of s.65 of the Act. 3 C W N 604 overruled.

Khetrapal Singh Roy v Kritarthamoyi Dasi
10 C W N 547. F B.=33 Cal 566.

555—S. 170 (3)—Transfer of occupancy holding, if may make deposit—Voidable interest.

A transfree of an occupancy holding not trans-

Bengal Acts-(Tenancy Act VIII of 1885) S. 170-*Contd.*

ferable by a custom has no interest in his holding, and is not entitled to make a deposit under S. 170 (3) of the Bengal Tenancy Act, to avoid a sale of the holding in execution of the landlord's decree for rent.

To permit such a transfree to make the deposit and thus prevent execution is an irregular exercise of jurisdiction open to revision by the High Court. 11 C W N 312 ; 13 C W N 652, Fol ; 8 C L J 261 ; 7 C L J 282 ; 6 C L J 601, Ref.

Nalini Behary Roy v Fulmani Dasi. 16 C W N 421.

556—S. 170—True nature of property-Court if can ascertain.

When the jurisdiction of a Court is sought to be excluded on the ground that the property attached is of a particular description, it is open to the Court to ascertain the true nature of the property.

Sarba Sundari Dasi v Harendra Lal Roy Chowdhury. (1910) 12 C L J 549 =7 Ind Cas 490.

557—S. 170, Cl (3) Bengal Tenacy Act VIII of 1885.

The purchaser of a share in tenure advertised for sale in execution of a decree for arrears of entire 16 annas rent against the recorded tenure-holder is entitled to make deposit of the amount under S. 170, cl. 3 of the Bengal Tenancy Act to prevent the sale, because he has an interest in the tenure and the interest which he possesses is voidable upon the sale.

If, on a previous occasion, the transferee of a tenure had been allowed to make a deposit under S. 170, cl (3) of the Bengal Tenancy Act, the Court ought to allow him to make a deposit on a subsequent occasion. 13 C W N 1175 : 3 Ind Cas 835 ; 10 C L J 473, Fol. 10 C W N 438, Fol.

Jugal Mohini Dasi v Sreenath Chatterjee. 7 Ind Cas 477=12 C L J 609.

558—Ss. 170, cl (4), 171—C. P. C., (Act XIV of 1882), S. 310-A—Evidence Act (I of 1872) S. 115—Withdrawal of money deposited by transferee of holding, by landlord——Recognition of transfer—Estoppel—S.170 cl (4), whether has retrospective effect.

Where the landlord of a holding sold it in execution of a rent-decree, and the previous purchaser of the holding deposited the purchase-money, and the landlord, knowing who he was, agreed to the sale being set aside on that deposit :

Held, that the landlord was estopped from questioning the purchase.

S. 170, cl. (4). of the Bengal Tenancy Act, enacts that the withdrawal of money deposited under S. 310-A of the C. P. C., by a landlord, shall not operate as an admission of the transferability of the holding. But it does not relate to procedure ; it is a rule of evidence and cannot have any restrospective effect. 6 C L J 601, Fol.

Ahmed Ali v Roshan Ali, 9 Ind Cas 619.

—S. 170 (3)—Holding advertised for sale in execution of decree for rent obtained by co-sharer landlord—Application to deposit money to save sale by purchaser of holding—Summary rejection of application—Remedy of applicant. **See** Civ. Pro. Code (1908). **11 Ind Cas 125.**

—s. 170.

See Bengal Tenancy Act s. 65. Case No (259) **33 Cal 566.**

—s. 170

See Bengal Tenancy Act S. 148 A. Case No (444) **8 Ind Cas 50.**

S. 170.

See Claim to attach property, **5 C W N 474.**

—s. 171

See Sale for Arrears of Rent—Incumbrances.

—S.171—Not exhaustive of cases where mortgagee can tack on payments to the mortgage amount.— **31 Cal 978.**

559.—S. 171 cl. (1), (c)—Remedy of the person paying the money to save the property from sale.

Although the depositor under s. 171 of the Bengal Tenancy Act is entitled upon application to the execution Court to obtain delivery of possesion as against the judgment-debtor who is a party to the proceedings, he is not entitled to an order for delivery as against a person who is a stranger to the proceedings; against such a person his remedy is by a regular suit. **Ram Narain Routh v. Lal Das Routh. 6 C L J 595=12 C W N 55.**

Notes.—Ref: 10 C L J 473.

Bengal Acts-(Tenancy Act VIII of 1885) S. 171-*Contd.*

560.—S. 171–Purchaser of durputni–Possession, suit for not necessary.

An unrecorded purchaser of a share of a durputni may, when the tenure is advertised for sale in execution of a decree for rent by the putnidar, apply under section 171 of the Bengal Tenancy Act. Upon such application he is entitled to be placed in possession without recourse to a separate suit. 6 C L J 592 Ref: **Radhika Nath Sarkar v Rakhalraj Gain 10 C L J 473=13 C W N 1175= 3 Ind Cas 835.**

—S. 171 (1) (*b*)—Rights of darpatnidar. **See** Regulation VIII of 1819 (Putni),

15 C W N 404=9 Ind Cas 489.

561.—Prior and puisne mortgagee—Purchase by each at mortgage sale—Rights *inter se*—Partial redemption—Redemption price—Payment by puisne mortgagee to save property from rent sale if may be taken into account.

A first mortgagee obtained a decree for sale of the mortgaged properties and purchased the same in execution, but when he proceeded to take possession was successfully resisted (*i*) by a second mortgagee who had mean-while sued on his mortgage, obtained a decree and purchased some of the properties in execution, and (*ii*) by certain other persons who had purchased some of the other properties from the mortgagor. None of these had been made parties in the first mortgagee's suit, the latter not having had notice of their interest in the mortgaged properties. *Held* —That it was not obligatory on the first mortgagee to institute a fresh suit for sale on his mortgage against these persons, and a suit for recovery of possession of the properties on the basis of his purchase was maintainable, 9 C W N 728: = 32 Cal 891 (1905) followed. That if the Defendants wanted to retain possession, they must redeem the Plaintiff; but as the Plaintiff was both mortgagee and purchaser, the Defendants were not bound to redeem the entire mortgage, but only to the extent of the properties purchased by them. 2 C L J 202 (.905); 7 C W N 723: s. c. 30 Cal 755 (1903), relied on. That to redeem the Plaintiff, it was not sufficient for the Defendants to pay a proportionate share of the purchase money paid by him. The amount

Bengal Acts (Tenancy Act VIII of 1885) S. 171-*Contd.*

payable must be calculated on the basis of the Plaintiff's mortgage. But inasmuch as the Plaintiff had already enforced that mortgage and the mortgage-debt had been thereby converted into a judgment-debt, he was entitled to the contract rate of interest, only up to the date of the decree in the previous suit, and interest at the Court rate subsequent thereto up to the date of payment to be fixed by the decree in the present suit. 10 C W N 592 s. c. 33 Cal 590; 11 C W N 249: s. c. 5 C L J 106 (1906), followed. 8 Cal 79 (88) (1881), not followed. *Held*—That in taking accounts credit ought not to be given to the Defendants for payments alleged to have been made under sec. 171, Bengal Tenancy Act, to save the properties from sale in execution of a rent decree, inasmuch as the first mortgagee was not bound by law to pay the amount within the meaning of sec. 69 of the Contract Act.

Gangadas Bhattar v. Jogendra Nath Mitter 11 C W N 403= 5 C L J 315.

562.—S. 171—Co-tenant paying decree for rent, if can have lien on co-tenant's shares.

The interest of a co-tenant is void and not voidable on sale. Where, therefore, in order to save the holding, a co-sharer tenant paid up the amount due on a rent-decree from his co-tenants. he acquired no lien on the share of his co-tenants.

Ashutosh Ghose v Abinash Chandra Chowdhuri. 15 C W N 782.

563.—Sec. 171, cl. (1) (c)—Depositor—Possession, delivery of—Encumbrancer.

A person, who has made a payment under section 171 of the Bengal Tenancy Act, is entitled to be placed in possession of the tenure, upon application to the execution Court, and he is not bound to bring a regular suit to obtain possession.

An encumbrancer whose interest is not voidable, because the decree under execution is in favour of a co-sharer landlord and operates as a mere money decree, is not entitled to make a deposit and to obtain possession under S. 171 of the Bengal Tenancy Act. **Umatul Fatima v. Nemai Charan Banerji. 6 C L J 592.**

Notes.—Comp 6 C L J 595. Ref 13 C W N 1175 Appr 10 C L J 473.

Bengal Acts-(Tenancy Act VIII of 1885) S. 171-*Contd.*

564.—S 171—Withdrawal of money deposited by landlord, effect of—Transferee, receipt of money from, by landlord

It is the duty of the landlord to challenge the title of the applicant under s. 171 of the Bengal Tenancy Act and to deny that he has any interest in the tenancy advertised for sale or that the interest is of a description which would be voidable upon the sale. As his silence is prejudicial to the interest of the applicant, he is estopped from denying the latter's title later on.

If a party makes an application on the allegation that all the elements necessary to make a provision of law operative are persent and if this is denied, it is not only competent to the Court, but it is its duty to investigate whether all the elements which give jurisdiction, do as a matter of fact exist.

A receipt of money by a landlord from a transferee of his tenant may, under certain circumstances, amount to recognition of the transfer. 6 C L J 122, 11 C W N 865, 4 A L J 570. 9 Bom L R 846 Ref to Thomas Barclay v Syed Hossein Ali Khan, **6 C L J 601.**

Notes.—Comp 9 C L J 563=13 C W N 651. Ref: 10 C L J 538=6 M L T 255=3 Ind Cas 346.

565—S. 171—Suit for recovery of money paid to save a superior tenure from sale—Under-tenure-holder, right of, who deposits decretal amount, when he himself was in arrears—Charge, enforcement of—Suit, if maintainable—Defence, equitable, if may be successfully taken.

An under-tenure-holder, who has saved a superior tenure from sale in execution of a decree for arrears of rent by a deposit under S. 171 of the Bengal Tenancy Act, is competent to maintain an action for the recovery of the sum deposited by enforcing the charge created in his favour by that section, even when the impending sale was likely to be brought about, partially, at any rate, by reason of his own default.

Bengal Acts-(Tenancy Act VIII of 1885) S. 171-*Concld.*

To such a claim for money, the defendant is entitled to interpose an equitable defence.

If part of the sum deposited by the plaintiff to avert the sale was payable by him to the superior landlord, he is not entitled to recover that sum from the defendant. **Hemanta Kumar Ghose v Rajendra Bala Dasi, 13 C L J 454.**

566—S. 171—Se-putnidar paying off Putnidar's decretal amount—Charge, if can be split up—Appeal by one of the defendants—Decree, variation of—Decree, proper form.

Where a *se putnidar*, after paying money to satisfy a rent decree obtained by a *putnidar* against the *dur-putnidar*, brought a suit for contribution praying for a personal decree and also for a declaration that the *dur-putni* tenure was liable to be sold for the money paid by him:

Held, that the money paid was to be charged on the whole tenure and that the charge could not be split up.

Where, upon the appeal of one of the defendants, the question was raised as to what the proper form of the decree should be so far as the charge was concerned, the appellate Court was bound to set the matter right and make the decree in the only form in which the law directs it should be made. **Beni Madhub Banerjee v. Purna Chandra Daw, 14 C L J 134.**

Bengal Tenancy Act—S. 171—Deposit for saving property from sale—Deposit by alleged mortgagee—Mortgage found invalid—Voluntary payment. **See** Contract Act, **9 Ind Cas 615.**

Bengal Acts-(Tenancy Act VIII of 1885) S. 172-*Concld.*

—S. 171.

See Bengal Tenancy Act, S. 3, Case No. (21).

32 Cal 972.

—S. 171.

See Bengal Tenancy Act S. 86. Case No.(314).

13 C W N 97.

567-568—Ss. 172, 188—Right of suit.

Where a co-sharer landlord brings a suit against a raiyat for arrears of rent and for additional rent on the basis of a kabuliyat executed by the raiyat in which the right of the Plaintiff to certain rent was admitted and his right to additional rent for lands found on measurement to be in excess of the area stated was also admitted, and the right of the Plaintiff and the liability of the Defendant were distinctly set out as the basis of the agreement between the parties without any reference to the right of any other co-sharer landlord: *Held*—That such a suit is maintainable although Plaintiff's co-sharer is not made a party. That sec. 188 of the Bengal Tenancy Act does not affect the co-sharer landlord's right under the kabuliyat unless the right to make such an agreement is otherwise forbidden by the Bengal Tenancy Act, and sec. 188 which is the only section which deals with the full action of landlords and tenants in the matter of contract, does not refer to such a matter. 2 C W N 44: s. c. 25 Cal 917 (1897), distinguished. 19 Cal 610 (1892); 1 C W N 521: s. c. 25 Cal 917 (1896), referred to.

Gobind Chandra Pal v. Hamidulla Bhuian, 7 C W N 670.

—S. 173.

See (1) Appeal—Orders, Case No. (949).

21 Cal 825.

(2) Limitation Act, Art 178.

(3) Special or Second Appeal — Orders subject or not to Appeal.

569—S. 173—Sale for arrears of rent—Purchase by benamidar for judgment-debtor — Sale void or voidable—Suit to set aside sale—Proper Court to decide whether sale should stand or not —Bengal Tenancy Act (1885), S. 173.—

Where a sale takes place under the Act in execution of a decree for arrears of rent, and the purchaser is found to be a mere benamidar for the judgment-debtor.—*Held*, in a suit to set aside the sale on that ground, that on the wording of s. 173 the sale was only voidable, and not absolutely void, that section leaves it in the discretion of the Court to set aside the sale or not as it thinks fit. Under that section the proper Court to determine whether the sale should stand or not is the Court that held the sale.

Gopal Chunder Mitra v. Ram Lal Goshain, 21 Cal 554.

Bengal Acts-(Tenancy Act VIII of 1885)-S. 173-*Contd.*

570—S. 173—Second appeal — Auction purchaser—Rent decree—Sale set aside.

An auction-purchaser has no right of second appeal against an order, passed under S. 173 of the Bengal Tenancy Act, setting aside a sale in execution of a rent decree, on the ground that the auction-purchaser is the *benamidar* of the Judgment-debtor. 24 Cal 707, Dist.

Durlay Prodhania v. Mahammad Mainaddi Bepari, 1 Ind Cas 279.

571—S. 173, cl. (3)—Appeal, whether lies against order under—Test to be applied, what is —Application by unrecorded co-sharer in tenancy—Representative of judgment-debtor——C. P. C.. (Act V 1908), S. 47.

No inflexible rule can be formulated that an order under S.173 is or is not appealable as a decree. The test to be applied in the circumstances of each case is, what is the true nature of the question raised, that is, whether the question relates to the execution of the decree, and who are the parties or their representatives.

An unrecorded co-sharer in a tenancy is not a representative-in-interest of the recorded tenant within the meaning of S. 47 of the C. P. C. (1908). Therefore, where an application was made by an un-recorded co sharer for the setting aside of a sale on the ground that the judgment-debtor, the recorded tenant, had purchased the holding through another person, and the Court sets aside the sale, the order was not appealable. (21 Cal 825, Fol: 24 Cal 707: 1 C W N 534, Dist: 3 C W N 184, Ref:) **Joytara v. Ram Krishna Seal,** 7 Ind Cas 769.

572.—Bengal Tenancy Act S. 173—C P C S 47; O 21, r. 90 (1882 Ss. 244, 311)—Representative—'Person whose immoveable property is sold'.

Where the landlord of an occupancy holding

Bengal Acts-(Tenancy Act VIII of 1885)-S. 173-*Concld.*

obtains a decree for rent against his registered tenant, an unregistered transferee of the tenant into whose hands a portion of the holding has previously passed is bound by the decree and is, therefore, a representative of the judgment-debtor within the meaning of S. 244 of the Civil Procedure Code. Principle of F, B. case in 24 Cal 62 applied. 6 C W N 127 not foll. Such a transferee can apply to set aside a sale held in execution of the decree as 'a person whose immoveable property has been sold within the meaning of S. 311, Civil Procedure Code. He can also apply under S. 173 of the Bengal Tenancy Act to set aside the sale on the ground that the holding has been purchased by the judgment-debtor in the name of the auction-purchaser. **Azgar Ali v Asaboddin Kazi. 9 C W N 134.**

Notes.—Fol: 32 Cal 1031=9 C W N 824; 10 C W N 240; 11 C W N 312; 8 C L J 161. Ref: 11 C W N 163; 5 C L J 80; 13 C W N 98=8 C L J 327; 7 C L J 282; 33 Cal 1219; 2 C L J 369.

—S. 173—Un-recorded co-sharer if representative of recorded co-sharer—Order under S. 173 when appealable. **See** Civ. Pro. Code (1908). **15 C W N 512**

—S. 174.

See (1) Co-sharers—General Rights in Joint Property.

(2) Execution of Decree—Effect of Change of Law pending Execution.

(3) Sale for arrears of Rent—Setting aside Sale—General Cases.

573—S. 174—Deposit, Nature of—Power to set aside sale.

The deposit under s. 174 of the Tenancy Act must be of such a nature as to be at once payable to the parties, and a Court has no power to set aside a sale under that section unless the judgment-debtor has complied strictly with its provisions. **Rahim Bux v Nundo Lal Gossami. 14 Cal 321.**

Notes.—Ex: 23 Bom 723. Con: 2 C W N 474.

574.—S. 174—Act creating new rights, Effect of—Application for execution.

The provision of an Act which creates a new right cannot, in the absence of express legislation or direct implication, have a retrospective effect. *Held*, accordingly, that a judgment-debtor's right under s. 174 of the Bengal Tenancy Act to set aside a sale did not avail where the sale was held in pursuance of a decree, the execution whereof had been applied for before that Act came into operation. **Lal Mohun Mukerjee v Jogendra Chunder Roy. Bonomali Chunder Ghosal v Ramkali Dutt. 14 Cal 636.**

Bengal Acts (Tenancy Act VIII of 1885)-S. 174-*Contd.*

Notes.—Over: 22 Cal 767 F B. Appl: 15 Cal 383 F B. Ref; 16 Cal 267 F B. 21 Cal 940 F B; 23 Bom 450; 11 Bom L R 1372.

575—Bengal Tenancy Act (1885), s. 174—Execution applied for after the passing of the Act—Decree made previous to the Act—Bengal Tenancy Act VIII of 1869—Construction.

A sale in execution of a decree passed under Bengal Act VIII of 1869, execution having been applied for after Act VIII of 1885 had come into force, cannot be set aside under s. 174 of the latter Act. 14 Cal 636.
Uzir Ali v Ram Komal Shaha. 15 Cal 383.

Notes.—Over: 22 Cal 767 F B. Ref 16 Cal 267 F B; 21 Cal 940 F B; 23 Bom 450.

576.—Bengal Tenancy Act (1885) s. 174—Meaning of judgment-debtor.

The term "judgment-debtor" as used in s. 174, does not include a transferee or assignee from a Judgment-debtor and must be construed in a restricted sense to include the judgment-debtor alone. **Rajendro Narain Roy v Phudy Mondul. 15 Cal 482.**

577.—Sale for arrears of rent—Deposit—Extension of time on account of the Court being closed.

On the sale of tenure for arrears of rent, the judgment-debtor can apply to set aside the sale on a deposit of the amount to be paid under the decree to the decree-holder together with sum equal to 5 p. c. of the purchase-money for payment to the purchaser; and if the Court be closed on or before the last day of the period limited, the judgment-debtor may pay the said sum into Court on the first day the Court re-opens, though there is no express provision in the section to that effect. **Shooshee Bhusan Rudro v Go-**

Bengal Acts-(Tenancy Act VIII of 1885) S. 174-*Contd.*

bind Chunder Roy. 18 Cal 231.
See **Peary Mohun Aich v Anunda Charan Biswas.** 18 Cal 631.

Notes.—Appl: 22 Mad 179. Fol: 18 Cal 631; 8 M L J 265; 10 C W N 535=3 C L J 339. Ref: 21 Mad 385.

578.—Sale for arrears of rent - Amount of deposit incorrectly calculated by an officer of the Court.

Under s. 174 of the Bengal Tenancy Act a judgment-debtor deposited the amount payable under the section, within 30 days from the date of the sale. Subsequently it was discovered that the calculation of the amount which was made by an officer of the Munsiff's Court was incorrect. On this the Munsiff held that the provisions of the section had not been complied with and so confirmed the sale. *Held* that, when the calculation was made by an officer of the Court, and the amonnt paid thereupon, the Munsiff was bound to set aside the sale. The order of the Munsiff was without jurisdiction and must be set aside. **Ugrah Lall v Radha Pershad Singh.** 18 Cal 255.

See **Makbool Ahmed Chowdhry v Bagle Sabhan Chowdhry.** 25 Cal 609.

Notes.—Fol: 25 Cal 216; 609. Ref: 11 C W N 116.

579.—Bengal Tenancy Act (1885) s. 174—Civil Procedure Code (1882) s. 11—Jurisdiction—Suit to set aside a sale.

A suit to set aside a sale cannot be maintained under the provisions of s. 174. The right to set aside a sale is not an abstract right which can be enforced by action against one person alone, but it is a right to call upon the judge to set aside a sale, and on his failing to do so, to bring his failure to the notice of the Court.

Kabilaso Koer v Raghu Nath Saran Singh. 18 Cal 481.

Notes.—Fol: 36 Mad 492.

580.—Bengal Tenancy Act (1874) clauses (1) & (2)—Application to set aside the sale—Deposit

Bengal Acts-(Tenancy Act VIII of 1885)-S. 174-*Contd.*

of decretal amount—Incorrect calculation by an officer of Court—Effect of deposit without asking for specific relief—Practice.

The judgment-debtor, deposited within 30 days from the date of sale in execution of a decree for arrears of rent, in Court, under s. 174, the amount recoverable under the decree, with costs, and a sum equal to five percent of the purchase money. The challan was endorsed by a ministerial officer of the Court. The amount was discovered to be short by 9 pies, which the judgment-debtor paid in, with a prayer that "the execution case may be declared as finally closed," but without applying in express terms to have the sale set aside. *Held* that, under s. 174 the Court was found to set aside the sale, notwithstanding that the applicant did not in exprese terms ask for that specific relief. 18 Cal 255, referred to. The fact of his depositing the amount was a sufficient indication of his intention to seek the reliefs. The challan, which sets out the purpose of the deposit, may be regarded as a sufficient application. **Abdool Latif Moonshi v Jadub Chandra Mitter.** 25 Cal 216.

Notes.—Ref: 26 Cal 449 F B. Fol: 11 C W N 116.

581.—S. 174-Person whose immoveable property has been sold:—See C P C S 310 A. **32 Cal 107.**

58.—S. 174-Tenure sold in execution of a decree for cesses—Rent—Definition of Bengal Tenancy Act s 3 cl 5—Bengal Cess Act (Bengal Act IX of 1880) s, 47.—

S 174 of the Bengal Tenancy Act is applicable to the case of a tenure or holding sold by the landlord in execution of a decree for arrears of cesses due thereon although s. 174 is not specifically mentioned in s. 3 cl 5 as one of the sections to which the extended definition of rent is applicable. **Kishori Mohun Roy v Sarodamani Dasi.** 1 C W N 30.

Notes:—Ref 13 C W N 591; 3 C W N 344.

582.—Nature of deposit required.

A deposit under s. 174 of the Bengal Tenancy Act must be such as the decree-holder may draw out at once a deposit not made payable to the decree holder until a certain event had happened is not a good deposit within the meaning of that section. **Shakote v. Jotindra Mohun Tagore** 1 C W N 132.

Bengal Acts-(Tenancy Act VIII of 1885) S. 174-*Contd.*

Notes:—Dist 8 C W N 355.

583—S.174-Civil Procedure Code, 1882 s 295-Deposit made by judgment-debtor.

S. 295 of the Code of Civil Procedure does not apply to a deposit made by the judgment-debtor under s. 174 of the Bengal Tenancy Act. **Bihari Lal Pal v. Gopal Lal Seal. 1 C W N 695.**

Notes:—Fol 30 Cal 262.

584—Ss.174, 162-Setting aside sale-"Decree." Meaning of.

The word 'decree" in s. 174 of the Bengal Tenancy Act,no doubt primarily refers to the decree of which execution is sought for; but if in the meantime, that is to say before the sale is actually held, the decree of the first Court, of which execution was applied for, is modified in appeal in favour of the judgment-debtor, then necessarily 'the decree' must be the decree of the Appellate Court. So where a decree for rent was passed by the first Court on the 11th January,and in execution of the decree the defaulting tenure was sold on the 5th June, but in the meantime the decree had been modified by the Appellate Court, on the 18th May,—*Held*, that the judgment debtor could set aside the sale by depositing within 30 days from the date of sale the amount covered by the decree of the Appellate Court together with a sum equal to five per centum of the purchase-money. **Bhiki Singh v. Bhanu Mahton. 3 C W N 231.**

585.—S.174-Proceeding in execution of decree -Application for execution—Civil Procedure Code 1882 s. 647.

A proceeding under s. 174 of the Bengal Tenancy Act is not a proceeding for the execution of a decree; it may be a proceeding relating to the execution of a decree but it does not come within the Explanation to s. 647 of the Civil Procedure Code as being an application for the execution of a decree. **Subh Narain Lall v. Goroke Prosad 3 C W N 344.**

Notes.—Ref 13 C W N 591.

586:—S. 174—Sale—Setting aside—Deposit—Miscalculation by an officer of the Court.—

Where upon setting aside a sale under S, 174 of the Bengal Tenancy Act it was found that the amount of deposit fell short of the amount required to be deposited under the law, but that this was owing to a mistake in calculation by the officer of the Court who ordinarily supplied such information and it appeared that the Chief Ministerial officer of the Court had also signified his approval of the information by signing the challan.—*Held*,—That this was a case in which the High Court ought not to interfere. 26 Cal 449 distinguished; 18 Cal 255 referred to;25 Cal 216 followed. **Sheikh Fakir v Beraj Mohini Dasi. 11 C W N 116.**

Bengal Acts-(Tenancy Act VIII of 1885)-S. 174 *Contd.*

587,—S. 174-Civil Procedure Code (Act XIV of 1882), S 311—Application under both sections-Withdrawal of latter—Effect—Appeal.

An order under s 174 of the Bengal Tenancy Act is appealable if the question is between the parties to the suit or their representatives, and the question raised in a question relating to execution discharge or satisfaction of the decree.

The word "applies" in the proviso to s. 174 of the Bengal Tenancy Act means "applies and prosecutes."

If a judgment debtor has made an application under s. 311 C P C, he is competent to apply under s. 174 of the Bengal Tenancy Act,if he withdraws his application under s. 311, C P C.

Where a judgment-debtor made an application under s.311 C P C, on the 13th July, to set aside a sale held on the 11th July and subsequently on the 5th August he applied under s. 174 of the Bengal Tenancy Act, and the Court ordered that the money might be received if the application under s. 311 was withdrawn, the necessary deposit was made on the following day, and on his application on the 7th August to withdraw the application made under s. 311, C P C, the same was dismissed on the 24th August and the application under s. 174 Bengal Tenancy Act allowed.

Held, that the order under s. 174 of the Bengal Tenancy Act, for setting aside the sale was validly made. **Sital Rai v Nanda Lal. 13 C W N 591=1 Ind Cas 304.**

588—S. 174—Execution sale, application to set aside—Deposit of judgment-debt and compensation within thirty days, insufficiency of—Deficiency, supply of, later on—Time for deposit, extension of—Jurisdiction of Court to extend

Bengal Acts-(Tenancy Act VIII of 1885) S. 174-*Contd.*

time—Sale, setting aside of, on appeal—Appeal if lies against order setting aside sale—Civ Pro. Code (Act V of 1908), S. 47—Inconsistent position, if may be allowed to be taken—Order, effect of—Compensation, decree-holders purchasers, if entitled to—Costs of decree, *vakalatnama*, if recoverable—Poundage-fee.

An application by the judgment-debtor, to set aside a sale held in execution of a decree for rent, on deposit of the judgment debt and compensation under S. 174 of the Bengal Tenancy Act, was dismissed by the Court of first instance, on the ground that the necessary deposit was not made within thirty days of the sale, the sum deposited proving insufficient and the balance having been paid after thirty days of the sale. On appeal by the judgment-debtors, the appellate Court held that the Court had power to extend the time, and set aside the sale as prayed by the judgment-debtors; the decree-holders purchasers appealed.

Held, that, the judgment-debtors having appealed to the lower appellate Court on the assumption that the adverse order of the Court of first instance had been made under S. 174 of the Bengal Tenancy Act read with S. 47 of the Code of Civil Procedure, it is not competent to them to urge that the order in their favour by the lower appellate Court was, as a matter of fact, made without jurisdiction, and that although the appeal preferred by them was incompetent, it is not open to the decree-holders to assail that order by way of appeal. It is not open to a party litigant to assume inconsistent positions of this character, having succeeded in the lower appellate Court on the assumption that the order of the original Court was of a particular description, they cannot be permitted to turn round and assume an entirely different and inconsistent position.

The order made by the original Court dismissing the application of the judgment-debtors to set aside the sale under S. 174 of the Bengal Tenancy Act is to be treated as one within the scope of S 47 of the Civil Procedure Code and in the nature of a decree against which a first appeal and a second appeal lie under the law.

Whether an order in execution proceedings is within the scope of S. 47 of the Code of 1908 depends upon its nature and contents. If it decids a question relating to the execution, satisfaction or discharge of the decree, and if the decision has been given between parties to the suit or their representatives in interest, the order of the Court falls within the scope of S. 47, and is a decree within the meaning of S 2.

It is not open to the Court to extend the time within which a judgment debtor is required to make a deposit under S. 174 of the Bengal Tenancy Act, or Rule 89 of Order 21 of the Code of 1908.

The position, however, may be different if the party has been prevented from making the deposit by reason of the action of the Court, because in such a contigency the Court is guided by the principle that an act of the Court prejudices no man.

S. 174 of the Bengal Tenancy Act applies to all purchasers whether they are decree-holders or strangers to the execution-proceedings, and the decree-holder auction-purchaser is entitled to get five per cent, upon the purchase money, just like any other auction-purchaser.

S. 174 makes it obligatory upon the judgment-debtors to deposit the amount recoverable under the decree with costs, and the costs here referred to are costs properly incurred by the decree-holder subsequent to the decree and in the course of execution proceedings.

A copy of the decree is not, ordinarily, necessary for the purpose of the execution proceedings, and the decree-holders are not entitled to charge the amount spent by them in obtaining a copy of the decree, specially when not required by the Court to produce one, as part of the costs mentioned in S. 174 of the Bengal Tenancy Act.

An execution proceeding is essentially a continuation of the suit.

The authority of a pleader engaged in the suit does not terminate with the decree, but it is competent to him to appear on behalf of his client, in the course of execution proceedings without a fresh authority.

A fresh *vakalatnama*, or authority to a pleader being unnecessary for the purpose of executing the decree, the costs for *vakalatnama* are not costs chargeable by the decree-holder under S. 174 of the Bengal Tenancy Act.

Bengal Acts-(Tenancy Act VIII of 1885)-S. 174-*Contd.*

The poundage-fee paid by the decree-holder in respect of the execution sale at which they purchased cannot be treated as an integral part of the costs incurred by them and the decree-holders are not entitled to claim the money from the judgment-debtors.

When a sale of immoveable property is set aside under Order 21, rules 89, 91 and 92 of the Code of 1908, or under S.174 of the Bengal Tenancy Act, the decree-holder becomes entitled to a refund of the fee The decree-holders are not entitled, in the event of a reversal of the sale, to recover from the judgment-debtor the poundage-fee. If the sale is reversed, the decree-holder will forthwith become entitled to a refund of this money. If, on the other hand, the sale is not set aside, he will not be entitled to a refund. In either event, he is not entitled to claim the money from the judgment-debtor. (15 C W N 725, Ref.13 C L J 257; 26 Cal 449; 13 C W N 591, Ref & Fol.; 38 Cal 339; Expl. and Dist 13 C L J 535, Fol. 18 Cal 481; 13 C L J 467, Ref.;14 C W N 882; 13 C L J 432, Expl and Dist. 15 C L J 83, Ref. 15 A W N 140; 22 Mad 286, 9 W R 362; 10 W R 144; 11 W R 271; 16 W R 25; 11 C L J 243, Ref. 17 All 206; 22 I A 44, Ref. 20 Bom 198; 6 B H C R A C J 83; 14 C L J 445, Ref. (1885) 29 Ch D 351; (1911) Times L Rep 284 Ref). **Raghubar Dayal Sukul v Jadu Nandan Misser. 15 C L J 89.**

589—Bengal Tenancy Act (VIII of 1885), s. 174—O 21, r 89 (1882 S 310 A)—Mokarari Tenure, sale of—Durmokararidar right of, to have sale set aside.

A *mokarari* tenure was sold in execution of a rent-decree, and a *durmokararidar* deposited the decretal amount with compensation and applied, under s. 310 A, C P C to have the sale set aside. *Held*, he is a person whose immoveable property has been sold, within the meaning of s. 310A and as such, enlitled to have the sale set aside, on the ground that he has an interest in the holding, which he is entitled to protect. 29 Cal 1; 8 C W N 55; 8 C W N 232, 23 Cal 393 and 29 Cal 459 Refd to. 5 C W N (Notes) 132 Not Fol.

Narain Mandal v Sourindra Mohan Tagore. 32 Cal 107.

Notes:—Fol: 11 C W N 742.

590—S. 174, sub-s. (1),—'Judgment-debtor'—

Bengal Acts-(Tenancy Act VIII of 1885) S.174-*Contd.*

Defendant against whom no decree passed if can apply to set aside sale.

The expression 'judgment debtor' in sub-s. 1 of S. 174 of the Bengal Tenancy Act means the person against whom a decree has been made, in execution whereof the sale sought to be set aside has taken place. *Hence* the defendant against whom no decree was passed is not a judgment-debtor and is not entitled to make an application to have the sale set aside. **Abdul Sobhan v Monab Ali. 15 C L J 170.**

591—S.174—Sale in execution of rent decree-Deposit by judgment-debtor—Subsequent withdrawal of deposit-Previous purchaser, application by— Allegation that deposit made with his money —Fresh deposit allowed to be made by him.

A sale was held in execution of a rent-decree and the judgment-debtor made a deposit under S. 174 of the Bengal Tenancy Act. Subsequently, the judgment-debtor made an application for leave to withdraw the deposit and thereupon the Court refused to set aside the sale. Then the present petitioner appeared and alleged that he had purchased the property long ago and that the deposit was made with his money. The Court dismissed his petition on the ground that he had no *locus standi*.

Held that, in the interests of justice, the petitioner ought to be allowed to use the name of the judgment-debtor and to make a fresh deposit now within seven days from the arrival of the record in the Court below. **Adhar Chandra v. Ram Charan, 10 Ind Cas 526.**

592—S. 174, Proviso—Civil Procedure Code (Act V of 1908), O. XXI, r. 90—Application to set aside sale for irregularity—Subsequent application to set aside sale on deposit.

A judgment-debtor's property was sold in execution of a rent-decree on 19th, August 1910. On August 23rd, he put in an application to have the sale set aside on the ground of material irregularity, and on that application notice was issued to the decree-holder and the auction-purchaser. On September 17th, the judgmentdebtor put in an application under S. 174 of the Bengal Tenancy Act, and the Court ordered him to make the deposit of the decree-holder's dues and the auction-puachaser's damages, which were deposited. The

Bengal Acts-(Tenancy Act VIII of 1885) S. 174-*Concld.*

case under rule 90 came up for hearing on September 24th, and on that date the judgment-debtor put in an application to withdraw from the prosecution of that case:

Held, (*Per Coxe, J, Teunon, J. dissenting*) that the judgment-debtor was not entitled under the proviso of S. 174 to make an application under S. 174 and that the application could not be regarded as in itself tantamount to a withdrawal from the proceedings under rule 90, so as to justify the setting aside of the sale on acceptance of the deposit. (1 Ind. Cas. 304; 13 C W N. 591; 11 C. L. J. 202,expl. and Dist.) **Mangal Mandal v. Bejoy Chand, 11 Ind Cas 757.**

593—S.174-Deposit of rent in Court—Cost—Interest.

When a tenant is sued for arrears of rent, even though he should deposit the rent in Court during the pendency of the suit, he is still liable to have the decree passed against him, as the arrear was admittedly due when the suit was brought. Interest to date of deposit in Court and costs of suit being paid within 15 days, execution would be avoided. **Baboo Sheonath Singh v Ram Phul Rae. 1 N W P 97.**

—S. 176.

See Sale for arrears of Rent—Incumbrances.

—S. 178.

See (1) Interest—Miscellaneous Cases—Arrears of Rent.

(2) Landlord and Tenant—Forfeiture—Denial of Title.

(3) Right of Occupancy—Acquisition of Right—Mode of Acquisition.

(4) Right of Occupancy—Transfer of Right.

594-595-S.178—Right of occupancy—Agreement restricting right of occupancy—Suits pending when Act came into force.

Bengal Acts-(Tenancy Act VIII of 1885) S. 178-*Contd.*

S. 178 of the Bengal Tenancy Act (Act VIII of 1885) has no application to suits instituted before the date on which that Act came into force. So where a landlord sued to eject a tenant who had executed a solenamah agreeing to hold the land in suit for a specified period at a specified rent, and providing that the landlord was to be at liberty to enter on the lands at the expiry of the period, and the suit was instituted on 6th October 1885, and where it was found that at the date of the solenamah the tenant had acquired a right of occupancy with respect to some of the lands in suit.—*Held* that the tenant was not entitled to the benefits conferred by s. 178, cl. 1, sub-cl. (b), of the Bengal Tenancy Act, but was liable to be ejected. **Moheshwar Pershad Narain Singh v Sheobaran Mahto, Moheshwar Pershad Narain Singh v Dursun Raut. 14 Cal 621.**

596—S. 178, Sub S. (1) cl. (a). Sub-S. (3) cl. (a) Landlord and tenant—Contract Stipulation-Re-entry on raiyat's death—Validity—Act VIII of 1869, s. 7.

A valid contract of tenancy providing that the tenant, a raiyat, should hold the land for his lifetime, and that the contracting landlord would have the right to re-enter on his death, could be created before the passing of the Bengal Tenancy Act. Such a contract does not come within the terms of the provision in cl. (a), Sub-s (1) or cl. (a) of 178 of the Bengal Tenancy Act, and is, therefore, enforcible. The contract in this instance having been created by a *solenamah* in 1877 and the tenant dying in 1902, *held* that the landlord can recover khas possession. **Balu Chandra Chakravarti v Nistarini Debi. 10 C W N 533=33 Cal 136.**

—Ss. 178, 179.

See Bengal Tenancy Act s. 65. Case No.(272).

4 C L J 521.

—S. 178.

See Bengal Tenancy Act s. 116. Case No.(421)

1 C L J 456.

Bengal Acts-(Tenancy Act VIII of 1885) S. 178-*Concld.*

—S. 178 (3) (h).
See Bengal Tenancy Act s.67. Case No. (281)
33 Cal 683.

—S. 178.
See Bengal Tenancy Act s.116. Case No. (419)
13 C W N 661.

—S. 178.
See Bengal Tenancy s 67. Case No. (283).
13 C W N 95.

—S. 179.
See (1) Cess.
(2) Interest—Miscellaneous Cases—arrears of Rent.

597—Ss. 179, 67—Permanent tenure—Interest—Rate—Limit.

Held, by the full Bench Ameer Ali J. dissenting, that S. 67 of the Bengal Tenancy Act does not control the terms of S. 179 of the Act, and that notwithstanding the limit of 12 per cent. interest on arrears of rent under S. 67, higher interest may be stipulated for in the case of permanent leases under the terms of S. 179 of the Act. **Matungini Debi v Makrura Bibi.**
(1898) 5 C W N 438=29 Cal 674.

Bengal Tenancy Act—S. 179—Applicability. See Abwabs, **9 Ind Cas 47.**

—S. 179.
See Bengal Tenancy Act s 71 Case No. (297).
10 C W N 527.

—S. 179.
See Bengal Tenancy Act s. 2 cl. (4). Case No. (12).
10 C W N 527.

—S. 179.
See Bengal Tenancy Act s. 11. Case No. (12).
12 C W N 175.

—S. 179.
See Bengal Tenancy Act s. 67. Case No. (279)
29 Cal 674.

—S. 180.
See Right of Occupancy—Acquistion of Right—Mode of Acquisition.

598—Ss. 180, 43, 20—Occupation by raiyat for less than 12 years-Increase of rent by unregistered instrument—Bengal Tenancy Act, S. 43 does not control S. 180, Sub s. (1).

Bengal Acts-(Tenancy Act VIII of 1885)-S. 180-*Concld*

Section 180, sub-section (1) of the Bengal Tenancy Act is not controlled by s. 43, so that a raiyat in occupation of chur lands, who has not acquired a right of occupancy by continuous possession for twelve years, may enter into a valid agreement for increase of his rent from time to time without a registered instrument under s. 43.
Jahandar Baksh Mullik v Ram Lall Hazrah.
11 C L J 364=14 C W N 470=
5 Ind Cas 565.

—S. 180.
See Bengal Tenancy Act s. 20. Case No. (97).
33 Cal 444.

—S. 181.
See Service Tenure.

599—Sec. 181, occupancy Right—Ghatwali Tenure—Local usage or custom.

The occupation of land which is included in a Ghatwali tenure and which had been held under a Ghatwal for more than 12 years by a raiyat, does not necessarily confer on him a right of occupancy.

The Bengal Tenancy Act does not expressly lay down any rule of law with respect to acquisition of either occupancy or non-occupancy right in land held by Ghatwals as service tenures, and the incidents of a Ghatwali tenure, which are declared by Sec. 181 of that Act not to be affected by the provisions of Act are nowhere specified.

The growth of such rights would seem to be inconsistent with the nature, but a custom or local usage might grow up in any local area as to recognition of occupancy rights and such a custom might be binding on successive Ghatwals. **Mohesh Majhi v Pran Krishna Mandul.** **1 C L J 138.**

Notes—Ref: 2 C L J 379; 33 Cal 630; 10 C L J 602.

600.—Bengal Tenancy Act VIII of 1885 s. 181, Resumption——Transfer to zemindar—Right acquired in land—Settlement by a person not having any right, if applicable.

Where Chauwkidari Chakran lands which had been resumed were settled upon tenants by a person who had no right to deal with the lands

Bengal Acts-(Tenancy Act VIII of 1885) S 181-*Contd.*

and the tenants with whom settlement had been made set up title as against the real owner on the ground that they had acquired *bona fide* a right from one whom they *bona fide* believed to have a right to let them into possession and were consequently occupancy or non-occupancy raiyats *Held*, that the tenants did not acquire any right and 20 Cal 708 did not apply. *Harrington and Bodilly JJ.*—Chauwkidari Chakran lands when resumed and transferred to the zemindar become his zerait land. Mookerjee J.—Upon such transfer the lands are at the zemindar's disposal to be dealt with by him as mal or zerait at his option. Applicability of s. 181 of the Bengal Tenancy Act to such lands considered.

Shaikh Jonab Ali v Raikbuddin Mallik.
9 C W N 571.

601A.—Ghatwal—Right to grant permanent lease—How far successor bound.

As a general principle a Ghatwal is not competent to grant a lease in perpetuity. and his successors are not bound to recognise such an incumbrance. 15 W R 38 foll.—A lease in perpetuity granted to the Plaintiff by Defendant No. 7 who is a ghatwal jointly with the predecessors of the other ghatwal Defendants is inoperative even against defendant No. 7 as the lease is one and indivisible.

Held, also on the construction of the lease and finding of the lower Appellate Court that the lease created a tenure and not a raiyati holding.

Narain Mullick v Badi Roy.
6 C W N 94=29 Cal 367.

Notes.—Diss: 9 C L J 91: 36 Cal 726, 33 Cal 693. Ref: 10 C L J 189, 11 C W N 152

601B.—Bengal Tenancy Act, Ss. 19 and 181 Acquisition of Chowkidari Chakran land—Service tenure—Landlord's Tenancy Act.

A raiyati tenancy was created under a Chowkidari in Chowkidari Chakran land so far back as 1846. *Held*, that having regard to S 6 of Act X of 1859 as soon as the Act came into force the raiyat acquired a right of occupancy. B. L. R. Sup., Vol. 202; 15 W R 231 Ref. to. That the right of occupancy acquired before 1859 would be maintained under the Act of 1869 as also under the provisions of S. 6 of Act VIII of 1859 B C, and would continue to exist under S 19 of the

11 C. C. 89

Bengal Acts-(Tenancy Act VIII of 1885) S. 181-*Concld.*

Bengal Tenancy Act. 21 Cal 129 foll.

Ram Kumar Bhuttacharjee v Ram Newaj Rajguru. **8 C W N 860.**

601C.—S. 181—Ghatwali land—Occupancy right—Non-occupancy right—Trespasser, tenant under.

The restriction on the growth of occupancy or non-occupancy rights in ghatwali lands is for the benefit of the ghatwal. When therefore the zemindar unlawfully dispossesses the ghatwal and settles the land with a raiyat, the latter acquires non-occupancy and occupancy rights against his landlord. The zemindar's position is not improved if upon resumption of the ghatwali lands by Government, they are subsequently settled with them.

Babu Lal v Purna Chandra Babu.
10 C L J 602=4 Ind Cas 737.

—S. 181.

See Bengal Tenancy Act s. 30. Case No. (152)
2 C L J 379.

—S. 181.

See Bengal Tenancy Act s. 65. Case No. (271)
2 C L J 379.

602.—Ss. 182, 61—Deposit of rent by tenant of homestead land who, is also a raiyat of the village, but under a different landlord.

Plaintiff brought a suit for rent of a plot of bastu land from the defendant who was a raiyat of the village under another landlord. The defendant pleaded that, owing to dispute between the rival landlords, he had deposited the rent under S. 61 of the Bengal Tenancy Act, and that there was a full acquittance by the deposit. *Per Ghose J.*—It was not necessary to decide in the case whether the defendant was a raiyat under S 182 of the Bengal Tenancy Act and whether a deposit could be made under s. 61. The deposit had been made in fact, and the question which remained for determination was as to who amongst the rival landlords was entitled to the money made available by the deposit. The present suit was therefore liable to be dismissed. *Per Geidt J.*—The suit was liable to be dismissed because s. 182 of the Bengal tenancy Act applied and the deposit under s. 61 was a valid deposit.

Protap Chandra Das v Biseswar Pramanick. **9 C W N 416**

Bengal Acts-(Tenancy Act VIII of 1885) S. 182-*Concld.*

603—Sec. 182—Homestead-land of a raiyat, incidents of—Occupancy right.

In order to make the provisions of the Bengal Tenancy Act applicable to the homestead of a *raiyat* held by him otherwise than as part of his holding, it is not required by Sec. 182 of the Act that the raiyat in occupation of the homestead should be a raiyat in the village in which the homestead land is situated, nor is it necessary for him to be a raiyat under the same landlord as the landlord of the homestead land. **Kripa Nath Chakravarti v. Seikh Anu.**

10 C W N 944=4 C L 332.

—S. 183.

See—Right of Occupancy-Transfer of Right.

23 Cal 179, 427, 26 Cal 184.

604—Bengal Tenancy Act S. 183:—Decree tainted by fraud-Claim of rent at a higher rate—Custom and usage-Transfer of occupancy holding.

Where a landlord obtained a decree against his tenant at a higher rate than the proper rate of rent and the landlord explained that it was owing to a mistake of the *patwari*,-*Held*, that this was not sufficient to constitute fraud. The essence of usage of transferability is that transfers made to the knowledge of, but without the consent of the landlord are valid and must be recognised by him. Where the usage of transferability of occupancy holdings was found to have been growing up in other *patties* than that of the plaintiff landlord—*Held* that the plaintiff could regard the growth of the usage in his *patti* which was a separate estate by refusiug to acknowledge the validity of transfers in that *patti*.

Jagun Prasad v Posun Sahoo. 8 C W N 172.

Notes.—Ref 12 C W N 1086=8 C L J 261. Fol 11 C W N 83.

605.—S. 183 Transferability by custom—Proof.

Where the facts found as to local usage of transfer of a non-transferable holding are that the landlord received rent from the transferee entering the original tenant's name in the

Bengal Acts-(Tenancy Act VIII of 1885) S. 183-*Concld.*

receipt and mentioning the transferee or any person who pays as the person through whom payment is made, and the transferee's name is entered in the books only on payment of *nazar* to the landlord. *Held* that this amounted to a recognition by the landlord of the transfer only as between the transferor and the transferee, and that, unless the *nazar* was paid, the transferee did not acquire title. The transfer, on these facts, might be without the consent of or without reference to the landlord, but the payment of *nazar* is essential to validate it. **Maharaja Radha Kishore Manikya v Srimutty Ananda Priya 8 C W N 235.**

Notes—Fol. 2 Ind Cas 992; Ref., 11 C W N 83; Dist. 13 C W N 242, 12 C W N 1086 =8 C L J 261, 12 C W N 539; Commented on, 10 C L J 110=13 C W N 541.

606—S. 183. B—Res judicata-Civ. Pro Code (Act V of 1908). s.12.

A record of-rights was prepared and finally published on the 31st December, 1898. In a suit for rent which subsequently fell due, rent was claimed at the rate stated in the *khatian*: the Court did not allow the Plaintiff rent at the rate claimed, but at the rate admitted by the defendant. In a second suit of rent for a period subsequent to that for which the first suit was brought, plaintiff claimed rent again at the rate mentioned in the *khatian*.

Held—That inasmuch as the *khatian* was not considered in the earlier suit, the presumption under S. 103-*B* of the Bengal Tenancy Act in its favour continued, and the Court Should consider the same as evidence in the case.

Sarifunnessa Chowdhurani v Sasadhar Moulik. 14 C W N 364=5 Ind Cas 781.

607.—Bengal Tenancy Act (1885) s. 184 and Sch. III, part I, Art. 3—Suit by an occupancy raiyat—Limitation.

The suit mentioned in s. 184 and sch. III, Part I, Art. 3, after Act, means a suit by an occupancy raiyat as such, that is, an occupancy raiyat claiming a right of occupancy as against his landlord. **Chunder Kishore Day alias Mukhori Dey v Raj Kishore Mozumdar 15 Cal 450.**

Notes.—Dist. 24 Cal 40. Ref. 3 C W N 499.

Bengal Acts-(Tenancy Act VIII of 1885) S.184 *Concld.*

608—S. 3=(1877 S. 4) Limitation-Dimissal of suit—No plea nor issue:—If upon issue:—If upon the record it appears clearly that a suit is barred the Court can take cognisance of it and dismiss the suit, even though there was no such plea nor issue. **Deo Narain Chowdhry v C R H. Webb.** **5 C W N 160=28 Cal 86.**

—Ss. 184. 185, Sch III art 3 Applicability of S. 28 Limitation Act. See Act I of 1895. **(Public Demands Recovery).** **14 C L J 292.**

—S. 184.

See Bengal Tenancy Act s.144. Case No.(432) **7 C L J 152.**

—S. 185.

See Chowkidari Act. **9 C W N 571.**

—S. 188.

See Superintendence of High Court Civil Procedure Code 1882 s. 622,

609—Co-sharers. suit by—Parties.

S. 188 of the Bengal Tenancy Act applies only to such matters as a landlord is, under the Act, authorized or required to do; there is nothing in that Act which requires or authorizes a landlord to sue thereunder for arrears of rent. One of several joint landlords is competent to sue for the entire rent due from a tenant making his co-sharers parties to the suit. **Prem Chand Nuskur v Mokshoda Debi** **14 Cal 201.**
Umesh Chunder Roy v. Nasir Mullick. **14 Cal 203 note.**

Notes.—Fol; 15 Cal 47; 17 Cal 160; 29 Cal 54. Ref 17 Cal 538; 19 Cal 593; 26 Cal 727; 4 C W N 508; 5 C W N 763; 9 C W N 34; 7 C W N 908; 5 C L J 235 F B; 10 Bom L R 66=35 Cal 331 P C=7 C L J 139=12 C W N 210.

610.—Bengal Tenancy Act (1885) s. 188—Suit by co-sharers—Rent suit—Jurisdiction—Civil Procedure Code (1882) s. 622.

The District Judge dismissed a suit for rent on the ground that the suit could not be entertained in the form it was framed under the provisions of s. 188 of the Act. *Held*, on an application under sec. 622 of the Civil Procedure Code, that the District Judge had acted illegally was much, as s. 188 did not apply to the case and that his decision must be set aside. 14 Cal 201, and 14 Cal 203 note, followed. 16 Cal 6: L R, 11 I A, 237, distinguished.

Bengal Acts (Tenancy Act VIII of 1885) S. 188-*Contd.*

Jogobundhu Pattuck v Jadu Ghose Alkushi. **15 Cal 47.**

Notes.—Fol: 4 C W N 508. Ref: 17 Cal 538; 26 Cal 727, 1 C W N 617; 626; 7 C W N 908; 5 C W N 763· 16 Bom 708; 29 Cal 54; 25 All 509 F B; 9 C W N 34; 5 C L J 235 F B; 10 Bom L R 66=35 Cal 331 P C=7 C L J 139=12 C W N 249; 10 C L J 458.

611—S. 188 and 158-Co-sharers-Joint landlords—Application under s. 158 by one of several joint landlords—Refusal by joint landlords to join in such application, Effect of.—

An application under s. 158 of the Bengal Tenancy Act, 1885, cannot be made by one of several joint landlords. S. 188 of the Act requires that such an application should be made by all the landlords acting together, and it is not a sufficient compliance with its provisions to make the landlords, who refuse to join, parties to the proceedings under s. 158. 7 Cal., 633, 11 Cal., 615, 11 Cal., 644, 10 Cal., 36, 14 Cal., 201, and 15 Cal.. 47, referred to. **Moheeb Ali alias Dummer v. Ameer Rai** **17 Cal. 538,**

612—S.188--Co-sharers-Suit for enhancement of rent or for additional rent—Joint landlords.

Having regard to the provisions of s. 188 of the Bengal Tenancy Act 1885, where two or more persons are joint proprietors, they must all join in bringing a suit for enhancement of rent or for additional rent. 4 Cal 96 referred to. **Gopal Chunder Das v. Umesh Narain Chowdhry.** **17 Cal 695.**

Notes.—Ap: 25 Cal 917; 10 C W N 787=3 C L J 627; 4 C W N 508. Dist: 19 Cal 610, 755; 3 C W N 225; 255. Ref 19 Cal 593; 9 C W N 34; 33 Cal 1010=10 C W N 952; 9 Bom L R 743 P C.

613.—Bengal Tenancy Act (1885) s. 188—Ejectment suit—Joint owners.

Bengal Acts-(Tenancy Act VIII of 1885) S. 188-*Contd.*

A suit for ejectment by one or two joint owners under the contract law on a breach of the conditions of a lease by the tenant is not barred by s. 188 of the Act.

Haripria Debi v Ram Charan Myti. 19 Cal 54.

614.—S. 188—Lands formed by drying up of bhil or marsh—Suit for share of new lands and for assessment—Suit for possession of whole of land and for assessment.

The principal defendants held a holding under the plaintiffs and their co-sharers. Subsequent to the certain of the original holding, defendants took possesion of certain lands by gradual encroachment. Plaintiffs brought a suit for recovery of their share of the encroached lands or for assessment of rent, and made their co-sharers parties *Held*, that it was altogether a new holding, and the rent that would be assessed upon that would be a new rent in respect of the new holding, and a suit for assessment of rent is not an act that is authorized by s. 188 of the Bengal Tenancy Act, and s.52 was not applicable. 14 Cal 201, 14 Cal 203 note, and 15 Cal 47, referred to. But where a co-sharer landlord claims for khas possession with an alternative claim for rent, not merely of the additional land found in possession of the tenants over and above the land of their own holding, but in respect of the entire quantity of land found in posse sion of the tenants including the lands of their old holding:—*Held*, s.52 of the Bengal Tenancy Act applied, and s.188 would bar the maintainability of such a suit at the instance of a co-sharer landlord. 17 Cal 695 relied on. **Khandakar Abdul Hamid v Mohini Kant Saha. 4 C W N 508.**

Notes.—Ref: 10 C L J 458. Doub: 13 C W N 635.

615:—S.188-Decree for rent obtained by only some of co-sharer landlords—Sale in execution of such decree of occupancy holding not transferable by custom,—

A decree for rent obtained by some of certain co-sharer landlords, and not by the whole body of them,is not a decree under the Bengal Tenancy Act. 14 Cal 201; 15 Cal 47 referred to. An occupancy holding which is not transferable by custom,as also the interest of the judgment debtor in the said

Bengal Acts-(Tenancy Act VIII of 1885) S. 188-*Contd.*

holding are not saleable in execution of such a decree. 24 Cal 355 referred to. **Durga Charan Mandal v Kali Prasanna Sarkar. 26 Cal 727=3 C W N 586.**

Notes:—Appl: 27 Cal 187; Dist: 13 C W N 630. Fol: 27 Cal 415; 810; 4 C W N 571; 27 All 702; 2 A L J 469=(1905) W N 162; 9 C W N 972; 10 C W N 176= 4 C L J 68; W N (1907) 193; 29 All 612. Appr: 6 C L J 320 F B. Ref: 5 C W N 763 10 M L J 110; 8 C W N 472; 9 C W N 34; 11 C W N 83;29 Cal 54; 7 C W N 572; 5 C L J 235; F B; 294; 11 C W N 1011 F B;34 Cal 199, 11 C W N 513; 4 A L J 519; 5 A L J 121=30 All 146=(1908) W N 49=10 Bom L R 66=35 Cal 331 P C=7 C L J 139=13 C W N 249: 35 Cal 61 F B.

616.—Bengal Tenancy Act (1885), s 188—Joint Landlords—Suit by some of the joint landlords for enhancement of rent of tenure.

The plaintiffs, who were some only of several joint-landlords, brought a suit to enhance the rent and to recover their share of the rent at the enhanced rate for a specified period. *Held*, that having regard to the provisions of s. 188 of the Act, the plaintiffs could not maintain the suit. The term " joint-landlords " in the section must be taken to include all the co-sharers immediately under whom the tenant holds, whether such co-sharers receive their quota of rent from the tenant jointly or separately. 14 Cal 201, 17 Cal 695, and 17 Cal 390 referred to. **Haladhar Saha v Rhidhoy Sundri. 19 Cal 593.**

617.—Bengal Tenancy Act (1885), s 188—Joint proprietors—Effect of arrangement with fractional co-sharers——Creation of separate Tenancy.

Where a tenant, by his own act, has given the plaintiff power to deal with him as if he was his tenant alone, without any regard to the interests of his co-sharers, the effect is to create a separate tenancy and s. 188 of the Act is inapplicable to such a case. 17 Cal 695, distinguished. **Panchanan Bannerji v Raj Kumar Guha. 19 Cal 610.**

Notes.—Fol: 7 C W N 93: 670; 2 C L J 534: Dist: 25 Cal 917; 1 C W N 521.

Bengal Acts-(Tenancy Act VIII of 1885) S. 188-*Contd.*

618.—Bengal Tenancy Act (1885) ss. 188 and 52—Co-sharers—Suit by one co-sharer entitled to collect rent separately—Rent for land brought under cultivation in terms of lease—Land was granted by three joint-landlords under a kabuliat.

In a suit brought by one co-sharer, who was entitled under the kabuliat to collect his rent separately, to recover arears and also to collect the rent for fresh lands brought under cultivation the tenant objected that having regard to the provisions of s. 188, the suit could not lie at the instance of the plaintiff alone. *Held*, that the suit did not lie. It was not a suit for enhancement of rent in the ordinary sense of the term, nor was it a suit for additional rent for excess lands and as the plaintiff was entitled to collect his share separately, there was no reason why he should not be entitled to claim his share separately, not upon any fresh adjustment of the rent inconsistent with the continuance of the old tenancy, but upon an ascertainment of rent payable in accordance with the terms of the original letting. 4 Cal 96, and 17 Cal 695, distinguished.

Ram Chunder Chuckrabutty v Giridhur Dutt. 19 Cal 755.

Notes.—Fol: 22 Cal 658; 3 C W N 225.

619—Suit by co-sharer for rent payable under terms of lease—Suit by one of several joint-landlords.

Plaintiff, the co-plaintiff, defendant No 1, and other persons, who also were defendants, held a tenure, under which defendant No, 1 held an under tenure. Plaintiff brought this suit for the whole of the rent, claiming only his own share of it, making those co-sharers defendants who did not join as plaintiffs. The terms of the defendant's pottah were that, the whole of the lands being brought under cultivation, the landlords would be at liberty to measure the lands of the ganti, and, if the land be found greater in quantity than 150 bighas the tenant would pay rent at the rate of 10 annas per bigha. The lands being found greater than the said quantity, the plaintiff prayed for a decree for rent at that rate for the whole area. The defendant pleaded *inter alia* that the plaintiff, as a fractional sharer in the landlord's interest, could not sue him alone. *Held*, that the suit was maintainable at the instance of the plaintiff alone, and that it was not a suit to alter the rent under the provisions of s. 52 of the Bengal Tenancy Act. 19 Cal 755 relied upon; 17 Cal 695, dist.

Dintarini Dasi v. Broughton. 3 C. W. N., 225.

Bengal Acts-(Tenancy Act VIII of 1885) S. 188-*Contd.*

620. - Bengal Tenancy Act (1885) s. 188—Fractional co-sharer—Right to bring a suit for enhancement of rent—Effect of agreement to pay rent separately—Joint landlords.

A suit for enhancement of rent cannot be brought by a fractional co-sharer. Under s. 188, all the landlords must join as plaintiffs in a suit for the purpose of enhancement of rent. An agreement by a tenant to pay separately the co-sharers their shares does not create a separate tenancy. 17 Cal 695, and 25 Cal 917 note: 1 C W N 521, approved of. 19 Cal 160, and 22 Cal 658 distinguished. **Baida Nath De Sarkar v Ilim. 25 Cal 917=2 C W N 44.**

Hira Charan Bose v Ranjit Singh. 25 Cal 917 note 1 C W N 521

See Sadagar Sircar v Krishna Chandra Nath. 26 Cal 937.

Notes.—Ref: 10 C L J 618; 2 C L J 10; 26 Cal 937; 27 Cal 417; 7 C W N 670; 8 C W N 192. Dist: 8 C L J 534; 8 C W N 191; 751. Ap: 25 Cal 917.

621-S.188-Partition of estates-Joint-landlords.

A tenure was held under a zamindari which originally formed one entire estate. The estate was subsequently partitioned by the revenue authorities into four several estates. The rent of the tenure was thereupon allotted proportionately to each of the four estates thus formed, although the land forming the tenure remained undivided. In a suit for enhancement of the rent of the tenure brought by the proprietor of some of the estates, —*Held*, that the effect of the partition of the parent estate was to create separate and distinct tenures out of the original single tenure under the proprietors of each of the estates; that the proprietors of the several estates were not joint landlords of the tenure within the meaning of s. 188 of the Bengal Tenancy Act and that therefore a suit for enhancement of rent would lie by a proprietor of one of the estates in respect of the rent allotted to his estate. 22 W R 530 and 5 Cal 273 followed.

Hem Chandra Chowdhry v. Kali Prasanna Bhaduri 26 Cal 832.

Bengal Acts-(Tenancy Act VIII of 1885 S. 188-*Contd.*

Notes:—Ref 10 C W N 818.

622—Bengal Tenancy Act (VIII of 1885) s. 188—Joint landlord—Suit for apportionment of rent & arrears of rent.

S. 188 of the Bengal Tenancy Act lays down that joint landlords can only sue for the rent collectively or by common agent. But it does not prescribe that the relation of joint landlord is to endure for ever or does not prohibit joint landlords from ceasing to be joint, or from suing for their shares of the rent separately when they have ceased or wish to cease, to be joint landlords. When a defendant is subject to a joint liability, it would without doubt be unjust to allow him to be sued by one of his joint creditors who would not release him from his liability to his other creditors. But there would seem to be no reason why the creditors should not be allowed to sever their mutual relations, and sue their debtor separately for their shares of the debt, provided this be done in such a manner as to free the debtor from all further liability to any of them.

Rajnarain Mitter v Ekadasi Bag. 27 Cal 479=4 C W N 449.

623—Ss. 188, 65—Money decree—Suit—for rent for four years—Plaintiff's constituting the entire body of landlords for two years—Decree, whether may be split up.

In a suit to recover rent for 4 years, the plaintiffs constituted the entire body of landlords as regards the claim for the first two years, but only fractional co-sharers as regards the claim for the last two years.

Held—That the decree passed was not a rent decree under the Bengal Tenancy Act, but only a money decree under the ordinary law. (17 Cal 390; 3 C. W. N. 604) referred to. **Sheikh Nainuddin v Srimanta Ghose. 6 C W N 124 =29 Cal 219.**

Notes.—Ref: I C L J 500.

624—Sec 188—Arrear of putni rent due to a co-sharer zemindar—Suit by him under Act VIII of 1885 to recover the whole rent of the tenure—Refusal of his co-sharer zemindars to join as plaintiffs to bring the same—Law applicable to the case—Agreement to pay shares in the

Bengal Acts-(Tenancy Act VIII of 1885) S. 188-*Contd.*

putni rent separately—Its effect on the right to sue on the tenure.

Appellant, a co-sharer in a zemindari interest in consequence of the putni rent falling into arrear so far as the share which should have come to him was concerned, brought a suit making the putnidars defendants and joining as co-defendants his co-sharers in the zemindari on the ground that they refuse to join him as plaintiffs. The suit was framed as one under the Bengal Tenancy Act to recover the whole rent of the tenure, and for purpose to bring to sale the tenure itself. The plaint also asked in the alternative for a decree for the appellant's share of the rent:

Held, that the appellant was competent to bring a suit, under the Bengal Tenancy Act, for the whole rent due to respect of the property in suit.

Held, also, that the law applicable to the present case must apparently be that by the express terms of the Bengal Tenancy Act in the event of the rent being unpaid the owners of the zemindari interest were entitled, by suit under that Act, to bring a putni to sale, with consequences prescribed by that Act, and it was a general rule—a rule not derived from the Bengal Tenancy Act, but from quite another branch of law, namely, the general principles of legal procedure—that a share, whose co sharers refuse to join him as plaintiffs, should bring him into the suit as defendants, and sue for the whole rent of the tenure, unless there was something to exclude the case from the operation of those rules.

It was contended that the case was excluded from the operation of those general rules on the ground that by express or implied agreement between the zemindars and the putnidars, the share in the putni rent of the several zemindars were to be paid, and so far as they were paid at all, were in fact, paid separately.

Held, that the right to bring the tenure for sale for arrears of rent remained intact, and also the right of one sharer to making his co-sharers defendants when they would not join as plaintiffs.

Their Lordships had no inclination to question the course of rulings in Bengal that agreement, either expressly proved or implied by the conduct of the parties might eastablish the right

Bengal Acts-(Tenancy Act VIII of 1885) S 188-*Contd.*

to sue separately for the share of rent receivable by the separate share-holders.

Their Lordships thought that it was clearly a sound view of the law, as clearly laid down in Bengal that such an arrangement, expressed or implied merely affected the right to sue separately for rent, and in no other respect modified the terms of the holding. **Raja Pramada Nath Roy v Raja Raman Kant Roy. 35 Cal 331=35 I A 78=7 C L J 139=3 M L T 151=10 Bom L R 66=18 M L J 43.**

Notes—Fol: 35 Cal 744=7 C L J 425. Ref: 10 C L J 517, 10 C L J 463.

625—S. 188-Enhancement of rent-Co-sharer landlord—Suit for enhancement of rent by one co-sharer landlord by making others as defendants whether maintainable—"Acting together" meaning of.

The institution of a suit for enhancement of rent is a thing authorized by the Bengal Tenancy Act, in the case of tenure-holders as well as in the case of occupancy raiyats.

The Act prohibits one or some of two or more joint landlords from suing to enhance the rent, unless both or all of the fractional landlords join in the suit as co-plaintiffs.

Therefore, a suit for enhancement of rent brought by one of the joint landlords, making the other landlords, who do not concur with him, defendants, will not lie. 35 I. A. 73 ; 12 C W N 240; 10 Bom. L. R. 66 ; 7 C. L. J. 139 ; 3 M. L. T. 151; 18 M. L J. 43; 35 Cal. 331, Dist. **Jatindra Nath v Prasanna Kumar. 8 Ind Cas 842 (P. C.)=9 M L T 1=13 Bom L R 1=15 C W N 74=13 C L J 51=21 M L J 92=38 Cal 270.**

626—S.188 and ss.65 & 52-Abatement of rent—Authority of a co sharer to grant abatement.

A fractional share-holder of a tenure has no right to grant abatement of rent in respect of a holding within the tenure independently of his co-sharers. **Syama Charan Mandal v Saim Mollah 1 C W N 415.**

627—S. 188—Suit for damaging for cutting down trees.

Bengal Acts-(Tenancy Act VIII of 1885) S. 188-*Contd.*

A suit for recovery of damages for value of trees cut down by a tenant is maintainable at the instance of one of several joint landlords.

Hrisikes Singha v Sadhu Charan Lohar 2 C W N 80.

628—S.188-Separate collection-Suit for whole rent if lies.

Where a whole body of co-sharer landlords and their tenants have come to an arrangement by which rent is made payable to the co-sharers separately in proportion to their shares in the estate, it is not competent for one of the co-sharers, so long as such arrangement subsists to bring a suit for the full rents of the tenure by making his co-sharers parties Defendants in the suit. **Raja Promada Nath Roy v Raja Ramoni Kant Roy. 9 C W N 34.**

629.—Separate collection of rent—Suit by all the co-sharers for entire rent—Maintainability—Bengal Tenancy Act (VIII of 1885), S. 188.

Where it appeared that some of several co-sharer landlords had been collecting their portion of the rent separately for 25 years, but there was no division of the tenure.

Held, that there is nothing to prevent the co-sharers from reverting to their original condition if they are all agreed; and a suit brought by all the co-sharers for the recovery of the entire rent is maintainable.

An arrangement, under which fractional shares to the rent are paid separately to different co-sharers, does not bind the parties for all time, and may be put an end to by the tenants or by the landlords collectively, though not by one of the landlords against the consent of the others. 4 Cal 96; 17 Cal 695 and 9 C W N 84 Ref. **Shyama Charan Bhattacharya v Akhoy Kumar Mitter 10 C W N 787=3 C L J 627**

Notes.—Fol 33 Cal 1010.

630.—Bengal Tenancy Act (VIII of 1885) S. 188—Co-sharer landlords-Separate collection-Right of sharer to sue for whole rent making co-sharers defendants—"Required or authorised to do" under the Act—Filing of suit—General prin-

Bengal Acts-(Tenancy Act VIII of 1885) S. 188-*Concld.*

ciples of legal procedure. Agreement, either expressly proved or implied by the conduct of the parties, may establish the right of co-sharer landlords to sue separately for the shares of rent receivable by them. But such an arrangement merely affects the right to sue separately for rent in no other respect modifies the terms of the holding. The right to bring the tenure to sale for arrears of rent remains intact, as also the right of one sharer to sue, making his co-sharers defendants when they will not join as plaintiffs.

The filing of a suit is not a thing, which the landlord is under the Bengal Tenancy Act, required or authorised to do: and S.188 of the Bengal Tenancy Act is no bar to a sharer suing (under the general rules of legal procedure) for the whole rent of the tenure, making his co-sharers who refuse to join as plaintiffs, defendants in the suit. **Raja Pramada Nath Roy v. Raja Ramani Kanta Roy. 12 C W N 249 P C= 35 Cal 331=35 I A 73.**

Notes.—Fol 12 C W N 835. Disc 13 C W N 793.

631—S. 188—Damages, suit for—Co-sharer landlord and tenant—Other co sharers, if necessary parties.

S. 188 of the Bengal Tenancy Act has no application to a suit by a co-sharer landlord against an occupancy raiyat for damages for value of trees alleged to have been improperly cut and appropriated.

Although, in an action on a contract, all the parties jointly interested therein ought to be brought before the Court, the rule is otherwise in an action for damages for wrong independent of contract. Where several persons are entitled to sue in respect of a wrong done to them jointly as for instance in the case of injury to their joint property by trespass, conversion or negligence, it is not necessary that they should all join as plaintiffs in the action. Any one of the parties is entitled to maintain a suit in so far as he has been damnified by the alleged tortious act of the defendant. **Fatic Chandra v Alas Bibi, 15 C L J 295.**

631A—Bengal Tenancy Act Ss. 188, 65-Money

Bengal Acts-(Tenancy Act VIII of 1885) S. 188-*Contd.*

decree—Suit for rent for four years-Plaintiff constituting the entire body of landlords for two years-Decree whether may be split up.

In a suit to recover rent for 4 years, the Plaintiffs constituted the entire body of landlords as regards the claim for the first two years, but only fractional co-sharers as regards the claim for the last two years;

Held, that the decree passed was not a rent decree under the Bengal Tenanly Act, but only a money decree under the ordinary law.

Sheikh Naimuddin v Srimanta Ghose. 6 C W N 124.

—S. 188.

See (1) Bengal Tenancy Act s. 65. Case No (255). **29 Cal 219.**

(2) Bengal Tenancy Act S. 106. Case No (400). **7 C W N 400.**

(3) Bengal Tenancy Act s. 52. Case No (325). **13 C W N 635.**

(4) Bengal Tenancy Act s. 91 Case No (336). **35 Cal 417.**

(5) Bengal Tenancy Act s. 65. Case No. (217) **3 Ind Cas 29.**

—S. 189. Rules made under.

See (1) Landlord and Tenant—Ejectment—Notice to suit.

(2) Superintendence of High Court—Civil Procedure Code, s. 622.

(3) Valuation of suit—Appeals.

632—S. 189—Jurisdiction of Revenue Officer to make a record of rights without order of Government.

S. 104 of the Bengal Tenancy Act (before the amendment of 1898) applies to proceedings taken under s. 103 as to those under s. 101. On an application under s. 103 a Revenue Officer can make a survey and prepare a record of rights without any order of the Government under s. 101.

Dharani Kanta Lahiri v. Gaber Ali Khan (1899) 30 Cal 339.

—S. 189.

See Bengal Tenancy Act s. 101. Case No. (356). **30 Cal 339.**

Bengal Acts-(Tenancy Act VIII of 1885) S. 195-*Contd.*

—S. 192.

(1) Bengal Tenancy Act s. 153. Case No. (479) **6 C L J 669.**

(2) Bengal Tenancy Act s 55. Case No (2 3) **11 C W N 939.**

633—Ss. 193, & 153-Falker rent-Falkar rent is rent within the meaning of the Bengal Tenancy Act, and s. 153 is applicable to a suit for recovery of such rent. **Kanai Mahaldar v Madhu Sudan Ghose. 6 C L J 669.**

—S. 193.

See (1) Bengal Tenancy Act s. 144. Case No. (432). **7 C L J 152.**

(2) Bengal Tenancy Act s. 153. Case No (485). **5 Ind. Cas 158.**

—S. 195.

See Bengal Regulation VIII of 1819.

634—S. 195 (e)—Liability of tenure in the hands of a purchaser.

Putni Regulation (VIII of 1819) sec. 17—Contribution—Decree for rent for a period anterior to sale. There is no conflict between sec 65 of the Bengal Tenancy Act and sec. 17 (3) of the *Putni* Regulation. Antecedent balances may be mere personal debts, which cannot be summarily recovered under the procedure prescribed by the *Putni* Regulation but they may be also a charge on the *taluk*, and the *taluk* may be sold subject to them. Where the purchaser of a *Putni taluk* paid off a decree for rent obtained against the old tenant for a period anterior to that of the rent-decree in execution of which the tenure was sold: *Held*—That the purchaser was not entitled to contribution from the old tenant against whom the rent-decree was obtained. 1 C W N 458 (1896), followed. **Peary Mohan Mukhopadhya v. Sreeram Chandra Bose. 6 C W N 794.**

635—Bengal Tenancy Act (VIII of 1885), Chap X-Record of-rights—Publication of record—Rate of rent.

In a suit for rent which accrued due after the final publication of a record of rights the plaintiff relied upon the proceedings of the settlement officer and the defendant relied upon a rent decree passed previous to those proceedings declaring a lower rate of rent. *Held*—that the plaintiff was entitled to claim the rate of rent as stated in the settlement proceedings. **Rajah Pudmanund Singh v Ghanshyam Misser. 6 C W N 914.**

Notes.—Revers 32 Cal 336=9 C W N 610= 1 C L J 134. Ref 5 C L J 92;11 C W N 153; Diss 32 Cal 386.

635A.—Sch. II, Art. 3—Limitation, special—Ouster—Settlement, colourable and sham.

In order to bind the tenant by a short period of limitation of two years, under Art. 3 of Sch. II of the Bengal Tenancy Act, it must be strictly shown that the ouster is an ouster by the landlord and known to the tenant as such.

Therefore, where the ouster was by an alleged settlement from the landlord, which is found to be a colourable and sham transaction, the tenant suing for recovery of his holding will not be bound by the special limitation.(3 C W N 215 (217), Ref. **Arman Gazi v Krishna Chandra Nandi. 5 Ind Cas 383.**

635B.—Sch. III-Limitation-Dispossession of tenant by landlord—Landlord selling holding in execution of rent-decree—Landlord's hand in the ouster—Suit for possession by tenant—Rent-decree by ticcadar after expiration of lease—What is liable to be sold.

When a tenant is dispossessed of his land by another tenant, and the landlord has a hand in the ouster, the special limitation laid down in Sch. III of the Bengal Tenancy Act applies to a suit for recovery of possession.

When a landlord sells a holding in execution of a decree for rent, and the holding is purchased by another *raiyat*, the special limitation will apply.

Obiter dictum:—When a *ticcadar* obtains a decree for rent after the expiration of his *ticca*, all that he can sell is the right, title and interest of the tenant and not the tenure.

Conflict of authority on the point pointed out. 13 C W N 109; 3 Ind Cas 315; 9 C L J 131, Fol: 31 Cal 550. Fol: **Natabar Jana v. Rudra Narain Maiti. 9 Ind Cas 625.**

636.—Sch. III Art 1—Misjoinder-Sch III Art 1—Deposit by alleged transferee of tenant—Protest by landlord—Withdrawal of amount—Estoppel.

Bengal Acts-(Tenancy Act VIII of 1885) Sch. III Art 1-*Concld.*

Where the plaintiff sued for possession of certain lands part of which was in the possession of defendants Nos 3 and 4 as their holding and the rest as obtained by them by encroachment on the khas lands of the landlord.

Held, that the suit was not bad for misjoinder of causes of action.

Where the suit to recover possession from a trespasser the provisions of the Bengal Tenancy Act do not apply and the suit is not barred by Art. I of Sch. III of the Act.

The plaintiff landlord brought a suit for rent against his tenants defendants Nos 3 and 4, and got a decree in execution of which the holding was advertized for sale: defendant No 1 asked for permission to deposit the decretal amount, stating that he was the representative of defendants Nos 3 and 4. The plaintiff protested against the deposit but the Defendant was allowed to put in the money. The plaintiff withdrew the amount.

Held, that the withdrawing the amount could not bar the plaintiff in a suit for possession against defendant No. 1 **Prodyat Kumar Tagore v Mahomed Hussain Khan.**

7 Ind Cas 86

Bengal Tenancy Act Sch III

See Bengal Tenancy Act S 3 (5) (case No 23). **8 C W N 640.**

637.—Sch. III, art 2—Limitation-Suit for arrears of rent at excess rate.

In 1865 the plaintiff sued and obtained a decree for payment of additional rent for excess land held by the defendant, and, on the 29th March 1877, instituted another suit against the defendant for khas possession of newly-accreted lands, or, in the alternative, for an assessment of rent thereon according to the terms of the defendant's kabuliat. This suit was dismissed on the 29th June 1881; but, on appeal to the High Court, this decision was reversed on the 11th May 1883, and khas possession was given to the plaintiff. On appeal, the Privy Council, on the 24th July 1886, reversed the decree for khas possession, and declared the plaintiff entitled to a decree, fixing the extent of the excess lands and assessing rent therefor in terms of the kabuliat, such rent to be payable from and after the 28th March 1878,

Bengal Acts-(Tenancy Act VIII of 1885) Sch. III Art 2-*Contd.*

and remitting the case for a finding as to the extent of the excess lands. The Subordinate Judge, to whom the case was remitted, gave the plaintiff a decree on the 21st March 1887 for increased rent in respect of 2 kanis 7 gundahs 2 cowries of excess land. On the 14th July 1887, the plaintiff instituted a suit to recover excess rent for the years 1878 to 1886, and for rent at the old rate plus the excess rent for a portion of the year 1887. *Held* that the suit, so far as the rent for 1878 to 1883 was concerned, was barred by limitation. **Hurro Kumar Ghose v Kali Krishna Thakur.** **17 Cal 251.**

638.—Sch. III Art 2–Limitation for rent-suit –Rent payable under a lease–Registered lease.

The Bengal Tenancy Act (VIII of 1885) prescribes one period of limitation for all suits for rent brought under its provisions. Art 2 of the third schedule of that Act includes a suit to recover arrears of rent payable under a lease, and there is no distinction as to the form of the lease or as to whether it is registered or not. 15 Cal 221, and 3 Mad 76, distinguished.

Iswari Pershad Narain Sahi v Crowdy. **17 Cal 466.**

Notes.—Ref. 1 C L J 456.

639.—Sch. III Art 2, and s. 184—Rent-suits on registered contracts.

Suits for rent, founded on registered contracts in respect of lands subject to the provisions of the Bengal Tenancy Act are governed by limitation provided in that Act.

Mackenzie v. Mahomed Ali Khan. **19 Cal 1.**

Notes.—Ref: 19 Cal 489; 11 C W N 57: 5 C L J 19. Appl: 4 C L J 553.

640-641.—Sch. III Art 2, and Ss. 3, 4 and 5 —Building lease—Lease not for agricultural or horticultural purposes.

A registered lease granted for building purposes is not a lease for agricultural or horticultural purposes within the meaning of the Act. Therefore the special limitation provided by art,

Bengal Acts-(Tenancy Act VIII of 1885) Sch. III Art 2 *Contd.*

2 Sch. III of the Act is not applicable to such a lease. **Raniganj Coal Association v Judoonath Ghose. 19 Cal 489.**

Notes.—Fol: 28 Cal 485; 12 C W N 724.

642.—Bengal Tenacy Act (VIII of 1885) Sch. III Art 2 and s. 184-Suit for arrears of rent.

A landlord sued his patnidar on the 13th April 1891 for the recovery of the arrears of rent for the last year under the Regulation VIII of 1819 in the Collector's Court and prayed for the sale of the patni taluk. The patni taluk was purchased by the landlord himself on the 1st of May 1891. But the whole of the arrears were not recovered and again a suit was brought for the recovery of the balance due. The defendant pleaded limitation. *Held*—that the suit was governed by the provisions of the Bengal Tenancy Act s. 184, and sch. III art 2 (b). The period of limitation being 3 years from the last day of the Bengali year in which the arrears fall due. Hence the suit was barred by limitation.

Burna Moyi Dassee v Burma Moyi Chowdhurani. 23 Cal 191.

Notes.—Ref: 10 C L J 517.

643.—Sch III Art 2—Limitation Act XV of 1877 Art 116-Tenure holder-Bengal Tenancy Act.

Plaintiff as ijardar of certain land, brought a suit for rents, due for six years, basing his claim upon a kabuliat alleged to have been executed by the predecessor of the defendants. A new plea was for the first time taken before the appellate court, that the suit was barred by limitation being one for rent for a period of more than three years. *Held*, the Bengal Tenancy Act did not apply as the lands were not let out as holdings for agricultural or horticultural purposes. The suit was not barred therefore.

Umurao Bibi v Mahomed Rojabi. 27 Cal 205: 4 C W N 76.

644.—Sch. III Art 2-Suit for arrears of rent brought by assignee of landlord.

Bengal Acts-(Tenancy Act VIII of 1885) Sch. III Art 2-*Contd.*

Art. 2 of pt. I of sch. III of the Bengal Tenancy Act does not apply to a suit brought by the assignee of the arrears from the landlord, but art. 110 of the second schedule of the limitation Act applies to such a suit. **Mohendro Nath Kalamaree v Koilash Chandra Dogra. 4 C W N 605.**

Notes.—Dist: 35 Cal 744=7 C L J 42).

646.—Sch. III. Art 2 (b)-Limitation of rent suits—Fusli year—Rent due on the last day of Bhadra-Period of Limitation.

The period of limitation when the Fusli year prevails is three years from the last day of Jeith. If any instalment is due on the last day of Bhadra, the period of limitation will expire on the last day of Jeith in the third subsequent year, so that in such a case, the suit must be brought not within three years but within three years and nine months **Iswardhari Singh v Ram Brich Roy. 7 C L J 106.**

647.—Sch. III art 2 (*a*)—Rent, deposit of—Onus Notice, service, of, by post, presumption—Fact, question of—Order sheet, exparte entry in, evidentiary value of.

If a tenant relies upon clause (a) of article 2 of Schedule III of the Bengal Tenancy Act he must prove that there was an application which fulfilled the requirements of section 61, sub-section (2) of the Bengal Tenancy Act, and that a deposit was made under section 61 after the arrear had fallen due; he must also show that notice under section 63 was served on the landlord and prove the date when the service was effected.

There is no presumption that a letter, which was posted properly addressed, and the presumption that the letter reached the addressee, has no application till it is established that the letter was properly addressed.

Bengal Acts-(Tenancy Act VIII of 1885) Sch III Art 2-*Contd.*

Before the presumption of due service can be applied, it is necessary to prove that the notice was sent in a cover which was properly addressed.

The presumption that a notice sent by post was duly served is not a conclusive presumption of law; it is merely a presumption of fact; and whether it arises in a particular case or not, depends upon all the circumstances.

An *exparte* entry in the order sheet is by no means conclusive evidence, if it is admissible in evidence at all, as against the landlord, who was not a party to the proceedings for deposit under section 61 of the Bengal Tenancy Act.

Mir Tapurah Hossein v Gopi Narayan. 7 C L J 251.

Notes.—Fol: 7 C L J 262. Comp: 8 C L J 256 =35 Cal 561. Ex: 9 C L J 623. Ref: 36 Cal 726; 10 C L J 189.

648.—Sch.III. Art 2 (b)-Limitation Act (XV of 1877) Sch. II, Art 132.

Where there is a special rule of limitation prescribed by law, that rule is to be followed to the exclusion of the more general rule.

In suits for rent, the period of limitation is that prescribed by Art. 2 (b) of Sch. III of the Bengal Tenancy Act, and it cannot be extended by the application of the ordinary rules of limitation prescribed by the Limitation Act.

Kali Charan Bhowmik v Harendra Lal Rao. 4 C L J 553.

Notes.—Ref: 10 C L J 517.

649.—Sch.III, Art.2, cl.(b)-Registered lease-Limitation.

Where a tenant under a registered lease which expired in 1311 B. S., and a suit for rent in respect of the period up to 1311 was brought in 1313: *held*, that the suit was governed by the limitation as prescribed by schedule III article 2 (b) of the Bengal Tenancy Act, as the plaintiff sued, thought after the expiry of the lease, in his capacity of landlord, to enforce the rights which he had as landlord. 7 C L J 652= 35 Cal 737, Fol. **Kamala Prosad Singh v Jhunti Raut. 3 Ind Cas 114.**

Bengal Acts-(Tenancy Act VIII of 1885) Sch. III Art 2-*Contd.*

650—Sch. III, Art 2—Suit for recovery of arrears of rent—Limitation:—Where a suit for the recovery of arrears of rent was brought more than three years after the due date· *held* that the fact that a suit for enhancement had been brought by the plaintiff within that period and in that suit the plaintiff had claimed enhanced rate for the year in question, stayed the operation of the law of limitation. **Hem Chunder Chowdhry v. Kali Prosunno Bhaduri (Si Andrew Scoble). 8 C W N 1=30 Cal 1033= 30 I A 177; P C.**

Notes:—Dist: 32 Cal 18,

651—Sch. III, Art. 2 (a)—Deposit of rent—Notice of deposit on one of several joint landlords, effect of—Limitation.

When co-sharer landlords are jointly and severally entitled to rent, the service of notice on one of the landlords of the deposit of rent under sec. 61 of the Bengal Tenancy Act has not the effect of reducing the period of limitation to six months as provided in Art. 2 (a) of Sch. III of the Act. **Rup Chand Mahton v Gudar Singh 6 C W N 15.**

651.A—Bengal Tenancy Act (VIII of 1885) Sch. III, Art. 2 (b)—Suit for rent by a co-sharer landlord against some of several joint tenants—Limitation—Maintainability.

Art. 2 (b) of Sch III of the Bengal Tenancy Act applies to a suit by a co-sharer landlord.

A suit for rent against some of several joint tenants is maintainable as joint tenants are jointly and severally liable.

Jogendra Nath Roy v. Nagendra Narain Nandi. 11 C W N 1026.

651.B——Drainage charges, recovery of, by landlord—Limitation—Bengal Tenancy Act (VII of 1885), Sch III, cl. (2), sec. 3, cl (5)-"Rent" —Waiver of statute by contract—Validity—Limitatian, running of, from date other than that on which amount is payable. A suit to recover drainage charges payable by a tenant to his landlord under sec. 42, cl. (b) and sec. 44, sub sec. (1) of the Bengal Drainage Act is governed by cl. (2) of Sch. III of the Bengal Tenancy Act and must brought within 3 years from the last day of the Bengali year in which the sum claimed fell due. Drainage charges payable by the tenant to the landlord as

Bengal Acts-(Tenancy Act VIII of 1885) Sch. III Art 2-*Concld.*

above are included within the definition of "rent" in sec. 3, sub-sec. (5) of the Bengal Tenancy Act. 8 C. W. N. 640 (1904), explained and followed. Although a sum of money may be payable on a specified date, the limitation for recovery thereof need not necessarily run from that date. It is lawful for parties to substitute for their statutory obligation under the Drainage Act a contractual obligation. *Held*, in the present case, that the contract merely amounted to a covenant by the tenant to pay drainage charges in accordance with the statute and did not modify or supersede its provisions. 32 Cal 1019 (1905). approved. 19 Cal. 1 (1891), referred to.

Naffer Chandra Majil v. Jyoti Kumar Mukerjee, 11 C W N 57.

—sch III Art 2

See Bengal Tenancy Act s. 144. Case No (432)
7 C L J 152

—sch III Art 2 (a)

See Bengal Tenancy Act s. 69. Case No (290)
7 C L J 251.

—sch III Art 2 (a)

See Bengal Tenancy Act s. 61. Case No (246)
29 Cal 283

652—Sch III, art 3—Limitation—Suit by occupancy raiyat to recover possession from trespasser, Limitation for.

Art 3, sch. III of the Bengal Tenancy Act (Act VIII of 1885), relates to suits brought by an occupancy raiyat against his landlord and not to a suit brought against third parties who are trespassers. **Ramjannee Bibee v Amoo Beparee. 15 Cal 317**

Notes:—Dist: 24 Cal 40

653-Bengal Tenancy Act (1885) Sch. III, Art 3—Bengal Act VIII of 1869 s. 27—Suit by occupancy raiyat to recover possession—Question of title—Possessory Suits—Limitation.

A suit by an occupancy raiyat for the recovery of possession of land of which he has been dispossessed by his landlord, in which the title of the tenant was disputed and put in issue, is powered by the special limitation prescribed by the Bengal Tenancy Act (1885) sch III, art 3, viz., 2 years from the date of dispossession that enact-

Bengal Acts-(Tenancy Act VIII of 1885) Sch. III Art 3-*Contd.*

ment intended to provide for all suits to recover possession of land brought by an occupancy raiyat, and to limit the period previously allowed by the courts for suits to recover possession by reason of a title set up and provided by the plaintiff, and not to provide only for suits of a possessory nature such as were previously dealt with by S. 27 of Bengal Act VIII of 1869.

Saraswati Dasi v Horitarun Chuckerbutty. 16 Cal 741.

Notes.—Fol 17 Cal 926.

654—Sch. III Art 3—Limitation—Bengal Tenancy Act, s 184—Suit for possession by an occupancy raiyat.

Having regard to the provisions of s. 184 of the Bengal Tenancy Act, 1885, the period of limitation for a suit for the recovery of land by an occupancy raiyat is two years as prescribed by art 3, sch. III of the Act. 16 Cal 741, followed.

Ramdhan Bhadra v Ram Kumar Dey. 17 Cal 926.

Notes—Diss. 7 C W N 218. Ref: 8 C W N 446, 9 C W N 56; 31 Cal 647.

655—Bengal Tenancy Act (VIII of 1885) sch. III Art 3—Suit by occupancy raiyat for possession—Limitation.

Art 3 of sch III of the Act, which prescribes a limitation of two years, is not restricted to suits against the landlord alone, it applies to a suit brought against a tenant with whom the land was settled by the landlord. 15 Cal 317, and 15 Cal 450 distinguished. **Bheka Singh v Nakchhed Singh. 24 Cal 40.**

Notes:—Ref: 4 C W N 326. Appr: 13 C W N 108.

656—Sch. III Art 3-Limitation-Dispossession by landlord—Possession, recovery of, suit for—Occupancy raiyat, suit for recovery of possession by, against a landlord.

The special limitation of two years as laid down in the Bengal Tenancy Act does not apply to a case where an occupancy raiyat is dispossessed from his holding by his landlord, not as a landlord, but as a representative of the persons whose right, title, and interest he has purchased.

Abhoy Churn Mookerjee v Titu. 2 C W N 175.

Bengal Acts-(Tenancy Act VIII of 1885) Sch. III Art 3-*Contd.*

Notes:—Rel: 6 C W N 333. Dist. 4 C W N 326. Fol : 5 C L J 650. Ref · 13 C W N 108.

657—Sch. III Art 3-Limitation Dispossession by a landlord from occupancy holding.

Where the plaintiff purchased an occupancy holding at an auction-sale in execution of a mortgage decree against an occupancy raiyat and sued the landlord to recover possession of the same although plaintiff had never been in actual possession at all, and his predecessor had been ejected from possession by the landlord of the occupancy holding more than two years before suit and the latter claimed to maintain his possession by virtue of a decree which he obtained for possession as against the occupancy raiyat, the mortgagor—*Held* that the case was not governed by the special limitation of two years. 2 C W N 175, referred to. **Dinobundhu Saha v Lolit Mohun Moitra. 2 C W N 595.**

Notes:—Dist: 4 C W N 326

658—Sch. III Art 3—Limitation—Occupancy holding, Suit to recover possession of.

In a suit by a purchaser from former holder for recovery of possession of an occupancy-holding, where the defendants were in occupation, they having been inducted into the land by the agents of the landlord,—*Held* that the period of limitation is two years, inasmuch as it is under the authority of the landlord that the ouster took place. 24 Cal 40, relied on. 1 C W N 573, 2 C W N 175, and 2 C W N 695 distinguished. **Chintamoni Sahu v Upendra Nath Sarnokar. 4 C W N 326**

Notes:—Appr. 13 C W N 108.

659-Sch. III Art 3-Occupancy raiyat, Ouster of—Limitation.

Where the plaintiff, an occupancy raiyat, was ousted by the defendant, and after the ouster the defendant took a settlement from the landlord,—*Held* that two years' limitation would apply to a suit for the recovery of possession. **Hara Kumar Nath v Nasaruddin. 4 C W N 665.**

Notes:—Over: 29 Cal 610 F B.

Bengal Acts-(Tenancy Act VIII of 1885) Sch. III Art 3-*Contd.*

660--Sch. III Art 3-Limitation—Dispossession of tenant by landlord—Landlord selling holing in execution for rent-decree—Landlord's hand in the ouster—Suit for possession by tenant—Rent-decree by ticcadar after expiration of lease-What is liable to be sold.

When a tenant is dispossessed of his land by another tenat, and the landlord has a hand in the ouster the special limitation laid down in sch III of the Bengal Tenancy Act applies to a suit for recovery of possession. When a landlord sells a holding in execution of a decree for rent, and the holding is purchased by another *raiyat*, the special limitation will apply. (13 C W N 108, 3 Ind Cas 315 9 C L J 131 Fol). *Obiter dictum*:—When a *ticcadar* obtains a decree for rent after the expiration of his *tucca* all that he can sell is the right, title and interest of the tenant and not the tenure. (31 Cal 550 Fol). Conflict of authority on the point pointed out. **Natabar Jana v Rudra Narain Maiti. 9 Ind Cas 625.**

661—Sch III, Art 3—Dispossession by a landlord not acting as such—Suit by occupancy raiyat—Limitation.

Art 3 of Sch III of the Bengal Tenancy Act applies only to suits as between landlord and tenant and is not applicable to suit where the dispossession is by the defendant acting, not as landlord but expressly in a different capacity, namely, that of auction-purchaser of the right, title and interest of a tenant at a sale held in execution of a rent-decree obtained by him as a co-sharer landlord.

Brojo Kishore Mahapatra v Saraswati Dassi. 6 C W N 333.

Notes:—Fol : 5 C L J 650. Ref : 13 C W N 108.

662—Sch. III Art 3—Evidence Act S. 35—Butwara Chitta—Admissibility—Limitation.

A *Butmara Chitta* is not admissible in evidence under S. 35 of the Evidence Act (6 L R 139 and 25 Cal 90 Fol:)

In a suit by a tenant for possession of jote lands against his landlord, the question whether the plaintiff is a tenure-holder or a raiyat has an important bearing on the question of limitation,

Bengal Acts-(Tenancy Act VIII of 1885) Sch. III Art 3-*Contd.*

as it is impossible to decide it without first ascertaining the nature of the plaintiff's tenancy because on that depends the question whether the case is governed by the general limitation or the special limitation provided by Sch III. Act 3, Bengal Tenancy Act. **Iswar Chandra Das Sarkar v Tara Nath Chakrawarti 1 Ind Cas 807.**

Bengal Tenancy Act——Sch III. Act. 3—Possession of landlord after purchase in execution of rent decree——Period of limitation for suit by tenant for recovery of possession. **See** Landlord and Tenant.

10 Ind Cas 54

663—Sch. III, Art. 3-Limitation-Occupancy raiyat—Co-sharer landlord—Auction purchaser.

At a sale held in execution of a decree for arrears of rent obtained by a co sharer landlord against a registered tenant, another co-sharer landlord purchased the holding, and in obtaining delivery of possession, evicted a person other than the judgment debtor. The person dispossessed sued to eject the auction purchaser.

Held, that Sch. III Art. 3 of the Bengal Tenancy Act had no application to the case, as the dispossession by the defendant was in his character of auction purchaser, and not of landlord (2 C W N 175; 6 C W N 33 Fol.)

Mahomed Khalil v Hirendra Nath Bhattacharya 5 C L J 650.

664—Sch. III, Art. 3—Limitation—Dispossession—Recognition of title.

Where one of two co-sharer landlords brought a suit to have his right established to sell the occupancy holding of the *raiyat* in execution of a decree for money obtained by him, and it was proved that although the other co-sharer landlord had dispossessed the *raiyat* more than two years before the institution of the suit, but that notwithstanding the unlawful dispossession the title of the *raiyat* was throughout recognised by all parties concerned and the recognition had been up to within two years of the institution of the suit. *Held*, that the suit was not barred by the two years' rule, **Sheikh Sarafuddin Mondul v Chandra Mani Gupta 5 C W N 405.**

665—Sch. III, Art, 3—Dispossession by one of the co sharer landlords—Suit by tenant for possession—Limitation.

Dismissed as beyond two years, though question not specifically raised. **Joolmutty Bewa v Kali Prasanna Roy. 28 Cal 127 note F B =4 C W N 801.**

666—Suit for recovery of possession by an occupancy raiyat—Limitations—Disspossession by landlords, sale, fractional, or entire body of.

The period within which an occupancy raiyat can sue to recover possession of land from which he has been dispossessed by his landlord is two years as laid down in art. 3, sch III of the Bengal Tenancy Act, whether such dispossession be by a fractional landlord, the sole landlord, or the entire body of landlords. 28 Calc., 127 note, referred to. **Parameswar Nomosudra v Kali Mohan Nomosudra 28 Calc 127; 4 C W N 801 note Joolmutty Bewa v Kali Prasanna Roy 28 Calc 127 note; 4 C W N 803 note.**

Notes:—Ref: 29 Cal 54; 1 C L J 500; 5 C W N 763. Dist: 6 C W N 333. Fol: 7 C W N 542; 28 Cal 127.

667—Landlord and tenant—Bengal Tenancy Act (VIII of 1885, B. C.) Sch III. Art 3—Dispossession of occupancy raiyat by a fractional or co sharer land—Limitation.

The rule of limitation applicable to a case where a fractional or co-sharer landlord dispossesses an occupancy *raiyat* who claims recovery of possession on that ground is two years as laid down in Art 3 of Sch. III of the Bengal Tenancy Act.

(Second appeal No. 1513 of 1892; (F. B.) unreported **See** foot-note, page 803 post.—Ed. Ref.). **Parameswar Namasudra v Kali Mohan 4 C W N 801=28 Cal 127.**

668—Sch. III, Art 3—Limitation—Dispossession by a person other than the landlord.

Where an occupancy raiyat is dispossessed and the landlord has had no hand in the *ouster*, the period of limitation applicable is 12 years and not 2 years as provided in Art 3, Sch. III of the Bengal Tenancy Act. 4 C W N 665 considered. **Ranjulla v Ishab Dhali 6 C W N 702= 29 Cal 610 F B.**

Bengal Acts-(Tenancy Act VIII of 1885)-Sch. III Art 3-*Contd.*

Notes:—Dist: 9 C W N 54 Ref: 16 C P L R 145; I N L R 73.

669—Sch. III, Art 3—Occupancy raiyat, suit for possession by—Dispossession by tenant set up by landlord—Limitation.

When an occupancy raiyat is dispossessed by a person whom the landlord has set up as tenant, the dispossession being really by the landlord, the limitation applicable to a suit for recovery of possession by the raiyat is that described in Art 3 of Sch. III of the Bengal Tenancy Act 6 C W N 702 s. c. 29 Cal 620 dist. **Rakhit Mahanta v Puddo Bauri. 9 C W N 54.**

Notes—Appr: 13 C W N 108.

670—Co-sharer taking kabuliyat in respect of his share—Rent decree, execution purchase under—Priority of title—Purchaser under mortgage decree against holding—Bengal Tenancy Act (VIII of 1885), S. 3 cl. (9) and Sch. III Art 3—"Holding"—Special limitation—Dispossession by auction purchaser, not incapacity of landlord. P held 7 bighas of jote at a jamma of Rs. 9 The defendants, who were 4 annas landlords, took from P a kabuliyat in respect of one fourth of the land, the boundaries given being those of the bighas.

Held, that the defendants must be considered fractional co-sharers, and not the 16 annas landlords in relation to P; that when they obtained the one-fourth of the land in execution, they did not acquire an indefeasible interest in the land, so as to have a priority of title against the plaintiffs, who were purchasers in execution of a decree on a mortgage prior to the defendant's purchase.

Held, also that as the defendants dispossessed the plaintiff, not in their capacity of landlords but as auction-purchasers, they could not claim the aid of art, 3, Sch. III of the Bangal Tenancy Act and the benefit of the special limitation of two years.

Held, further that the defendants were not entitled to raise the question of the transferability of the holding, and to plead that plaintiffs had purchased nothing. (1 C W N 521; 25 Cal 97; 2 C W N 44; 25 Cal 917; 2 C W N 680 and 2 C. L. J. 10 Ref. 2 C W N 175; 6 C W N 393; 5 C. L J 650; 11 C L J 20; 14 C. W. N. 71: 5 Ind Cas 39, Ref. 4 C W. N. 679; 6 C W N 624. 11 C W N 76; 11 C L J 20; 14 C W N 71; 5 Ind Cas 39 Ref.) **Sarat Chandra Chatterjee v Ishwar Chandra Shaha 5 Ind Cas 397.**

Bengal Acts-(Tenancy Act VIII of 1885)-Sch. III Art 3-*Concld.*

671—Sch III Art 3—Limitation—Occupancy right—Dispossession—Adverse possession.

When a person entered into possession of an occupancy holding by permission of the tenant and subsequently claimed a title in himself and obtained recognition from the landlord, the case was one of adverse possession and not dispossession and the two years' limitation prescribed by Art 3 Sch III of the Bengal Tenancy Act has no application. **Sonatan Sheikh v Chsku Sheik 10 C L J 89=3 Ind Cas 398.**

672.—Sch III Art 3-Dispossession by a fractional co sharer landlord Occupancy ryot. suit for recovery of possession by-Limitation.

The special limitation of 2 years provided by Art 3 of Sch III of the Bengal Tenancy Act is restricted to suits between persons occupying the position of landlord and tenant, for it is in regard to such relations that the Act has been designed It is of no consequence whether the ejectment is by some co-charers or by the entire body of landlords **Annada Sundari Chandalini v Kebulram Changa 7 C W N 542.**

Notes—Ref 1 C L J 500.

673—Sch III, Art, 3—Dispossession by landlord—Auction-purchaser at sale in execution of decree obtained by landlord-Collusion Occupancy raiyat, suit by—Limitation.—

Where an occupancy raiyat is dispossessed by a person who has purchased the rights of some of the tenants at auction in execution of a decree for arrears obtained by the landlord, such person must be held to be acting in collusion with the landlord and the suit is governed by the special law of limitation prescribed in Art. 3, Sch III of the Bengal Tenancy Act. **Aminuddin Munshi v Ulfatunnissa Bibi 9 C L J 131 =13 C W N 108=3 Ind Cas 315.**

—Sch III Art 3.

See Butwara. Case No (1) **1 Ind Cas 807.**

674.—Sch III Art 6—Limitation—Ex-parte decree in suit for rent—Civil Procedure Code s 108—Application for execution of decree-Decree final—Execution proceedings struck off-Bengal Tenancy Act (VIII of 1885), Ss. 143, 144, 148.

Bengal Acts-(Tenancy Act VIII of 1885) Sch III Art. 6-*Contd.*

Having regard to ss 143, 144 and 148 of the Bengal Tenancy Act, there is a special procedure laid down for rent suits; therefore decrees in rent suits are decrees under art 6 of Sch III of the Bengal Tenancy Act. The words 'final decree' in the above article of the Act refer to the final decree in the suit and does not include an order in appeal upon an application to set aside that decree under s 108 of the Code of Civil Procedure. A decree-holder applied on the 27th May 1889 for execution of an exparte rent decree for a sum under Rs 500 obtained on the 30th May 1888. In execution thereof certain properties of the judgment debtor were attached,and the 31st. of August 1889 was fixed as the date of sale. The judgment-debtor then applied to have the exparte decree set aside and pending the disposal of that application the sale was stayed on the 31st October 1889 the Court further ordered striking the execution case off the file,of its own motion for convenience. On the 28th December 1889 the application to set aside the decree was rejected and this order was confirmed on 16th May 1890 in appeal. The decree-holder again applied to execute the decree on the 21st January 1892, with a prayer that his application might be taken to be in continuation of his former application of the 27th May 1889, *Held* that the application must be taken as a continuation of the former execution proceedings, so far at least as regards the property mentioned in the former application but as regards other properties, it must be held to be barred as not having been made within three years from the date of the decree *i. e.* 30th May 1888. **Baikanta Nath Mittra v Aughore Nath Bose** 21 Calc 387.

Notes:—Ex: 23 All 13,

675.—Bengal Tenancy Act, Sch III, Art 6. An application for execution of a decree for a sum not exceeding Rs 500 in value obtained by one of two or more joint landlords for his share of the rent is not governed by the special rule of limitation laid down in Art 6 of Sch III of the Bengal Tenancy Act, but by the general law of limitation, namely, Art. 179 of the second schedule of Act XV of 1877. **Kedar Nath Chatterjee v Ardha Chandra Roy Chowdhury** 29 Cal 54=5 C W N 763.

676.—Art 6—Application for execution—Judgment debtor discovered to have been dead on date of application—Application for substitution after expiry of period of limitation—Limitation.

The decree-holder applied for execution of a decree for rent on the last day of the period of limitation allowed by Art 6 of S III of the Limitation Act, and subsequently discovered that the judgment-debtor had died before the date of the application and without unreasonable delay got his legal representative substituted in his place, and proceeded with the execution as against the latter.—*Held*—That the proceeding against the legal representative of the judgment debtor was in continuation of the proceeding started on the last day of limitation and was not time-barred

Kumar Kalanand Singh v Chandra Kishore Jha 14 C W N 971=12 C L J 192= 6 Ind Cas 971.

Bengal Tenancy Act Ch X.

See Bengal Tenancy Act Amendment Act s 9. Case No (54). 11 C W N 859.

Act VIII of 1885 (Bengal Tenancy).

Sch III Part, III Art 6-Execution of restitution order. See Execution of Decree. 9 Ind Cas 246.

677.—Sch. III Art. 6—Limitation Act (XV of 1887), art. 179—Execution of decree—Period from which limitation runs—Date of decree—Date of payment.

On the 26th May 1890, a rent decree was passed for the sum of Rs 400, payable on the 15th August 1890. On the 9th August 1893, the decree holders applied for execution of the decree. *Held* that the period of limitation ran from the date of the decree, and not from the date fixed for payment, and that the application was barred by art 6 of sch III Act VIII of 1885. **Ram Sidday Mukerjee v Dwarka Nath Mukerjee** 22 Calc 644

678.—Sch III Art 6—Execution of decree—Limitation Act (XV of 1877), s 19—Acknowledgment of liability.

An acknowledgment of liability under s 19 of the Limitation Act made by a judgment debtor to the decree-holder's right to execute a rent-de-

Bengal Acts-(Tenancy Act VIII of 1885) Sch III Art. 6-*Contd.*

cree gives the decree-holder a fresh starting point for counting the period of limitation prescribed by art 6 of Sch III of the Bengal Tenancy Act.

Harihar Lal v Gunendar Pershad **9 C W N 1025.**

Notes:—Ref 10 C L J 517=6 C L J 472.

678A.—Limitation Act (XV of 1877) s 19 applicability of, to applications for execution of rent decree—Bengal Tenancy Act (VIII of 1885) Sch III Art 6 Sec. 185, sub-section 2, effect of—Acknowledgment of liability saves Limitation of application for execution of rent decrees not exceeding Rs 500. Section 19 of the Limitation Act is applicable to applications for execution of rent decrees coming under Art 6 of Sch III of the Bengal Tenancy Act by reason of Sub-sec 2 of Sec 185 of that Act.

Section 19 of the Limitation Act applies to applications for execution of decrees and an acknowledgment of liability under that section can save an application for execution of a decree for arrears of rent for a sum of money not exceeding Rs 500 from being barred by limitation. 8 Cal 716 and 9 Cal 730. Appl. **Rakhal Chandra Tewari v Hemangini Debi** **3 C L J 347.**

Notes:—Ref 10 C L J 517.

679—Sch. III. Art 6—Act I of 1907 B. C. Sec. 61, Sub-Sec. 4—Execution of decree—Limitation—Decree by co-sharer landlord.

An application for execution of a decree for rent obtained by a co-sharer landlord, presented after the amendment of the Bengal Tenancy Act by Act I of 1907, is governed by the amended Article even though the decree might have been made before the amendment.

Under Sch. III, Act 6 as amended, a decree for rent in a suit by a co-sharer landlord is subject to the same period of limitation as a suit by the entire body of landlords.

Quære, whether the case of Kedarnath v. Ardha Chander which interpreted the law as it stood before the amendment of 1907 was correctly decided **Thakamani Dasi v. Mohendra Nath Dey Sarkar,** **10 C L J 463.**

Bengal Acts (Tenancy Act VIII of 1885)-*Concld.* Sch III Art. 6-*Concld.*

679A.—Bengal Tenancy Act (VIII of 1885) Sch III Art 6——Application for execution of decree for rent by a co-sharer landlord for a sum not above Rs.500 in value.

An application for execution of a decree for a sum not above Rs. 500 in value got by one of two or more joint landlords for his share of the rent is not governed by the special rule of limitation laid down in Art 6 of Sch. III of the Bengal Tenancy Act, but by the general law of limitation namely Art 179, of the second Sch of Limitation Act. 14 Cal 201; 15 Cal 47, 17 Cal 390: 17 Cal 489; 28 Cal 727 ref.to. **Kedar Nath Chatterjee v Ardha Chandra Roy Chowdhry.** **5 C W N 763.**

680—Enhancement of rent, suit for, if lies—*Bastu* land within Municipality—Bengal Tenancy Act (VIII of 1885) not applicable—Maintainability of suit—Notice.

Where the subject-matter of a tenancy is *bastu* land situated in a Municipality (to which the provisions of the Bengal Tenancy Act are not applicable), a suit for enhancement of rent brought by a landlord without previously serving the tenant with notice either to quit or to pay rent at the enhanced rate, must fail.

Krishna Kant Saha v. Krishna Chandra Roy, **9 C W N 303.**

Bengal Tenancy Amendment Act III of 1898.

Notes.—[S. 1 Rep. in pt., s. 11 rep., Act I of 1903.].

1—S. 167—Right of purchaser of holding subject to mortgage to re-purchase at rent sale to avoid mortgage—Fraud.

Where an occupancy-holding which had been mortgaged by the raiyat of the holding was purchased by a person in execution of a decree for money obtained by him, and the purchaser repurchased it in execution of a rent decree against the old tenant for arrears which had accrued previous to his first purchase and annulled by a notice under sec. 167 the mortgage of which he was aware at the time of his re-purchase. *Held*—That the purchaser did not commit any fraud in re-purchasing the property and was entitled to annul the mortgage, and the mortgagor was not

Bengal Acts (Tenancy Amendment Act III of 1898)-*Concld.*

entitled to get a decree upon the mortgage making the holding liable for the mortgage debt. That the purchaser was not bound as representative of the old tenant to pay off the decree for rent obtained by the landlord. **Surendra Mohan Singh v Bansidhar Marwari, 12 C W N 114.**

Bengal Tenancy Validation Act.

1—S. 17—Bengal Tenancy (Validation) Act (I, B. C. of 1903), sec. 1. Release by co-sharer-Cessor of liability of transferor-Notice to landlord if necessary.

Certain co-sharers in a permanent tenure by a deed, dated 2nd December 1893, which was registered in Book I, under sec. 51 of the Registration Act, relinquished all their right, title and interest and claim in the tenure in favour of the remaining co-sharer who, it was stipulated, was to remain in possession and was to be entitled to sell the tenure. He was also to pay certain debts mentioned in the deed for which the other co-sharers were to be under no liability. The deed was stamped with a five rupee stamp as a release. No landlord's fee was paid as required by sec. 12 of the Bengal Tenancy Act; *Held*,—That the deed was a transfer within the meaning of sec.12 of the Bengal Tenancy Act and the transfer was complete as soon as the document was registered. The non-payment of landlord's fee did not render the transfer invalid owing to the operation of sec 1 of Act I of 1903, B C. *Held, further*, that the liability of the co-sharers under the lease ceased with the transfer. 16 Cal 642 (1889); and 19 Cal 17 (1891), followed. **Hemendra Nath Mookerji v. Kumar Nath Roy, 12 C W N 478.**

Bengal Village Chaukidars Act VI of 1870.

See Village Chaukidars Act.

Bengal Village Chaukidars Act I 1892.

See Confession-Confessions to Police Officers.

Bengal Zamindari Dak Act VIII of 1862.

Notes:—[S. 1, Rep., Act XII of 1873; S. 9 rep in pt., Ben. Act VII of 1880; S. 11, Am., Act V of 1897; Rep. (in Bengal), Act IV of 1907; (in Assam), Act V of 1897, Obsolete in Eastern Bengal.].

Bengal Acts (Zemindari Dak Act-*Concld.*

Bequest.

See Charitable bequest.

—for charitable purposes.

See (1) Hindu Law—Will—Construction of Wills——Bequest for Charitable Purposes.
(2) Will—Construction.

—for masses.

See Will—Construction.

—for religious purposes.

See (1) Hindu Law—Will—Power of Disposition.
(2) Will—Construction.

—to a class.

See Hindu Law—Will-Construction of Wills—Perpetuities, Trusts, and Bequests to a Class.

—to Idol.

See (1) Hindu Law-Endowment.
(2) Hindu Law—Will—Construction of Wills—Bequest to Idol.

—void for uncertainty.

See (1) Hindu Law—Will—Construction of Wills.
(2) Will—Construction.

Bequest—See Hindu Law-Gift-Hindu Law—Will; and Will.

Bequest—to adopted son not adopted at time of testator's death:—See Hindu Law—Will. **15 M L J 299=28 Mad 363.**

Bequest—to daughter and her sons for generation:— **24 Mad 299.**

Bequest—to idol not in existence—Void:— **30 Cal 521.**

Bequest—to testator's adopted son—not conditional:— **24 Mad 214; P C.**

Bequest—to wife—Estate—Nature of:— **5 Bom L R 334; also 28 Cal 499= 4 Bom L R 555.**

Bequest-*Contd.*

1—Conditional bequest — Humble request—Vesting of legacy·—

Where a testator makes a bequest to A for maintenance contingent on A's suit against the testator for division of estate terminating in the latter's favour and on A humbly applying for subsistence:—*Held*, that the bequest does not vest in A until the conditions are fulfilled. An application by A asserting that the testator is under a duty to maintain him and asking for twelve times as much as is contained in the will is not a humble request. An application by A's representative or son is not a fulfilment of the condition.— **Veerabhadra Raju v. Chiranjeevi Raju. 15 M L J 111=28 Mad 173= 32 I A 105 (P C).**

2—Non-transferable, bequest of, if void or voidable—Void and voidable transaction, nature of—Recognition by landlord of transfer.

When a transfer of a non-transferable occupancy holding takes place, the transaction is in law voidable at the option of the landlord only. Hence the heir of an occupancy raiyat of such holding is bound by a bequest of the holding made by the latter in favour of a stranger.

If a transaction is void, no rights in favour of either party can grow under it, nor can it form the foundation of any estoppel. It is not necessary to have it set aside; its invalidity may be set up whenever it is sought to be enforced. It is incapable of being confirmed or ratified.

If a transaction is voidable. it is valid and binding upon the parties and persons deriving title through them whether by descent. purchase or otherwise, until it is avoided.

The transfer of an occupancy holding which is not transferable by local custom, may be validated by the consent of the landlord.

When the landlord recognises the transfer as valid, he recognises the transfer of the existing occupancy right as valid transaction. (4 C W N 679; 2 C W N 279, 6 C W N 624; 11 C W N 76 relied on.). **Hari Das Bairagi v Udoy Chandra Das. 8 C L J 261=12 C W N 1086**

3.—Illegitimacy, how far bar to inheritance:—Among sunnies, illegitimacy is no bar to one's inheriting from his mother and maternal relations. *Quere*:—How far the rule will hold good among Shiahs. **Bafatun v Bilaiti Khanum. 30 Cal 683.**

Bequest-*Contd.*

4—Will by Mahomedan—Consent by heirs. A consent given by the heirs of a Mahomedan testator whereby the latter disposes of by his will more than one third of his given property to a stranger, even if the consent is after the property is attached in execution of a decree against the heirs, does not amount to an alienation within the meaning of S. 276 of the Civil Procedure Code, 1882. **Daulatram v. Abdul Kayum. 4 Bom L R 132= 26 Bom 497.**

5.—Partition—Self-acquisition - Bequest of self-acquired property to sons—Presumption in favour of ancestral nature of estate taken;—

A, a Hindu father bequeathed his self acquired property to his sons. The will said they were to take the property in severalty, but its terms were otherwise consistent with ordinary rules of inheritance. One of the sons gifted some of the property. His sons sued to set aside the gift,as the property was property in which he had an interest by birth. *Held*, (1) that a Hindu can give or will away his self-acquired property as he pleases. Observations to the contrary in 3 M H C. R. 50 are no longer law. (2) He can leave it to descend to his sons as ancestral property. or can preserve for it that quality by will. The question whether he intended to pass it as ancestral or self-acquired property is one of intention turning on the construction of the deed of gift. The presumption is that he intended it to have the character of ancestral estate. If partition is made by the father on the footing that the property is partible, though there is in point of law a disposition made by the father, the intention of the farher will be taken to be that the quality of the ancestral property shall remain. So the plaintiff was entitled to recover. **Nagalingam Pillai v Ramchandra Tewar. 24 Mad 429.**

Notes.—Ref 19 M L J 384.

6.—Saudayika-Daughter-Absolute interest—Woman—Disposition of property during coverture—Will—Consent of husband.

That which is obtained by a married woman, or by a virgin in the house of her husband, or of her father, from her brother, or her parents,is termed Saudayika.

Bequest-*Contd.*

A woman cannot alien her *stridhan*, other than Saudayika, during coverture without her husband's consent: and her testamentary power of disposition is subject to the like restriction, where she is survived by her husband, who is not shown ever to have assented to the will. 25 All 468; 476; I B H C R 130; 117 refd to. **Bhau v. Ragnunath 7 Bom L R 936=30 Bom 229.**

Notes—Ref 31 Bom 453 9 Bom L R 834; 1187; 9 Bom L R 1305; 32 Bom 26; 59.

7.—Hindu Law—Hindu widow—Alienation, power of, over immoveable property,—Bequest by husband—Will, construction of, grant of—Absolute power, express or implied—Restrictions imposed upon power of alienation-Indian Succession Act (X of 1865), Sec. 82. Though a mere gift of immoveable property by a Hindu-husband to his wife, does not carry with it the power of alienation, yet where any such property is given by the husband to the wife, with express power of alienation, or when this power is implied by the grant, she would acquire an absolute power of disposal over the property, and when the gift is made by a will, the legatee is entitled under the provisions of sec. 82 of the Indian Succession Act, to the whole interest of the testator unless it appears from the will that only a restricted interest was intended to be given.

Where a will does not in express terms convey any estate of inheritance to a Hindu widow, still the widow will be entitled to alienate the property at her pleasure if there is no restriction imposed by the terms of the will, so far as the power of alienation is concerned.

Upon a construction of the will in this case which provided as follows "If neither of them (the wives) have any children then both my wives will enjoy and appropriate at their will the entire property moveable and immoveable in equal shares in full proprietary rights. In the absence of one, the other will similarly enjoy and appropriate at her will the entire aforesaid property in full proprietary right. In event of her death, my next reversionary heir will have such moveable and immoveable property as will remain." *Held*—That an absolute power of alienation was intended to be conferred on the widows. 1 C W N 387=24 Cal 834, 24 Cal 406, 4 C W N 387. **Saroda Sundari Dassi v Kristo Jivan Pal. 5 C W N 300.**

Bequest-*Contd*

8.—Hindu Law—Will—Construction of—Hindu widow—Life estate to a widow—Power to adopt, effect of:—On the construction of a will by a Hindu:—

Held:-that the testator's intention was to give his widow an ordinary life estate and not that of a Hindu widow and a contrary intention cannot be inferred from the mere fact that power was given to the widow to adopt a son and so divest herself of the estate: and that the testator's intention was that the gift to the subsequent legatee should vest at once but be liable to be divested in case a son should be adopted. The words "O putra poutradi" are equivalent to "putra poutradi Krama." **Gooroo Dass Mustafi v Sarat Chunder Mustafi. 29 Cal 699**

9.—Hindu Law—Will—Religious Endowments—Hindu law—Debutter—Hereditary shebaitship validity of disposal by will—Usage—Family custom. *Held by Maclean C J and Mitra* J,—In the absence of any local usage or family custom and where no case of necessity or clear benefit to the idol has been made out, a shebait of a private debutter is not entitled to dispose of his office of hereditary shebaitship by his will.

Held Woodroffe. J—That the question of usage did not affect the matter, and that the office of shebaitship could not be alienated by will. (6 Bom 298 Diss.) **Rajeshwar Mullick v. Gopeswar Mullick 12 C W N 323=35 Cal 226=7 C L J 315.**

10.—Bequest to daughters and their respective sons—Restriction of descent to male issues—Absolute or limited gift.

In construing the Will of a Hindu it is not improper to take into consideration what are known to be the ordinary notions and wishes of Hindus with respect to the devolution of property. It may be assumed that a Hindu generally desires that an estate, specially an ancestral estate, shall be retained in his family, and it may be assumed that a Hindu knows that as a general rule, at all events, woman do not take absolute estates of inheritance which they are enabled to alienate. L R 2 I A 7 (1874), followed. In the Will of Hindu drawn up in the English language, and probably by an English Solicitor who was one of the attesting witnesses, it was provided, in case of the failure of a prior bequest in favour of a son to be adopted to the testator, (which bequest in fact failed) that the estate was

Bequest-*Contd.*

to be made over to and divided between his two daughters in equal shares, "to whom and their respective sons he gave, devised and bequeathed the same." There was a proviso that in the event of one of the daughters dying without leaving any male issue surviving, the share of the deceased daughter was to go to surviving daughter and her sons—to the exclusion in both cases of female issue. Further that "in the case of the death of either daughter leaving sons, the share of such daughter was to be paid to such of her son or sons, share and share alike." *Held*—That under the Will the testator's daughters whom he incontestably intended to benefit were to have no more than what is generally known to be a woman's estate in his property. That the testator intended to create in their favour an estate for life with a remainder over to their sons. That in the events that happened, the daughters were entitled to the testator's estate in equal shares for life and with the benefit of survivorship between themselves.

Radha Prosad Mullick v Ranimoni Dassi. (P C) **12 C W N 729.**

11—Bequest—Probate and Administration Act s. 3—Bequest to idol—Shebait executor by implication—Probate.

Where a testator had bequeathed the bulk of his estate for the *sheba* of a *thakur* and made certain other dispositions in regard to the rest of the property: *Held*, on the construction of the Will, that his wife whom he had appointed *shebait* having been confided with the execution of the Will was executor by implication, and as such entitled to take out probate of the Will. **Kripamoyee Dassi v Mohim Chandra Dutt. 10 C W N 232.**

12—Construction of—Feeding and paying Brahmins, if valid bequest.

A direction in a will for feeding and paying the Brahmins on the day

Bequest-*Contd.*

following the night of Sivaratri is a valid bequest. 4 Cal 443; 6 Bom 24; 17 Bom 351, Fol.

Kedar Nath Dutt v Atul-Krishna Ghose. 12 C W N 1083.

Bequest, absolute.

See Hindu Law—Will

Bequest by a Hindu to his wife

See (1) Hindu Law—Will.
(3) Hindu Law—Gift.
(3) Hindu Law—Stridhan.

—by testator, of his wife's ornaments.

See Will.

—Charitable.

See (1) Hindu Law—Will.
(2) Will.
(3) Hindu Law—Endowment.

—Conditional.

See (1) Hindu Law.
(2) Will.
(3) Mahomedan Law—Will.

—for house expenses.

See Will.

—for religious purposes.

See (1) Hindu Law—Will.
(2) Will.
(3) Hindu Law-Endowment.

—lapsed.

See Will

—of attesing Witness.

See Will.

—of more than one-third of Estate.

See Mahomedan Law.

—of propeety to the boy named for adoption by testator.

See Hindu Law—Will.

Bequest-*Concld.*

—of residue.

See Mahomedan Law.

—pecuniary.

See Will.

—to a class.

See (1) Hindu Law—Will.
(2) Will.

—to a definite Sadavrat.

See (1) Will.
(2) Hindu Law—Will.

—to Brothers.

See Mahomedan Law.

—to Charity.

See Will.

—to Dharm, a void.

See Hindu Law—Will.

—to executor.

See Will.

—to executors and trustees in trust for son of testor and his widow.

See Will.

—to Heirs.

See Mahomedan Law.

—to idol.

See (1) Hindu Law—Will.
(2) Hindu Law—Endowment.

—to person not in existence at death of testator.

See (1) Hindu Law—Will.
(2) Will.

—to two charitable objects, one of such bequests being invalid.

See Will.

—to Unborn Son.

See Hindu Law—Will.

—to wife.

See (1) Hindu Law—Will.
(2) Hindu Law—Stridhan.

Berar

See Hindu Law.

1—Rule V (2)—Inam to the lineal descendants for personal maintenance—Power of alienation.—

An Inam granted under rule V (2) of the Berar Inam Rules, to a grantee and his direct lineal heirs and undivided brothers, confers upon each holder, in turn, an estate for life only, which is absolutely inalienable. 2 Bom 529 and 3 Bom 186, Ref: **Kristnaji v Manwar Ali. 6 N L R 72=6 Ind Cas 821.**

Berar, Judicial Commissioner of.

See Superintendence of High Court. **2 N L R 72.**

1—Ss. 4, 69, 205—Exchange—"Relinquishment for valuable consideration"—Right of pre-emption.

Where a co-occupant transfers his share, partly in exchange for another field and partly for cash, the transaction, both according to Hindu Law and the Act, is an exchange.

"A Relinquishment in favour of a specified person for valuable consideration," in s. 205 of the Code, means a transfer for valuable consideration of the kind described in s. 69. Such a transfer is usually described as a transfer by Razinmah and Kabuliyat.

A suit for pre-emption on a transfer by way of exchange of a divided share in a survey number does not lie. 11 Berar Law Journal 49, 22 Ch D 142 Ref. **Babu v Maruti, 3 N L R 138.**

2—S. 78, cl. (2)—Berar Jagir estate—Annual tenant paying rent at a fixed rate for three years after notice to pay enhanced rent can either be ejected under s.78 (2) or their rent could be enhanced by proceeding under s. 78; cl (4) of the Berar Code. 5 Ber L J 10 Ref. **Maruti v Jagannath. 5 N L R 100=2 Ind Cas 996.**

3—S. 79—Ejectment suit—Notice to quit—Where notice is necessary under s. 79, in a suit by a landlord to eject his tenant the suit in itself will not be regarded as a notice. 8 Bom 228; 9 Cal 48; 24 Cal 720 and 27 Cal 570. Ref. 21 Mad 288 and 2 Q. B. 135 (142) Fol. **Udebhan v Jagannath. 6 N L R 17=5 Ind Cas 699.**

Berar-*Concld.*

3—Ss. 197 and 171 (f)—Sale of holding for arrears of land revenue—Want of preliminary order of forfeiture under s. 121—Validity of the sale—Juisditcion of Civil Courts, exclusion of, under s. 171 (f).

Under s. 56, it is the existence of the arrears that works a forefeiture and renders the property liable to sale.

The fact, that the order of sale did not expressly declare forfeiture, as required by s. 127 did not vitiate the sale and the validity of the sale cannot be questioned in a Civil Court. 27 Cal 698, 23 Cal 775; 20 Cal 826 Dist.

Ramalal v Nago. **5 N L R 35 = 2 Ind Cas 26.**

4.—Ss. 206 and 211, sub sec. 1 cl. (a)—Pre-emptor Notice of foreclosure—Person entitled to —Objection by mortgagor.

The only person, who can object to the failure to give notice, under s. 206 of the Code, is the person having the right of pre-emption.

Where a mortgagee, foreclosed without notice a co-occupant of the mortgagor, the latter can sue for pre-emption under s. 211. But the mortgagor cannot plead want of notice to the co-occupant as a bar to the foreclosure decree being made absolute **Gangoo v Sakaram. 3 N L R 84.**

Berar Patels and Patwari's Law.

1.—S.20—Proviso—Social rights, meaning of —Suit for a declaration as to proprinquity of relationship to a patel, not maintainable.

The words "social right" in s. 20 (Proviso), do not include rights of precedence and the like enjoyed by a patel as such, but are intended to indicate such matters as adoption and legitimacy.

A suit, for a mere declaration that the plaintiff is a nearer heir than a third person to the patel, is barred by s.20. 3 N L R 131; 22 Bom 344 Fol: 1897 Berar L J 14.

Yeshwanta v Sitaram **5 N L R 79 = 9 Ind Cas 242.**

Betrothal.

See (1) Contract—Breach of Contract.
(2) Hindu Law—Marriage—Betrothal.
(3) Specific Performance.
(4) Hindu Law, Guardianship.
Jurisdiction of Small Cause Court.

1.—Parties to suit.

Under the Punjab Civil Court, *held* that when a betrothal contract had been entered into by a parent on behalf of his child, a suit for breach should be brought against the parent alone and not against both parent and child. **Mahomed Bux v Mussammat Jeeunt Beebee. P R 59 of 1866.**

2.—Child unborn.

A contract of betrothal made in regard to a girl not born at the time of the contract is null and void. **Diyala v Bhama. P R 60 of 1866.**

3.—Where money was paid by plaintiff on account of defendant, as a consideration for a bride for defendant, the plaintiff knowing for what purpose the money was required, *held*, that he might recover the money paid; the purchase of a wife not being *malum in se*, and being *malum prohibitum*, by the Punjab Civil Code, only as between the parties to the sale.

Shah Gool v Ikram. **P R 88 of 1867.**

4—Guardians.

Where a parent makes a betrothal contract for his child and dies, the guardian is prevented by the contract from making another for the child. **Ram Chand v Laljee: P R 21 of 1868.**

5.—*Held*, under the Punjab Civil Code, that although a suit would not lie to recover the consideration money paid to the parents of the bride elect to obtain their consent to the betrothal; yet a suit would lie to recover ornaments presented by a man to his betrothed in contemplation of marriage. **Gaman v Kabool. P R 69 of 1868.**

6.—Damages for injured feeling are not an independent personal wrong, but the consequential damages of the breach of contract. Indemnification for expenses incurred in gifts relates to all presents made in consequence of the be-

Betrothal-*Contd.*

rothal, and no such distinction can be made as that some are given "socially" and others "ceremonially." **Nubee Buksh v Suddeek. P R 22 of 1869.**

7.-Damages for procuring breach

In a suit for damages for breach of betrothal contract the Lower Court awarded damages against the parents of the girl, and also against her husband,on the ground that by marrying her had promoted the breach of contract. *Held*, that the suit as against the husband would not lie. **Jhangie Ram v Dass Ram. P R 83 of 1870.**

8.—Marriage brocage contract.

Where defendant agreed, in consideration of receiving Rs. 200, to find a wife for plaintiff, and the money was paid, but defendant did not perform his part of the contract,and it was found by the Court trying the case that defendant never intended procuring a wife for the plaintiff, but obtained the money under false pretences. *Held*, that a suit to recover back the sum of Rs, 200 (plaintiff having discovered the agreement to be void), was maintainable, but the Judges (Boulnois and Lindsey, JJ.,) considered the contract opposed to public policy. **Gahu v Haku P R 86 of 1875.**

9.—Suit for breach-Marriage of plaintiff after contract to another woman, pleaded in bar.

Plaintiff sued for damages for breach of betrothal contract. The plea was, that the plaintiff had married another woman, and for that reason defendant refused to complete the contract. *Held*, that by law and custom, the plea was no bar to plaintiff's suit, but that the subsequent marriage went in mitigation of damages. The parties were Muhammadans of the Hissar district.

Kandhal v Lahia. P R 59 of 1876.

10.—Betrothal Contract, breach of—Money paid under void agreement-Act IX of 1872, Section 57—Promises to do things legal and also other things illegal.

Where money has been paid by a bridegroom to the bride's father in consideration of the marriage of the latter's daughter, and the promised marriage has not been performed : *Held*, that such money can be recovered back by suit.

Betrothal-*Contd.*

The transaction between the parties comprises to distinct and separable sets of promises within the meaning of Section 57 of the Contract Act, and while one set, that relating to the marriage, is lawful, and amounts to a contract, the other set, that relating to the pecuniary consideration, may be unlawful as opposed to public policy,and therefore a void agreement. But whether such agreement be void or not, the person who paid the money is in either case entitled to recover it back in the event of the father of the girl refusing to celebrate the marriage. **Kahna v Kahn Singh. P R 106 of 1879.**

11.—Suit for damages for breach-Defendant justifying his refusal to carry out the contract by Custom—*Onus probandi*—Custom of Aroras—*Riwaj-i-am.*

In a suit for damages for breach of a betrothal contract, the parties to which were Aroras, it appeared that the existence of the contract and the subsequent refusal to perform it were facts not denied by the defendant, the father of the girl, but that the contention was, that owing to physical infirmities produced by supervening disease, *viz*, small-pox, contracted by plaintiff about two years after the betrothal, the plaintiff was not a fit person to contract marriage, and that the father of the girl was therefore excused by custom, from performing his promise of giving the plaintiff his daughter in marriage. It was admitted that the custom by which the parties were governed in matters relating to contracts of betrothal was correctly stated in the *Riwaj-i-am* prepared at Settlement, which provided that "if after betrothal the "boy or girl * * * * * contracts any "disease whereby the healthy condition of the "body may be permanently impaired * * * "* * the other party is at liberty to cancel "the betrothal"

Held, that the defendant, upon whom the *onus* under the circumstances lay, had failed to prove that the boy's health of body was permanently impaired, and that therefore the custom as embodied in the *Riwaj-i-am* justified him in refusing to perform the contract to give his daughter in marriage to the plaintiff's son.

Chandan Mal v Mitta Ram. P R 132 of 1888.

Betrothal -*Concld.*

11A—Suit for damages for breach of betrothal contract—Recovery of money paid under the agreement.—

Held—that a suit for damages for breach of a betrothal contract is maintainable. Sums advanced to the father of the girl may be taken into consideration in assessing such damages. Civil Ruling No 128 P R 1889 explained and distinguished.

Civil Ruling No 106 P R 1879 followed.-**Jesa Ram v. Ghausam 141 P R of 1890.**

12—Parties—Suit for damages for breach, of a contract of betrothal.

Held, that a minor plaintiff for whose benefit, and on whose behalf the contract of bethrothal was made, could sue for damages in respect of that breach.

Held, also that the suit lay only against the father and not the girl herslf as she was no direct party to the contract and the person guilty of the breach was the father. 5 P R 1909; 174 P R 1882; 21 Bom 23; 49 P R 1905 Fol. **Nabi Bakhsh v Rahim Baksh. 83 P R 1909; 42 P L R 1910.**

13—Breach of promise to marry—Procuring Breach of Contract—Liability of the mother for inducing person not to marry—Malice—Justification—Presence of malice is a removal of the justification,

It is well-established doctrine that the procuring of a breach of contract by a third party is an actionable wrong and the relationship of the party who procures the breach and the party who commits the breach as mother and son does not exclude the operation of the doctrine. (2 E & B 216; (1901) A C 495, 2 *K* B 745; I Ch 335; (1898) A C 1; (1908) A C 506 Ref).

Malice is not gist of action but if malice is alleged and proved it may disprove the justification or privilege which arises between the party procuring the breach and the party committing the breach of the contract.

Miss Irene Fanny Colquhoun v Mrs Fenney Sunither. 7 M L T 394=5 Ind Cas 475.

Betrothed and unbetrothed daughters.

See. Hindu Law.

Bettiah Raj.

1—Nimak sayar mehal created before 1804—Regs VIII of 1812 and IV of 1814 how affect right of grantees—Exclusive right to take saltpetre-Incorporeal right, grant of, at the time of permanent settlement-Monopoly-Abolition—Bettiah Raj The present proprietress of the Bettiah Raj is entitled to the declaration of her right at the permanent settlement-Holder under Government of the saltpetre mehal of Sarkar Champaran which passed to the Bettiah Raj by purchase in 1804.

Regs VIII of 1812 and IV of 1814 were not intended either to extend or to limit the right which the Bettiah Raj had to the *nimak sayar mehal*. The abolition of the monopoly of the East India Company by the latter regulation was not intended to affect the right of the Raj to realise its dues, either in the shape of royalty from the manufacturers or itself to manufacture saltpetre to the exclusion of all other persons or proprietors of land in Sarkar Champaran. The right to grant licenses and realise royalty would not be inconsistent with the abolition of monopoly. **Golab Chand v Moharani Janki Koer 13 C W N 454=36 Cal 267=1 Ind Cas 967.**

Betting and gambling.

1.-Betting and gambling-Distinction, between. Per Ghose, J The ruling in (13 Bom 681) does not apply in this case as the progress of the metal figures was not an operation of nature, and as there was contest viz between the keeper and the persons who asked.

Per Stephen J.-The soundness of the judgment (13 Bom 681) is doubtful. The difference between gambling and betting depends on the nature of the events on which the bet is made. If the event is brought about solely for the purpose or being betted about betting on, it is gaming, otherwise not. The popular and not the scientific or the historical meaning of the term is to be considered. **Hari Singh v Jadu Nandon Singh 8 C W N 458=31 Cal 542.**

Betting on rain fall.

See Gambling. **13 Bom 681; 17 Bom 184.**

Bhade khat.

See Registration.

Bhagdari Act (Bombay)

See Bom Act V of 1862.

1—Aden Courts Act 11 of 1864, Ss. 8, 15—Resident's Court at Aden—Suit for declaration and injunction—Claim valued for Court Fee purposes at Rs 130—Court Fess Act (VII of 1870) S. 7, Sub-S. 4, Cls (c) and (d)—Suits Valuation Act (VII of 1877), S 8—Reference to the High Court by the Resident—Civil Procedure Code (Act V of 1908), S. 115—High Court of Bombay-Revisional powers.

The plaintiff sued for a declaration and injunction with regard to certain property worth upwards of Rs. 50,000. The claim was valued at Rs 130 and the plaint was engrossed on a stamp paper of Rs. 10 under the provisions of the Court-Fees Act, S. 7, Sub-S (4), Cls (c) and (d). The first Court rejected the claim on the ground that the plaint was not properly stamped. The plaintiff appealed to the Court of the Political Resident at Aden and shortly after this the plaintiff applied under S. 8 of the Aden Act II of 1864 for reference of the following questions in the appeal for decision of the High Court of Bombay, namely: "Is the plaint sufficiently stamped, and was the order of the Court, rejecting the plaint under S. 54, Cl, (*b*), of the Civil Procedure Code without making an order as to what the requisite stamp should be, legal?". The Resident, however, dismissed the appeal under S 551 of the Civil Procedure Code, 1882: *Held* that the Resident's Court was subordinate to the High Court of Bombay which had, therefore, the power of revision, under S. 115 of the Civil Procedure Code of 1908, with regard to questions that should be submitted by the Resident under S. 8 of the Aden Act II of 1864. *Held further*, that as under S. 15 of the Aden Act, the Court of the Resident was to be guided by the spirit and principle of the laws and Regulations in force in the Presidency of Bombay and administered in the Courts of that Presidency not established by Royal Charter, and in the High Court in the exercise of its jurisdiction as a Court of Appeal from these Courts, the provisions of the Suits Valuation Act, S. 8, are "the law for the time being in force for the valuation of claims" as required in S. 8 of the Aden Act II of 1864. *Held further* that the assuming that the plaintiff's claim had been correctly valued under the Court-Fees Act, as appeared to be the case on a consideration of the reported decisions of this High Court, her claim estimated according to the law for the time being in force would be Rs. 130, and was, therefore, a claim which did not fulfil the requirements of S. 8 of the Aden Act, so as to give the plaintiff a right to demand the statement of the case upon any question of fact or law arising in her suit. **Rahimbai Jamalbhoy v Mariam Abdul Rasool. (1909) 12 Bom L R 149 = 34 Bom 267.**

Bhagdari Act (Bombay)—*Concld.*

Bhagdari Tenures.

See (1) Cases under Bombay Act V of 1862.

(2) Custom.

(3) Settlement—Mode of Settlement.

(4) Bhagdari Narvadari Act.

1—An allegation by the defendants, who cultivated lands admittedly included in the plaintiff's *bhag*, that they held independently of the *bhagdar*, and as tenants of the Government, paying assessment, and assessment only to the Government, is inconsistent with the tenure of a *bhagdari* village. If not inferior *bhagdars* they must, from the constitution of *Bhagdari* villages, be treated as *ganotias* or tenants, and liable to pay rent to the *bhagdar*. **Edulji v Muhamad. 1880 P J 167.**

2—Succession—Custom—Males in preference to females—Not judicially recognized—Should be proved by evidence.

Held, that the custom whereby in the District of Broach male relations succeed as heirs in Bhagdari villages in preference to daughters had not yet received such judicial recognition as would have entitled the Court in the absence of any pleading of the custom, and without any evidence of its existence in the village where the property is situate, to assume that the custom existed in the particular village. **Adarji v Bai Mani, 1894 P J 171.**

3—Succession—Custom—Daughter and daughter's sons excluded—Widow of brother of last male holder succeeds.

In the village of Amanpur in the Broach District there is a custom whereby daughters and daughter's sons are excluded from succession by male members of the Bhagdari family; the widow however of the deceased brother of the last male holder succeeds and is not excluded by male *pitrais* as such succession has not the effect of taking the property out of the Bhagdar's family. **Bai Jivi v Baavan. 1894 P J 188.**

Bhagelipana Lease.

See Lease.

Bhajan.

1.—Notes—Legitimate trade—Malice.

Though a legitimate calling or trade may involve a serious nuisance by noise, it does not render that noise non-actionable, in other words, noise does not necessarily become non-actionable merely because it is an incident of a legitimate trade.

In determining whether an actionable wrong has been committed and what measure of relief should be granted, the existence or non-existence of malice is a material consideration. **Hari v Vithal** **8 Bom L R 89.**

Bhale Sultan Chattris.

1.—Custom excluding daughters from inheritance.

Held—That the evidence adduced in this case proved the existence amongst the Bhale Sultan Chattris in Oudh of a general custom excluding daughters and their issue from inheritance. **Bajrangi Singh v Manokarnika Bakhsh Singh.** **12 C W N 74.**

Bhandara Ceremony.

See Hindu Law.

Bhaoli Rent-Road Cess.

See Bengal Cess Act S. 20

11 C W N 211.

Bhatta.

1.—Payment of—Time from which limitation runs—Limitation Act, Sch II art 179 (4).

Payment of bhatta is not sufficient to constitute the time from which the period of limitation would begin to run under the Limitation Act Sch II, art. 179 (4). **Maluck Chand v Bechar** **3 Bom L R 275=25 Bom 639.**

Notes.—Dist 28 Mad 399; Ref: 11 Bom L R 729.

Bhet Begari.

See Co-sharers—Suit by co-sharers.

15 C P L R 14.

Bhinna Gotraja Sapindas.

See Hindu Law (Inheritance).

Bhoker.

See Contract Act 1872, Section 30.

Bhootan Duars Act (XVI of 1869).

1.—Schedule and rules under Act—Bhutan Duars' Repealing Act (Bengal Act VII of 1895). S 3—Civil Procedure Code (Act XIV of 1882), application of, to Bhutan Duars——Minors, Fraud against—Suit to obtain relief against fraudulent transfers effected, and entries made in the record-of-rights under Act XVI of 1869 during one's minority.

The plaintiff's father died, possessed of a 4 anna share in a jote in Bhutan Duars. During their minority their elder brothers sold that jote to first three defendants in fraud of the rights of the plaintiffs, and the purchasers took possession of the jote accordingly and had entries made in their own names in the record-of-rights. The plaintiffs brought this suit under Act XVI of 1869 against the defendants to recover their share in the jote. The lower Appellate Court, without going into the merits, dismissed the case as not cognizable in view of the provisions of Act XVI of 1869 and the Repealing Act VII of 1895. On appeal therefrom,—*Held*, that the notification extending the Civil Procedure Code to Jalpaiguri had not the effect of introducing the Civil Procedure Code to the Bhutan Duars, although the latter are a part of Jalpaiguri, inasmuch as Act XVI of 1869, which was then in force in the Bhutan Duars, excluded that jurisdiction in express terms. But the effect of the repeal of Act XVI (without any qualification) by Bengal Act VII of 1895 has left the Civil Procedure to be administered in the Bhutan Duars. That the plaintiffs are not precluded by the entry in the record-of-rights from obtaining relief against the defendants. An entry in a record under Act XVI of 1869 in order to be conclusive evidence of any right interest, or other matter must be one which has been honestly and fairly obtained. **Brojo Kanto Das v Tufaun Das.** **4 C W N 287.**

Bhouli Rent.

See Rent in kind.

Bhouli Tenure.

See (1) Bengal Rent Act 1869, s 52

2 Cal 374.

(2) Rent in kind.

Bhuinhari Register.

See Evidence—Civil Cases——Miscellaneous Documents—Registers. **19 Calc 91**

Bhutan Duars Repealing Act VII of 1895.

Notes.—Rep Act I of 1903.

Bhuttees.

1.—Bhuttee—Childless widow—Custom—Inheritance.

Held, that it is not proved that there is any custom amongst the Bhuttees under which a childless widow inherits no share if there be a nephew. **Doolee Bibi v Shoojayet Khan F C's S C 1.**

Bhyachara.

See Tenure.

8.—General hypothecation of moveable and immoveable property.

A bond which does not specify the property alleged to be hypothecated, but merely engages that the debt may be realized from the moveable and immoveable property of the debtor, *held*, not to operate as a mortgage. **Mahamadju v Jai Ram P R 74 of 1878.**

Bias

See (1) Judge.
(2) Transfer.

Bicycle.

See Madras Municipal Act Sch B **19 Mad 83.**

Bid.

See cases under:—

Sale in execution of decree.

Bidder and Purchaser.

See Sale.

Bidders at Court-sale.

See Sale in execution of Decree-Bidders. **14 Mad 235.**

Bidder without permission of Court.

See Sale in execution of decree.

Bigamy

See cases under:—

(1) Divorce Act.
(2) Conversion.
(3) Marriage.
(4) Hindu Law Marriage.
(5) Hindu Law Conversion.
(6) Mahomedan Law Marriage.

Bill drawn in name of firm.

See Bill of exchange.

Bill in legislative Council, debate on.

See Statutes, Construction of.

Bill of costs.

See (1) Costs.

(2) Attorney and Client. Case No (6). **3 B L R O C 96; 3 Cal 473.**

(3) Costs—Taxation of Costs.

(4) Limitation Act, 1877, Art 84 (1871, art 85)

1—Taxation of.

A party chargeable with a bill of costs has power to apply to have his attorney's bill taxed but it is not competent to the attorney to apply to have his bill taxed without the consent of the party chargeable therewith. **Framji Cowasji. 9 Bom L R 1014.**

Bill of exchange.

—Power to issue —

See Company—Powers, Duties, and Liabilities of Directors.

—presumption of payment.

See Shipment.

Bill of exchange.

1 Evidence of dishonour and of presentment 1
2 Notice of dishonour 2—5
3 Accommodation acceptor 6—7
4 Failure of payment at sight 8
5 Suit on bill by indorsee for value against acceptor 9
6 Remission of, for sale for specific purpose 10
7 Agency 11
8 Endorser, Liability of 12
9 Liability of Drawer 13—14
10 Drawer's right to maintain a suit 15—16
11 Invalidity of assent signed on copies of bill 17
12 Liability of banker for payment of forged cheque 18

Bill of Exchange-*Contd.*

Evidence of Dishonour & of present-ment—*Concld*

13 Liability of indorsee 19
14 Necessity of re-indorsement 20
15 Plea that payee being a mere benamidar is not entitled to sue 21

Bill of Exchange.

See (1) Decree—Form of Decree—Bill of Exchange.
(2) Cases under Hindu Law—Contract—Bill of Exchange.
(3) Interest—Miscellaneous Cases—Bill of Exchange.
(4) Limitation Act, 1877, Art 69.
(5) Mahomedan Law—Bill of Exchange.
(6) Parties—Parties to Suits—Negotiable Instruments.
(7) Promissory Note.
(8) Stamp Act, 1879, sch I art 11.

(1) Evidence of dishonour and of presentment.

1—Noting on bill.

The mere noting on the bill, even if it disclose the name of the notary in full, is not evidence of the presentment or of the dishonouring of the bill. **Bombay City Bank v Moonjee Hurri-Doss.** **Bourke 0 C 274.**

(2) Notice of dishonour.

2—Reasonable notice.

In an action brought in the district of Patna against the indorser and acceptors of bills of exchange, after a part-payment by the acceptors, no objection having been taken as to the misjoinder of defendants, and the Judge having omitted to find whether the indorser had received notice of dishonour or not,—*Held* the case must be remanded to ascertain first, whether notice had been given within reasonable time, and, if not, whether thereby the indorser had been injured or exposed to material risk of injury ; and secondly whether (English law not being applicable to the case), by the usage of merchants at Patna, a part-payment by the acceptors and receipt by the plaintiff discharged the indorser from liability.
Gopal Das v Ali. **3 B L R A C 198.**

S. C. after remand. **Ali v Gopal Doss.** **13 W R 420.**

Notes:—Ref: 7 B L R 431.

3—Reasonable notice.

Even when English law regarding bills of exchange does not apply, the holder of the bill is bound to give the maker notice of dishonour in reasonable time. If the maker, for want of notice, has sustained injury or risk of injury, he is no longer liable. **Pigue v Golab Ram. 1 W R 75. Jeetun Lall v Sheo Churn.** **2 W R 214.**

Notes:—Fol: 12 C L R 333. Ref: 7 W R O 431; 3 B L R 198.

4—Reasonable notice.

Ordinary notice of the dishonour of a bill of exchange drawn in India and payable in England should be posted by the first mail which leaves England after the dishonour of the bill.
Uncovenanted Service Bank v Duffin. **3 N W 99.**

5—Dishonour of cheque taken in payment of bill of exchange when due.

The defendant endorsed to the plaintiff a bill of exchange drawn by N S & Co and accepted by C N & Co. The bill, at the time it was endorsed to the plaintiff by the defendant, bore the previous endorsement of N S & Co to the defendant. The bill fell due on December 3rd, 1870, which was a Saturday, and on that day the plaintiff sent his jemadar to C N & Co the acceptors to present the bill for payment. The bill was taken by A, one of the members of the firm of C N & Co., who gave a cheque for the amount and took a receipt from plaintiff's jemadar, striking out the signature of C N & Co as acceptors, but without the plaintiff's consent. The plaintiff's jemadar took the cheque immediately to the bank, but the bank was closed. Thereupon he returned to C N & Co; and informed them that the bank was closed and demanded cash. The plaintiff alleged that it was then stated that the cheque would be honoured on Monday. The plaintiff's jemadar then went and informed the gomastha of the plaintiff of what had been done. The plaintiff's gomashta sent him to the defendant's firm to give him notice of what had taken place. It was alleged that at this interview the defendant's liability was admitted in case the cheque was not honoured, and the plaintiff's jemadar was advised to wait until Monday, the defendant stating that he also had a cheque for Rs7,000 from C N & Co. This was denied by the defendant. On Monday 5th December, the cheque was presented to the bank for payment, and was dishonoured. The plaintiff's gomashta went to the defendant's koti, and gave notice of the dishonour of the bill and cheque,

Bill of Exchange-*Contd.*

(2) Notice of dishonour—*Concld.*

and asked him to pay the amount of the bill. The defendant asked for the bill, and the plaintiff's gomastha went to C N & Co, and brought back the bill, with the name of C N & co., which had been struck out, replaced. The defendant, seeing the bill was overdue, refused to pay the amount. The cheque was thereupon returned to C N & Co., and the bill retained by the plaintiff, who, on 6th December, caused written notice of dishonour to be given to the defendant. *Held* that the cheque must be taken to have been merely a conditional payment, and when it was dishonoured, the liability of the original bill revived. *Held*, also, that reasonable notice of dishonour was given, whether the bill to be taken to have been dishonoured on the Saturday or on the Monday. **Somarimull v Bhairo Das Johurry. 7 B L R 431**

Gopinath v Abbas Hossein. 7 B L R 434 note.

(3) Accommodation acceptor.

6—Survey—Accommodation acceptor—Discharge for survey—Equitable mortgage—Trust for the benefit of creditors—Contract Act (1 V of 1872) Ss. 132, 139—Evidence Act (I of 1872), S. 92.

Certain bills of exchange drawn by A in 1870 and 1873, were accepted by B for the accommodation of A, and endorsed by him to the Bank of Bengal. In May 1876, A, by letter agreed to execute a mortgage of a certain portion of his property, consisting of a share in a Privy Council decree, to B, and in the meantime to hold such property at the disposal of B, his successors and assigns. A became unable to meet his liabilities and in August 1876, executed a conveyance of all his property to the Official Trust for the benefit of his creditors. The bank assented to and executed this deed after it had been assented to and executed by some of his other creditors. The deed did not contain any composition with or release by the creditors, nor any agreement on their part not to sue A. In a suit by the bank against B as the acceptor of the bills,—Held that B was not precluded by the provisions of S. 132 of the Contract Act and S. 92 of the Evidence Act from pleading that he was an accommodation acceptor only, but that the letter of the 1876

Bill of Exchange-*Contd.*

(3) Accommodation acceptor—*Concld.*

May was a good equitable mortgage, and that B was not thereafter entitled, as against the Bank, to the equitable rights of an accommodation acceptor. *Held* further, that the trust did not impair "the eventual remedy" of B, and that therefore he was not discharged from his suretyship under the provisions of s. 139 of the Contract Act **Pogose v The Bank of Bengal. 3 Cal 174.**

Notes.—Dist: 13 Mad 172; 8 C W N 101.

7—Bill of exchange—Holder and acceptor—Accommodation acceptor—Con-tract to treat the acceptor as surety–Principal and surety.

The general rule is that the acceptor of a bill of exchange is the principal debtor and the drawer the surety. A contract to the contrary may be entered into between these two parties inverting their positions, and such a contract may be proved in proceedings between them. No such contract can be set up as between the acceptor and the holder.

Mere notice of the defendant's position as an accommodation acceptor is not sufficient to preclude the holder from treating him as a principal debtor. He cannot be so precluded, in the absence of evidence proving that there is a contract under which he is bound to treat the acceptor as a surety. **Bellew v Bank of Upper India Limited Lucknow. 13 O C 206=7 Ind Cas 727.**

(4) FAILURE OF PAYMENT AT SIGHT.

8—Liability of parties to draft—Effect of acceptance.

Immediately on failure of payment of a draft at sight, whatever may be the real state of the account between the drawer and drawee, the former becomes liable to the payee for the amount which would place him at the stipulated time and place in the same position as if the money had been duly paid. Where there is no acceptance, no cause of action can arise to the payee against the drawee. Nor is the legal relation between the drawer and the payee altered by a partial acceptance, the contract being in its nature indivisible; much less can any mere promise to pay part at a future time in any way satisfy the payee's claim, or postpone his right to reimbursement of his loss from the drawer. **Sheth Kahandas Narandas v Dahyabhai 3 Bom 182.**

Notes.— Dist: 32 Cal 118.

Bill of Exchange-*Contd.*

(5) SUIT ON BILL BY INDORSEE FOR VALUE AGAINST ACCEPTOR.

9—Sale by indorsee of goods against which bill drawn—Acceptor entitled to credit for amount of proceeds of sale.

J consigned goods to defendant, and for the price drew on the defendant two bills of exchange each for the sum of Rs 1,406-4 0. payable thirty days after sight, which were duly accepted by defendant. J indorsed the bills for value to the plaintiffs, who, in default of payment by defendant sold the goods and credited him the amount realized. After giving him credit for the amount, there remained due by the defendant to the plaintiffs, in respect of the said bills, a sum of Rs 1,017. The plaintiffs abandoned Rs 17 of this amount, and sued the defendant for R 1,000 in the Small Cause Court at Bombay. In that suit the defendant pleaded that the goods, in respect of which the bills were drawn, were damaged, and that he had, therefore, refused to accept them as he was entitled to do. The Judge thereupon dismissed the suit on the authority of 6 Bom., O. C., 53, holding that the plaintiffs could not under the circumstances, give the defendant credit for the goods, and that the claim was not, therefore, within the jurisdiction of the Small Cause Court The plaintiffs then brought the present suit in the High Court upon the bills of exchange, alleging that they held the proceeds of the goods for the consignor. The defendant contended that in no case could the plaintiffs recover from him more than the amount of the bills, less the proceeds of the goods. *Held* that the defendant was entitled to credit for the net proceeds of the sale of the goods. The plaintiffs had by the sale already realized part of the amount due to them ; and to allow them now to recover from the defendant the whole amount due on the bills would be to permit them to reallze this part of their claim a second time : in that case they would be bound to hand over the amount so realized to the drawers. But the drawers, when they negotiated the bills with the plaintiffs got all they were entitled to, and would have to account, in equity, to the defendant for anything further obtained by them. *Held*, therefore, that the defendant was exonerated to the amount of the proceeds of the goods, but was liable for the remainder of the sum claimed by the plaintiffs.

Agra Bank v Abdul Rahiman, 6 Bom 1.

Bill of Exchange-*Contd.*

(6) REMISSION OF, FOR SALE FOR SPECIFIC PURPOSE.

10—Property in bill of exchange—Suit for value of, on misappropriation.

Where bills of exchange are remitted for sale, and the proceeds directed to be applied to a specific purpose, the property in the bills remains in the remitter until the purpose for which they were remitted is satisfied. And where the money realized by the sale was wrongfully applied by the agent, it was held by the Judicial Committee (affirming the judgment of the Court at Calcutta) that the remitter was entitled to recover the value of the bills in assumpsit, upon an indebitatus count from the purchaser of them, who had notice of the purpose for which they were remitted, and the misapplication of the proceeds by the agent.

Mutty Lal Seal v Dent 5 Moore's I A 328.

(7) AGENCY.

11—The drawer of a bill of exchange cannot plead agency, unless it is shown on the face of the bill that he drew it as an egent. **Pigou v Ram Kishen. 2 W R 301.**

Notes.—Fol: 12 C L R 333. Dist: 7 W R 442

(8) ENDORSER, LIABILITY OF.

12—Held that an endorser of a bill is in the nature of a new drawer, and is liab'e to the holder in default of acceptance or payment by the drawer ; and that an endorser cannot be absolved from liability because the drawer was exonerated or not impleaded. **Jumna Das v Mehur Singh 1 Agra 182.**

(9) Liability of Drawer.

13—Liability of Drawer—Dishonour of bill.—Until dishonour, the drawer of a bill of exchange has no liability and no debt. **Miller v. National Bank of India, 19 Cal 146.**

Notes:—Ref: 20 Bom 133.

14—Negotiable Instruments Act (XXVI of 1881), s. 17—Drawer and drawee the same person—Forged endorsement of payee—Payment by drawee on forged endorsement — Liability of drawer—Ambiguous instrument — Election to treat it as a promissory note.—

Bill of Exchange-*Contd.*

(9) Liability of Drawer—*Concld.*

On the 29th April 1889, the plaintiff's brother-in-law, E, purchased from the defendant's branch at Mauritius a bill of exchange drawn on their Bank at Bombay payable on demand to the plaintiff's order in Bombay. The bill was on the following terms:—"The New Oriental Bank Corporation, Limited, Mauritius, 29th April 1889. On demand pay this first of exchange (second of same tenor and date being unpaid) to the order of Sulleman Hussein six hundred and forty rupees for value received. For the New Oriental Bank Corporation, Limited. To the New Oriental Bank Corporation, Limited, Bombay". E sent the bill by registered post to Bombay addressed to the plaintiff. During its transmission it was stolen. On the 18th May it was presented by some person to the defendant's Bank in Bombay bearing a forged endorsement in blank of the plaintiff, and it was paid by the Bank. The plaintiff, as soon as he heard of the loss of the bill, made inquiry at the Bank, and was told that the bill had been paid. On being shown the endorsement, the plaintiff pronounced it to be a forgery, and demanded payment of the bill, which the Bank refused. He thereupon filed this suit against the Bank as drawers of the bill. *Held*, (1) that the document was an " ambiguous instrument" within the meaning of s. 17 of the Negotiable Instruments Act (XXVI of 1881), and that the plaintiff had elected to treat it as a bill of exchange. (2) That, treating the document as a bill of exhange, the defendants, as drawers, were discharged by the payment to the *de facto* holder who presented it for payment.

Sulleman Hossein v. New Oriental Bank Corporation, 15 Bom 267.

Notes:—Con: 15 Bom 376.

(10) Drawer's right to maintain a suit.

15—Bill of exchange—Failure of acceptor to pay—Suit for compensation—Maintainability by drawer—Plea involving collateral enquiry.

Plaintiffs drew a bill upon a bank, which was accepted by the defendants, for value of certain articles supplied to the defendants, and at the same time, plaintiffs guaranteed to replace defective articles, if any, supplied by them. On the bill being presented for payment, the defendants dishonoured it on the ground that the articles were defective. Plaintiffs sued the defendants upon the bill, without the bill having been assigned to them by the Bank.

II C. C. 43

Bill of Exchange-*Contd.*

(10) Drawer's right to maintain a suit—*Concld.*

Held, that the plaintiffs being drawers of the bill were parties to the same, and having suffered loss by the failure of the defendants as acceptors to pay the amount of the bill at maturity, were entitled to be compensated by the defendants under S. 32 of the Negotiable Instruments Act, 1881.

Held, also, the amount due in money in respect of the defective articles supplied cannot be ascertained without collateral enquiry and the defendants cannot therefore raise this plea of failure of consideration in these proceedings, under S. 45 of the Act.

Messrs Schroder Smidt & Co. v Messrs J. Svamour & Co, 2 Sind L R 53.

16—Letter of credit—Change of the bill from document against payment to documents against acceptance—Change made without the consent of the drawer—Drawee refusing to pay—Liability of drawer.

The plaintiff purchased a bill of exchange drawn by the defendant on the firm of Schmolze Richman & Co. of London in terms of a letter of credit issued by the latter at the instance of T. Smart & Co. of London. The bill of exchange was accompained by bills of lading and invoice of the consignment and was sent to the plaintiff's office at London. It was marked D. P., *i. e*, documents to be delivered against payment of the bill. The drawees refused to accept the same, on the ground that the terms of the letter of credit was D A., *i e*, documents against acceptance.

The plaintiffs, with the consent of the agent T. Smart & Co of London subsequently changed the bill into D. A., which was then accepted by the drawees. The bill fell due on the 13th February 1901, when the drawees having failed in the meanwhile refused payment. The plaintiffs then brought a suit to recover the amount of the bill of exchange from the defendant.

Held, that the common intention of the parties was that the bill should be treated as D. P., and the alteration made in London without the consent and confirmation of defendant made it impossible for the plaintiff to recover. **Meaha v. National Bank of India, 5 Bom L R 524.**

See also Cases under:—

Negotiable Instruments.

Bill of Exchange-*Contd.*

(11) Invalidity of assent signed on copies of bill.

17—Bills of exchange—Acceptance by drawee—Acceptance taken on copies of bills not a valid acceptance—Bills endorsed over to a drawee in case of need—Holder in due course—The drawer can maintain the suit without disclosing his principal as a holder in due course—Bills accepted need not be dishonoured—and protested—Liability of acceptor at maturity of the bills—Assent not signed on bills but on copies—Assent not valid:—

The plaintiff sued to recover on certain bills drawn on the defendant and endorsed over to the plaintiff, the defendant having failed to pay them. In one of the suits, the acceptance by the defendant was signed upon the original bill, but in others it was merely on copies of the bills. The lower appellate Court threw out the first suit on the ground that the plaintiff was suing as agent for the London firm Francis Times and Co., without disclosing his principals, so that the suits were defective in form, and secondly that the suits were not competent as the bills had never been dishonoured and protested. The remaining suits were dismissed upon the ground that the acceptance was written on copies of the bills. *Held*, (1) that the bills were endorsed over to the plaintiff by the Bank in whose favour they were drawn, so that he was a holder deriving title from a holder in due course, and as such he was competent to sue under S 53. (2) That bills were made payable in Bombay and consequently, under Ss. 134 and 32 the acceptor became liable at the maturity of the bills. Presentment is not necessary to charge the acceptor. The acceptor was the principal debtor and his liability was independent of presentment. (3) That whereas S. 7 lays down that the acceptance shall be signed either upon the bill or upon one of its parts, the defendant's assent was signed only upon copies of the bill and a material requirement of the law was omitted with the result that there was no valid acceptance.

Ardeshir Sorabesha Moos v. Khushal Das Gokuldas, 32 Bom 247=10 Bom L R 268.

(12) Liability of banker for payment of forged cheque.

18.—Cheque—Payment by banker of forged cheque—Customer's liability.—

Bill of Exchange-*Contd.*

(12) Liability of Banker for payment of forged cheque—*Concld.*

A banker cannot make his customer liable for his own payment of a forged cheque except in case of negligence imputable to the customer. (1887) 4 Bom 253 dist. 1896 A C 514 ref.

Bhagwan Das v. Creet 31 Cal 249.

(13) Liability of indorsee

19.—Forged indorsement—Liability of indorsee—Holder in due course—Act XXVI of 1881, Sections 8, 9, 15, 16.

One M. D. purchased a bill of exchange payable to the order of G, from one N., who had stolen it, and who, representing himself as G., indorsed the bill in G.'s name to M. D, who acted in good faith, believing N.'s representations to be true, and giving value for the bill. M. D. then negotiated the bill, and a person deriving title from him received payment of the sum payable to G.

Held, that there being no indorsement by G, who was the "holder" as defined in Section 8 of the Negotiable Instruments Act, and it being impossible to regard N.'s forgery of G.'s name as an indorsement, N. having no power to indorse, M. D. was not the "indorsee" of the bill and could not be held to be its "holder in due course," and was therefore liable to G. for the value of the bill. **Gobinda v Maya Das. P R 28 of 1884.**

(14) Necessity of re-endorsement

20.—Bill of exchange endorsed to one party—Dishonour—Re-endorsement to drawer, if a condition necessary to drawer suing the acceptor.

J drew a bill of exchange to his order and S accepted the bill. J endorsed the bill to C. and Co. When the bill was presented for payment, it was dishonoured and duly protested for non-payment. Then C. & Co., debited J's account with the amount of the bill and returned the bill to J without re-endorsing it.

In a suit by J, to recover the amount of the bill from S, the acceptor, objection was taken that, as C. & Co. did not re-endorse it to J, J had no right to sue.

Held, that, even in the absence of a re-endorsement to J, he was entitled to sue the acceptor

Bill of Exchange-*Concld.*

(14) Necessity of re-endorsement-*Concld.*

who has failed to carry out the agreement he entered into under the terms of the bill.
James & Co. v. Scott. 36 Cal 291= 1 Ind Cas 972.

(15) Plea that payee being a mere benamidar is not entitled to sue.

21.—Negotiable—Instruments Act (XXVI of 1881) Secs. 8, 78—Promissory note, suit on—Defence,—Plaintiff a Benamidar, validity of.

Held, that it is not open to the defendant in a suit on a negotiable instrument to plead that payee named in the instrument or the indorsee as the case may be is a mere benamidar and not entitled to sue.

The provisions of the Negotiable Instruments Act, 1881, preclude the maker when sued on the instrument from pleading discharge by payment to any one bnt the holder i. e. the person named in the note. (21 Mad 30; 28 Mad 205; App; 7 Mad L J 64; 21 Mad 391 overruled. 23 Mad 597. expl; 2 C W N 286; L R 9 Ch 635; 1 Q B 97, 5 C B 583; Ref.). **Subba Narayana Vathiyar v K Ramasawmi Iyer 1 M L T 377 F B= 16 M L J 508=30 Mad 88.**

Bill of exchange, admissibility of in evidence.

See (1) Stamp Act
(2) Evidence—Civil cases

Bill of Lading

1 Varying bill of lading 1
2 Ship in port only on Sunday 2
3 Liability of shipmaster 3
4 Construction 4—38

(1) Varying bill of lading

1.—Shipping order—Custom.

In a suit instituted by a shipper to obtain bills of lading from the captain, in accordance with the terms of the order granted by the ship's charterers,—*Held* that the captain was entitled to vary the bills of lading in respect of any excess of measurement over the dimensions specified in the order, and that an alleged custom, precluding such variation, after the goods have been received on boardship, was contrary to law. It is the duty of the shipper to comply strictly

Bill of Lading-*Contd.*

(1) Varying bill of Lading—*Concld.*

with the terms of the shipping order. **Gentle v Thomson 1 Ind Jur O S 69.**

(2) Ship in port only on Sunday

2—Non-delivery of goods—Lord's Day Act, 29 Chas II c 7.

The owners of a steamer by their bill of lading stipulated that they would not land specie, but would deliver it on presentation of bills of lading, or carry it on at the consignee's risk, if delivery were not taken during the steamer's stay in port. The steamer arrived in port late on Saturday, and sailed at daybreak on Monday without delivering the specie shipped by the plaintiff, who sued for damages. *Held* that the Lord's Day Act, 29 Chas. II. ch, 7, did not apply to Moulmein; and that, even if it had done so, it could not prevent the shipowners from availing themselves of the stipulation they had made, and that no action for damages was maintainable against them. **Grasemann v. Gardner 3 W R Rec Ref 3**

Notes.—Ap: 4 M H C R 359; 5 B H C R 176. *Ref;* 33 Cal: 613=10 C W N 551= 3 C L J 576.

(3) Liability of ship master

3.—When a shipmaster undertakes that goods shipped by him shall be delivered subject to the exceptions and conditions mentioned in a bill of lading, in good order and condition, he takes upon himself the consequences and contingencies other than the exceptions expressed in the bill of lading, or which are implied by law. **Shetliff v. Scott 22 W R 39**

Notes.—Ap: 19 All 253 F B. Dist: 11 C L R 352. Ref: 1 C W N 24; 6 C L J 362.

(4) Construction.

4.—River Navigation in India—Difficulties or casualties of navigation.

Plaintiff sued to recover the value of certain hides which were lost in defendant's flat. The bill of lading contained, among other exceptions, the words "difficulties or casualties of navigation and all and every danger and accident of the river and navigation whatsoever." In evidence it was proved that the flat was destroyed by some projection embedded in the river. Held that the

Bill of Lading-*Contd.*

(4) Construction—*Contd.*

casualty was comprised among the exceptions in the bill of lading, and further that, having regard to the dangerous navigation of Indian rivers, parties entering into contracts of a similar nature should protect themselves by insurance.

Dhaunsee v India General Steam Navigation Co. 1 Ind Jur O S 125 = 1 Hyde 283.

5—Time-charter—Sub-charter—Bill of lading freight—owner's lien for unpaid money by time-charterers.

By a charter entered into by the owners of SS. Bomby and Issabhoy Thaver and Co., the owners agreed to let and the charterers agreed to hire the ship for six calendar months. The conditions of the charter were, among others, the following:—

(1) In default of the monthly payment of Rs. 18, 000, the owners were entitled to withdraw the steamer from the service of the charterers without prejudice to any claim the owners might otherwise have against them.

(2) The captain, though appointed by the owners, was to be under the orders and directions of the charterers as regards employment, agency or other arrangements. Bills of lading were to be signed at any rate of freight the charterers or their agents might direct without prejudice to that charter.

(3) The charterers were to have the option of sub-letting the steamer.

(4) The owners were to have a lien upon all cargoes for freight or charter money due under the charter. The ship was then sub-chartered to the plaintiff for a round voyage from Saigon to Reunion and back from Mauritius to Bombay. Freight was to be payable for the whole voyage at the rate of Rs. 1-8-0 per bag of 168 lbs. calculated only on the cargo, shipped from Saigon to Reunion. There was to be no freight payable by the sub-charterer to the time-charterers for any other cargo. The steamer completed this voyage and arrived at Bombay having on board a quantity of sugar put on board by the sub-charterer at Mauritius, and for which he had received bills of lading from the captain. The freight was prepaid by the sub-charterer in Mauritius: thus when the ship arrived in Bombay nothing remained to be paid by the sub-charterers to the owners in respect of the bill of lading freight. But something was due from the sub-charterer to the timecharterers, for money payable under the sub-charter. And the time-charterers owned a month's freight to the owners. For the payment of this latter sum, the owners claimed a lien on the sub-charterer's sugar on board SS. Bombay:

Held. (1)t hat under the circumstances the ship owners must be taken to have contracted with the sub-charterer that his sugar should be carried to Bombay in that ship on the terms of the bills of lading

(2) that the bills of lading were not mere receipts for goods given to a charterer already bound to the ship-owner by a charter-party entered into between them and which the captain had no authority to depart from.

(3) that, therefore, unless the fact that the sub-charterer had notice of the time-charter makes a difference, which on the facts here made out, the bills of lading entitled him to have his goods delivered to him on payment of the bills of lading freight.

(4)that the words "without prejudice to this charter" meant that the rights of shipowners against the time-charterers, and *vice versa*, were to be preserved.

Notice by a shipper of a charter-party has not the effect of incorporating into the bill of lading any terms which are inconsistent with it and which the captain was not bound to embody in the bill of lading. If the charter-party shows that the captain exceeded his authority in signing the bill of lading, and the shipper knew this, he cannot enforce the terms of the bill of lading uncontrolled by the charter-party. If the shipper knew that there was a charter-party, and had an opportunity of reading it, and did not trouble himself about it, he might be treated as knowing its contents.

A right to seize one person's goods for another person's debt must be clearly and distinctly conferred before a Court of Justice can be expected to recognize it.

Turner v Haji Gulam Mahomed. 6 Bom L R 743, confirming 3 Bom L R 510 =28 Bom 573.

Bill of Lading-*Contd.*

(4) Construction—*Contd.*

6—Insufficiency of package—Negligence.—

The defendants by a condition annexed to their bill of lading stipulated that they should not be responsible for "leakage or breakage or other consequences arising from the insufficiency of the address or package." The plaintiff shipped for conveyance from Hong-Kong to Bombay certain goods on board a steamer of the defendants in packages which were proved to be insufficient. These goods in accordance with a condition to that effect contained in the bill of lading, were transhipped at Galle. On their being landed in Bombay, it was found that all the packages were broken, and in a much more damaged condition than is usual in the case of such goods carried from Hong-Kong to Bombay in similar packages. The contents had to a large extent escaped from the packages, but were otherwise uninjured. *Held* that, under a bill of lading in the above form, the *onus* of proving that the packages were insufficient and that the injury which they had sustained was the consequence of such insufficiency lay upon the defendants, but that, when the result of the evidence on both sides was to leave it in doubt whether the injury was caused by negligence or was the consequence of the insufficiency of the packages, the plaintiff was not entitled to recover. **P. & O Steam Navigation Co. v Somaji Vishram. 5 B H C O C 113.**

Notes:—Ref: 3 Bom 120.

7—Insufficiency of package—Negligence, Evidence of.—

The defendants carry between Hong-Kong and Bombay. By a condition annexed to their bill of lading they stipulated that they should not be responsible for damage to goods arising from insufficiency of package. The plaintiff shipped certain goods in the defendants' steamer in packages which, though in fact insufficient, were packages of the kind ordinarily used for the conveyance of such goods from Hong-Kong to Bombay. On their being landed in Bombay, it was found that the packages were more or less broken, ond contents injured, and had to a small extent escaped from the packages. In an action brought to recover damages in respect of such injury, it was held that evidence of mercantile usage or of custom would be admissible to show that the words

Bill of Lading-*Contd.*

(4) Construction—*Contd.*

"insufficiency of package" should not be taken in their ordinary sense, but as meaning insufficient according to a special custom of the China trade. *Held*, also, that the evidence of those packages being ordinary China packages, and of such packages having always been carried by the defendants without objection, was not sufficient, in the absence of proof of negligence, to fix the defendants with liability for damage done to them, there being no proof that it had been the practice either of the defendants or any other ship-owners protected by a similar clause in their bill of lading to make compensation for injury to goods contained in such packages. **P & O. Steam Navigation Co. v Manickjee Naservanjee Padsha. 4 B H C O C 169.**

Notes:—Ref. 5 B H C R O 113.

8—Carriers by sea—Liability for damage to goods.—

Negligence—A steam navigation company was employed by plaintiff to carry cargo from Calcutta to Rangoon and to deliver it into the receiving ship, or to land it at the consignee's expense, their liability ceasing as soon as the goods were free from the ship's tackle. When the ship arrived at port, the consignee not having had his own boats alongside, the goods were put into other boats, one of which, through the negligence of the boatmen, was swamped and the contents damaged. Plaintiff sued for damages. *Held* that, as defendants were not shown to have neglected the duty of taking reasonable and proper care in the selection of boats, they were not liable for the loss incurred. **Bulloch Brothers & Co. v Toay Aung. 24 W R 74.**

9—Exemption from damage occasioned by neglect of Company's servants—Suit to recover goods destroyed—Contract Act s. 151—In a bill of lading, of a shipping company in which the plaintiff shipped two plate-glass cases there was a clause to the following effect:—"carried and delivered subject to the conditions after mentioned . . . loss or damage for any act neglect or default whatsoever of the pilot, master or mariners or other servants of the company, etc., excepted" In landing one of the two cases was entirely damaged on account of the negligence of the company's servants, and so the plaintiff sued the defendant company for damage. The defendant company (who were not subject to the Carrier's act) relied on the

Bill of Lading-*Contd.*

(4) Construction—*Contd.*

clause in their bill of lading. *Held* that the company were protected by their bill of lading, the terms of which had been accepted by the plaintiff. **Jellicoe v British India Steam Navigation. Co. 10 Cal 489.**

Notes:—Ref: 1 M L T 387=16 M L J 573; 30 Mad 79; 18 M L J 497; 32 Mad 95.

10—Liability of, for negligence damage to goods—Bill of lading—Provision to exemption from liability, effect of.—

The appellant's goods some bags of rice were shipped in Rangoon in a steamer belonging to the defendant company, for delivery to his agents at Tuticorin. On arrival there the goods were landed by the Company's servants during heavy rains and allowed to remain on the foreshore in a wet condition. Consequently the bags became damaged and were destroyed on the orders of the Municipal authorities as being unfit for consumption. Plaintiff sued the company for damages.

The bill of lading ran thus:

The company were not liable as to accidents loss or damage from any act, neglect or default whatsoever of the servants of the company &c. &c. "In all cases and under all circumstances, the liability of the Company shall absolutely cease, when the goods are free of ship's tackle, and, thereupon, the goods shall be, for all purposes and in every respect, at the risk of the shipper or consignee."

Held, per Subrahmania Aiyar, J—The Company, in landing the goods as they did without pre-cautions to prevent damage to them, failed to take the same care of the plaintiff's goods as a prudent person would, in similar circumstances have taken of like goods of his own, and the damage was, therefore, the result of the Company's negligence for which they were liable. The terms of the Bill of lading put an end to the Company's liability as carriers when the goods leave the ship's tackle, but constitutes their subsequent possession, until delivery, as that of bailees. 10 Q B 256. Fol: 26 L T 704, Coas; 22 Bom 184, Ref; 13 Bom. 571, 10 Cal 489, Compd; 22 Bom. 184 Compd. 10 Cal 489, 13 Bom 571 Fol, 32 L J Q B 77 Appl. **K V S Sheik Mahamed Rayuthar v The B I S N Company. 1 M L T 387=30 Mad 79.**

Bill of Lading-*Contd.*

(4) Construction—*Contd.*

11—Liability of master—Negligence-Onus probandi—Estoppel.—

The defendant, master of the steamer *Scindia*, signed a bill of lading, by which he agreed with C & Co. of London to deliver at Calcutta to them or their order four casks brass wire, which were shipped on board the *Scindia*. The casks were described in the bill of lading as bearing a certain mark, beneath which was the word "Calcutta" as being the port of destination, and they were stated as being carried subject to the following exceptions;—"The ship is not liable for obliteration or absence of marks, numbers, address or description of goods shipped: and expenses and losses by detention of ship or cargo, caused by incorrect marking, or by incomplete or incorrect description of the goods. In case any part of the within goods cannot be found during the ship's stay at the port of destination, they are, when found, to be sent back by first steamer at the ship's risk and expense, and subject to any proved claim for loss of market. The ship shall not be liable for incorrect delivery, unless each package shall have been distinctly marked by the shippers before shipment with the port of destination." The bill of lading was endorsed by C & Co. to the plaintiff a trader in Calcutta, who, on the arrival of the Scindia at that port, applied for delivery of the four casks; and it then appeared that they had been landed at Colombo. In a suit to recover the price of the goods,—*Held* the defendant was estopped from alleging that the casks were not marked as stated in the bill of lading. It was open, however, to the defendant to prove that the casks did not on their arrival at Colombo bear the word "Calcutta," and thus to bring himself within the clause in the bill of lading exempting the ship from liability for obliteration or absence of marks; but on proof of this, in order to disentitle the plaintiff to succeed, the defendant must show that the absence or obliteration caused the landing at Colombo. It was found on the evidence that he had failed to do this; and a decree was given for the plaintiff.

Madhub Chunder Dey v. Law 13 B L R 394.

12—Bill of Lading—Damage by rain to goods landed—Saving clauses in the Bill of Lading against negligence—Whether shipper liable for

Bill of Lading-*Contd.*

(4) Construction—*Contd.*

negligence—Whether the terms are contrary to public policy—Letters Patent Appeal—Whether confined to points differed.

Plaintiffs consigned some bags with the defendant's ship under a Bill of lading to be carried from Rangoon to Tuticorin. On arrival at Tuticorin some 246 bags were destroyed by the Municipal authorities after they had been landed on account of their damaged condition caused by rain. The plaintiffs claimed damages alleging that the damage was occasioned by the negligence of the defendants or their agents.

The Bill of Lading provided that the defendants were not liable for accidents, loss or damage from any act, neglect or default whatsoever of the Pilot, Master, or Mariners or other servants of the defendants. It further provided as a footnote that in all cases and under all circumstances the liability of the company shall absolutely cease when the goods are free of the ship's tackle.

Held, per Chief Justice and Sankaran Nair J, that there was no evidence to show that the bags were ready for delivery by being separated from the rest and if they were, when and on the facts, the defendants were negligent.

Held, per Wallis J, that the action was really in the nature of a claim for failure to deliver in good order and condition and it was for the plaintiffs to prove that the condition of the bags when put at their disposal was such as to justify them in refusing to take delivery and this onus they have failed to discharge.

Held, further per Chief Justice, that the general provision in the body of the Bill of Lading exempting defendants from any liability for any act, neglect or default whatsoever referred only to the neglect or default of the defendants' servants engaged in or connected with the navigation of the ship and after the bags left the ship's tackle, the question of the liability of the defendants must be governed by the special conditions at the foot of the Bill of Lading.

Held, further that if a carrier wishes to exempt himself from liability for the negligence of his servants, he must insert in his contract in one form or another provisions which in express terms exempt him from such liability.

Held, per Wallis J. that the words in the Bill of Lading *viz*, "that the liability of the Company shall cease when the goods leave the ship's tackle" do not impose upon the defendants liability for the negligence of their servants after the goods leave the ship's tackle, and that the express terms in the body of the Bill protects defendants from all liability.

Bill of Lading-*Contd.*

(4) Construction—*Contd.*

Held, further per Chief Justice and Wallis J. that in India as in England, a carrier can exempt himself from liability for the negligence of his servants

Held, per Sankaran Nair J. that the question was not concluded by authority in India and that the English Common Law ought not to be followed when it is opposed to the principle followed and acted upon by the Indian Legislature.

Held, further that a contract exempting a shipowner from the consequences of the negligence of himself or his servants in not taking reasonable care or the care referred to in sec. 151 of the Indian Contract Act, is opposed to public policy and is void under sec. 23 of the Indian Contract Act. Validity of the exemption clause, tested by the Indian Contract Act and the reasons of the English rule to the contrary considered and held unsuited to the conditions of India.

Held, further by the Full Bench, that on an appeal from judgment of two Judges of the High Court who have differred in opinion, the appeal is not confined to the point upon which the learned Judges differed and that the whole case is open on appeal. (1895) 2 Q B 301; 22 Bom 184; Ref. 1 K B 750, Expl: and Fol., 2 K B 378; 1 K B 769; (1904) P 286; 1 Q B 619; 26 L T 704, doubted. 10 Cal 489; 28 Mad 400 Ref.

Sheik Mahamed Ravuthar v The British India Steam Navigation Co., Limited. 4 M L T 110=18 M L J 497=32 Mad 95= 1 Ind Cas 977 (F B).

13—Stowage—Negligence of the crew or other servants of the ship—Period of loading covered by the contract of carriage—Fitness or unfitness of the ship.

The plaintiffs shipped certain bags of sugar on the 11th and 12th November 1887 on board the defendants' ship the *Byculla* for conveyance to Bombay. There being a dispute as to the number of bags shipped no mate's receipts were given and no bill of lading was signed until the 28th

Bill of Lading - *Contd.*

(4) Construction—*Contd.*

November and duly delivered the sugar in Bombay The sugar however was found to be damaged by water which was due to its having been stowed in immediate proximity to a quantity of wet timber. The plaintiffs sued the defendants in the Small Cause Court for the damage so caused. The defendants sheltered themselves under the terms of the exemptive clause in their bill of lading of the 28th November, which clause ran as follows:—"The act of God, the Queen's enemies .....and all the perils, dangers, accidents of the sea, ...and accidents, loss, or damage from any act, neglect, or default whatsoever of the pilot, master or mariners, or other servants of the Company, or from any deviation, excepted." The plaintiffs contended that a bill of lading did not relate to or cover the period of loading, and that, even if it did, the exception relied upon in this bill of lading related only to negligence subsequent to the commencement of the voyage. They also contended that the ship was not a ship "reasonably fit for the voyage" within the meaning of the rule laid down in 3 Ap. Ca, 72. In the Small Cause Court judgment was given in plaintiffs' favour. On appeal to the High Court on the case stated. this judgment was reversed. *Held* that this was not a case to which the rule laid down in L R 3 Ap Ca 72, applied, as there was no question here of any defect inherent in the ship. It was simply a case of negligent and improper stowage. *Held*, further, following 7 Bom O C 186, that the reasonable mode of construing the contract evidence by a bill of lading was to hold the exceptions to be coextensive with the liability, and that there was no evidence to be found in this bill of lading of any other intention *Held* further that the goods were covered by the bill of lading from the time they were put on board to be loaded; consequently, the defendants were protected from liability under the exemptive clause. 2 A and E., 393, and 4 C P D 182, commented on and followed. **Hassanbhoy Visram v British India Steam Navigation Company. 13 Bom 571.**

Notes.—Ref: 19 Bom 639; 1 M L T 387=16 M L J 573; 30 Mad 79; 18 M L J 497; 32 Mad 95.

14.—Bill of Lading—Liability of Shipping Company.

Bill of Lading-*Contd.*

(4) Construction—*Contd.*

The obligation of a Shipping Company to deliver goods in good order and condition is subject expressly to the conditions inserted in a Bill of Lading. In a case where a cask of brandy was shipped in good order at Madras, but on arrival at Calcutta was found empty, it was *Held* that the company was protected by the special words inserted in the bill of lading "Hogshed brandy covered with gunny, not responsible for condition and contents."

Cutler Palmer & Co. v. British India Steam Navigation Co. 25 Cal 654= 2 C W N 423.

15.—Liability for loss—Absence of negligence.

A & Co. at Madras shipped by the B. I S. N. steamer *Mahratta* a box of coral, to be delivered to their Agent *M* at Bimlipatam. At the time of shipment they declared the value and paid enhanced freight on account of such value. By the bill of lading the company undertook to deliver the case in good order at Bimlipatam to the consignee *M*, subject to certain conditions annexed. By one of these conditions, if the consignee did not take delivery when the ship was ready to discharge, the goods might be warehoused at the merchant's risk, and the company's liability was to cease when the goods left the ship's side. The consignee did not take delivery at the ship's side, and the company's agent at Bimlipatam took the case to the Custom House, as he was bound to do by the regulations of the port. If the Superintendent of the Custom House had known that the case contained corals, it would have been placed in an inner room, but the company's agent did not know the contents of the case, and therefore was unable to give any such information to the Superintendent. While the case was lying at the Custom House, application was made on plaintiff's behalf to the Company's agent for delivery of the case upon the usual guarantee. The agent refused to deliver the case without the production of the bill of lading. Afterwards the bill of lading was received from Madras, and the case was delivered up. At some time between its leaving the ship's side and delivery to the consignee, the case was opened and a portion of the contents stolen *Held* that the defendants were not liable.

Mackinnon Mackenzie v Minchin. 6 M H C 353.

Notes.—Ref: 19 Mad 169.

Bill of Lading-*Contd.*

(4) Construction—*Contd.*

16.—Declaration of value and nature of contents.

A was the consignee and holder of a bill of lading signed by *B* at Bombay, as master of the steam-vessel *John Bright*, for the safe carriage and delivery of a box addressed to *A*, which in fact contained diamonds of the value of 11,670, three rubies, and three emeralds, in all of the value of R.15,940. On the face of the bill of lading was printed, "This bill of lading is issued subject to the following conditions." One condition was that a "written declaration of the contents and value of the goods is required by the owner, and must be delivered by the shipper to the owner's agents with the bills of lading. A wrong description of contents or false declaration of value shall release the owner from all responsibility in case of loss, etc., and the goods shall be charged double freight on the real value which freight shall be paid previous to delivery." The declaration in this case was contended in the following letter from the shipper to the agent of the shipowner:—"Dear Sir,—Be good enough to give me an order for a small box containing diamonds to the value of about R.14,000, to be shipped on board the steamer *John Bright* for Calcutta. Yours, etc." The box was lost by the negligence of *B* or his servants. In a suit by *A* to recover "the value of the goods, *viz.*, R,14,000,"—*Held*, that all the shipowner was entitled to was that the shipper should make a declaration of what *bona fide* he believed to be the value. The declaration as to contents was not vitiated by the omission to enumerate all the different species of articles contained in the box. Upon the evidence, the declaration as to the value and nature of the contents was *bona fide;* therefore *A* was entitled to recover the value of the diamonds lost.

Dhunjeebhoy Byramjee Metha v Betham 2 Ind Jur N S 305.

17.—Leakage—Breakage—Damage caused by leakage from other goods.

Piece-goods were carried from London to Bombay under a bill of lading, the exceptions in which protected the Master from "leakage, breakage, rust, decay, loss, or damage from machinery, boilers , . . misfeasance, error in judgment, negligence of default of . . . persons in the service of the ship . . . and the ship not being liable for any consequences of causes therein excepted, however originating." The piece-goods, on their arrival in Bombay, were found to be damaged by oil and by chafing,—*i. e.*, by rubbing against other goods in the hold,—but there was no evidence to show how such damage was occasioned. *Held* that the term "leakage" did not include leakage from other goods on to the piece-goods, nor did "breakage" include damage caused by chafing, and that, as no negligence was proved, the master was not protected by the exception "damage from negligence."

Graham v Hille. 10 B H C 60.

18.—Leakage, Damage done by—Provision for place of claim, Effect of, on jurisdiction of Court.

Plaintiff shipped some bales of cloth from Calcutta to Rangoon under a bill of lading by which the defendants were bound to deliver,—accidents, loss or damages from fire, machinery, boilers, steam, and all the accidents of the sea, rivers, land carriage and steam navigation, etc. excepted. On the voyage one of the boilers burst, and steam and water escaping, some of the bales were damaged. *Held* that the damage was within the exceptions of the bill of lading, and therefore that the defendants were not liable to make good the loss. *Quære*—Whether, notwithstanding the exceptions in the bill of lading, the defendants might not have been made liable in a suit on the implied warranty if it had been proved as a fact that the boiler was not reasonably fit for the voyage. **British India Steam Navigation Co. v Ibrahim Moosum. 8 W R 35.**

19.—Exception in bill of lading—Seaworthiness—Suit for damage to goods by leakage while ship in dock.

The plaintiffs' goods were loaded in the defendants' steamer then lying in dock to be carried from Bombay to certain ports in East Africa. At the time of loading, the ship was apparently in a sound and seaworthy condition. Two days after the goods had been put on board, and when the ship was still in dock, it sprung a leak, and the water came into the hold and damaged the plaintiffs' goods. The ship was taken to the dry dock, the cargo was shifted, and the leak repaired. It appeared that the leak had arisen from the fact that one of the plates of the ship had been worn thin in one particular spot, so that, when the cargo was put on board, and the ship lay deeper in the water, the pressure be-

Bill of Lading-*Contd.*

(4) Construction—*Contd.*

came so great that a hole was made, and the water rushed in. The plaintiffs sued the defendants for damages. The defendants pleaded (1) that the ship was in a seaworthy condition when the goods were put on board; (2) that they were protected by the bill of lading, which contained the following exception:—*viz.*, "Accident, loss and damage from vermin, barratry, jettison, collision, fire, machinery, boilers, steam and all the perils, dangers and accidents of the sea, rivers, land carriage and steam navigation of whatever nature and kind and accident, loss or damage from any act, neglect or default whatsoever of the pilot, master or mariners or other servants of the Company or from any deviation excepted." *Held* that the defendants were liable. While the ship was in dock, it was not seaworthy, and the exception in the bill of lading did not limit the implied warranty of seaworthiness. **Vithuldas Gober v Bombay and Persia Steam Navigation Co. 19 Bom 639.**

20.—Carrier by sea—Bill of Lading—Loss by fire—Liabilities of ship—Owners for goods after being landed.

The Defendants, who were ship-owners under a bill of lading undertook to carry and deliver to the Plaintiffs certain goods, subject, *inter alia* to the following conditions -Viz, that the defendants should not be liable for loss from the "act of God, the Queen's enemies, restraint of Princes or Rulers, pirates robbers by sea or land,—accidents, loss and damage from vermin, barratry, jettison, collision, fire, machinery &c.," and that the goods were to be taken from the steamer's tackles by the consignees—failing which the steamer's Agents were at liberty to land them at the godowns on arrival at its destination, the vessel went at once alongside the wharf & landed the goods into godowns hired by defendants from the custom House, no opportunity having been afforded to the plaintiffs to take delivery from the ship tackle Shortly after being landed, the goods were destroyed by fire in the godowns, but through no fault of the defendants.

It was proved that the plaintiffs had paid the wharfage and godowns rent.

Held, that the plaintiffs had, by their conduct in so paying the wharfage and godown rent, acquiesced in the goods being placed in the

Bill of Lading-*Contd.*

(4) Construction—*Contd.*

godowns instead of being delivered over the ship's side, and that the defendants were not liable for the loss, the goods having been destroyed by fire while in their hands as wharfingers, and through no fault or neglect on their part.

Chinhong & Co v Sen Moh & Co. 4 Cal 736=3 C L R 585.

21.—Carriers by sea-Bill of Lading construction of—loss by fire-Libilities of ship-owner for goods after being landed.

Goods were shipped in the defendants steamer, under a bill of lading which contained a clause protecting the ship—owners from loss occasioned by fire and a further clause to the effect that the goods "are to be landed from the steamer's tackle by the consignees as fast as the steamer can discharge, failing which, the steamer's agents were to be at liberty to land them into godowns,—the cost of lighterage godown rent &c, thereby incurred to be borne by the respective consignees.

The steamer duly arrived at its destination on the afternoon of the 11th December and at once proceeded to discharge its cargo. It does not appear that notice of arrival was given to the plaintiff, who was the consignee of the goods. On the 12th the plaintiff applied for delivery but was informed that the goods had been landed into the go-downs and delivery could not be given as they were covered up by other cargo. On the evening of the 12th the go downs were burned down and goods destroyed. In a suit by the plaintiff for damages for short delivery, held that the defendants were entitled under the bill of lading for the speedy discharge of the steamer, to land and wharf the goods though not to charge for landing and wharfage unless the plaintiff had an opportunity of landing the goods himself.

Cossim Hossein Soortu v L E Phee Chuan. 5 Calc 477=5 C L R 157.

22.—Loss by fire before delivery—Exemption from liability.

The defendant received goods on board his steamer under a bill of lading which exempted him from liability for loss occasioned "by the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation of what-soever kind or nature," and lawfully landed them on the

Bill of Lading-*Contd.*

(4) Construction—*Contd.*

Custom-house Bunder at Bombay, where they were accidentally burned before they were delivered to the consignee. *Held* that he was protected by the above exception in the bill of lading. **Hong-Kong and Shanghai Banking Corporation v Baker** **6 Bom Hc O C 71.**

Held, on appeal that so long as the goods remained in his custody after being so landed, he was protected from liability under the above exemption in the bill of lading.

7 Bom Hc O C 186.

Notes;—Fol: 13 Bom 571. Ref: 19 Bom 639.

23.—Delivery in dock—"Landing or cranage charges" —Practice of dock to recover from consignee—Liability of ship-owner.

Certain boilers consigned to the plaintiff in Bombay were shipped at Liverpool in two steamers belonging to the same owners, under two bills of lading in these terms "Shipped in good order and condition, etc., to be delivered, subject to the exceptions and conditions hereinafter mentioned, in the like good order and condition, from the ship's tackles (where the ship's responsibility shall cease) at the aforesaid port of Bombay,'. etc. One of the exceptions and conditions above referred to was as follows:—"The ship-owner shall have the option of discharging in dock, and of making delivery of the goods under the bills of lading either over the ship's side or from lighters, or a store-ship, or custom-house, or warehouse, at merchant's risk." Freight was prepaid in Liverpool. On their arrival at Bombay, the two steamers went into the Prince's Dock belonging to the Port Trust, and discharged the boilers, by means of the Port Trust cranes, on to the dock wharves. The plaintiff subsequently sent to remove the boilers, but was not allowed by the dock authorities to do so until he had paid to them various sums, amounting in the aggregate to Rs. 930, on account, as stated in the bill furnished him by the Port Trust, of "landing charges" for the said boilers. The bills also contained certain additional charges for "wharfage." These the plaintiff was ready to pay, but the "landing charges" he paid only under protest, and in order to get possession of his goods, and now sought to recover the same from the defendants, who represented the ship-owners. It was the practice of the Port Trust to recover

Bill of Lading-*Contd.*

(4) Construction—*Contd.*

these charges in all cases from the consignees of goods discharged in their dock, and the charge was said to be levied on all goods landed on the wharves of the dock, whether by the dock's cranes or by the ship's own tackles. The charge was incurred the moment the goods touched the wharf. In their rates, sanctioned by Government, which by their Act the Port Trust were entitled to charge, this charge was called, not a "landing charge," but a "dock and cranage" charge. Had the plaintiff been given delivery of these goods in the stream, and afterwards himself landed them at any wharf belonging to the Port Trust in the Port of Bombay, the Port Trust would have sought to have made the same charge for allowing the goods to be landed, whether that was done by their appliances or not. *Held* that the ship-owner, and not the consignee, was bound to pay these charges, they being in reality charges for work and labour done in and about the landing of the goods—an operation which, under the bills of lading was within the duty of the ship-owner. *Per Latham, J.*—The ship having elected to discharge in the dock, it was her duty to land the goods on the wharf. Every charge which had to be incurred before that could be done was a charge antecedent to delivery, and one, therefore, which must be paid by the ship-owner. **Scott v. Finlay.** **7 Bom 386.**

24—"Weight, contents, and value unknown" —Act IX of 1856, s. 3—Assignee of bill of lading for value.

A bill of lading purporting to be for 50 tons of coals and containing a printed clause, "weight, contents, and value unknown," and similar words written above the signature of the master, does not amount to an admission by the master that he has received 50 tons of coal on board. Upon the true construction of the Bills of Lading Act (IX of 1856), s. 3, a bill of lading in the above form is not, in the hands of a consignee for value, conclusive evidence against the master of the shipment of 50 tons. **Nicol & Co v Castle.** **9 B H C 321.**

25———Freight Payment of—Incorporation in bill of lading of terms of charter-party-Cargo—Freight payable on intake measurement—Measurement at port of delivery-Discrepancy in measurements— Evidence— Burden of proof—Suit by consignee for excess freight.

Bill of Lading-*Contd.*

(4) Construction—*Contd.*

K V at Moulmein consigned to the plaintiff at Bompay 135 logs of teak timber shipped on board the defendant's ship. The bill of lading, which was signed by the defendant,described the logs as marked K V and measuring tons 115-12 -10 and it provided for the payment of freight thereon at Bombay, at the rate of Rs 17 per ton of 0 cubic feet on right delivery. The last clause of the bill of lading was in the handwriting of the defendant,and was as follows:—"Marks, number, quantity and measurement unkown; all other conditions as per charter party." The charter party was expressed to be between the owners of the ship and Messrs. B of Rangoon as charterers of the whole ship, and provided for the payment of freight " at the rate of Rs 18 per ton of 50 cubic feet for all timber,one rate throughout except 100 tons broken stowage at half freight, by intake measurement." On arrival of the ship at Bombay the plaintiff, as consignee of the timber and holder of the bill of lading, paid the defendant (the captain of the ship) Rs 1500 on account of freight and took delivery of the 135 logs. On measuring them he found that, according to his method of measurement, the total measurment of the 135 logs came only to tons 58-27-11-6 and not tons 115-12-10 as mentioned in the bill of lading. He claimed, therefore, to be chargeable with freight only on smaller quantity (*viz* Rs 995-8) and to recover from the defendant the difference (*viz* Rs 504-8) between that sum and Rs. I 500 paid on account as for an overpayment of freight. It was proved that all the timber on board had been measured at Moulmein by an employee of the charterers acting apparently as agent of all the different shippers, and that the measurements in the bills of lading were supplied by this person to the defendant as the measurements of the different consignments. It was also proved that the 135 logs received and measured by the plaintiff in Bombay were the same logs that were shipped under the bill of lading, and that the plaintiffs measurement of them was correct according to the mode of measurement which he adopted. There was no evidence as to what was the mode of measurement followed at Moulmein, nor, except the statements in the bill of lading as to what was the actual intake measurement of the timber there. *Held*, that the effect of the last clause in the bill of lading was to incorporate into that document the cause of the charter-party which provided that freight should be payable on the intake measurement; that the burden of proving what the intake measurement actually was lay upon the plaintiff, who sought to recover back money which he alleged, he had paid in excess of what was due; and that, in the absence of such evidence on behalf of the plaintiff, the statement of quantity contained in the bill of lading was *prima facie* evidence of the intake measurement of the timber. **Cursetji Rustomji Setna v Williams.**

5 Bom 313.

Bill of Lading *Contd.*

(4) Construction—*Contd.*

26—Freight, Payment of-Lien of ship-owner.

Where a bill of lading dated at the port of shipment,contains the words "freight for the said goods being paid here" it operates as a receipt for the freight The ship-owner is not bound to deliver the same to the shipper until payment of the sum to be charged for the carriage of the goods;but such sum is not freight, and the shipowner has no lien for the amount upon the goods,nor the bill of lading which represents them. **Soomar Jaffer v. Abdool Kurreem. 1 Ind Jur N S 230.**

27– Freight, Lien for on cargo—Advances on account of freight—Master's lien for freight-Charter-party.

By a charter-party made in London, the ship W was chartered to carry a cargo from Liverpool to Calcutta where she was to load from the factors of the charterer a full homeward cargo to be carried by her to Europe. Freight for the whole round, out and home, was made payable on safe delivery of the homeward cargo, but at so much per ton of the outward cargo delivered in Calcutta. The master was to have a lien on the cargo for freight etc, cash not exceeding £800 was to be advanced to the ship in Calcutta on account of freight, but subject to insurance, and £600 was to be advanced by the charterer's acceptance at three months, or in cash under discount,at charterer's option,on the sailing of the vessel from Liverpool,less five per cent for insurance. The charterer himself loaded the ship,and the master signed a bill of lading which declared the cargo to be shipped by the charterer to be delivered at Calcutta, as the agents of the charterer might direct, unto order or to his assigns, freight to be paid as per charter party. In the margin of the bill was written "Received in advance of the within freight £600 as per charter party. " The £600 had been paid,not in cash, but by the charterer's bill at three

Bill of Lading-*Contd.*

(4) Construction—*Contd.*

months. The charterer became bankrupt and the bill was dishonoured,and the fact of the bankruptcy and dishonour was known in Calcutta when the ship arrived there. On the ship's arrival in Calcutta *J O & Co*, who were the holders for value of the bill of lading, demanded delivery of the cargo. The master claimed a right of lien and refused to deliver unless, *J O & Co*, would pay the £600 bill which had been dishonoured, and would further advance, £800 for the ship's use and load a homeward cargo, according to the terms of the charter party. *Held* that *J O & Co* took the bill of lading with notice of the charter party, but that, under the circumstances, the master had no lien, and was bound to deliver the cargo to *J O & Co*. **Ogle v Nashholm. Bourke O C 171.**

28.—Freight, Lien for. on cargo-Advances on account of right—Lien of owners.

Goods were shipped deliverable to the order of the shippers or their assigns. The bill of lading stated that " freight for said goods was to be paid as per charter party, with average accustomed, reserving lien in full on cargo for full amount as stipulated therein."The charter party showed "that *H & Co* undertook to supply a full cargo for the ship,and that R H, agent for the ship,agreed with *H & Co* that the said ship should proceed to London dock, or any other suitable dock, for loading salt at party's option, or so near thereto as she can safely get,to be at all times afloat and in safety, and then load for the charterer's agent a full and complete cargo of salt, not exceeding what the master considers sufficient cargo which the charterers engage to ship,not exceeding what she can reasonably carry with her stores,provisions and furniture, and being so loaded shall therewith proceed to Calcutta, or so near thereto as she may safely get, and there deliver as per bills of lading, and on being paid freight at the rate of twenty three shillngs per ton. " The freight to be paid thus: "£500 by charterer's acceptance at two months on sailing less 2½ per cent insurance; or cash on sailing less 5 per cent interest and insurance,at charterer's option and the balance in cash on delivery as master requires,at current rate of exchange;2 percent, commission to charterers in lieu of consigment". *Held* that "a sum of money payable before the arrival of the ship at her port of discharge, and payable by the shippers of the goods at the port of shipment, is not freight in the strict legal acceptation of the term, with all the incidents of freight in giving the ship-owner the right of lien, unless it is stipulated for." Here the owners had a lien upon the goods for freight, notwithstanding that the bill of exchange for £500 had been given.

Thomas v Ogle Bourke A O C 100.

29—Freigt, Lien for, on cargo—Advances on account of freight—Dishonour of bills.

The captain of a ship has no lien on the cargo in respect of a portion of the freight stipulated, to be advanced, and advanced by bills afterwards dishonoured, nor in respect of a portion of the freight stipulated to be advanced at the port of discharge. A lien cannot arise in any case when the master has not a right to retain the goods till the freight is paid. Such advances are not freight, but advances to be made under discount, and upon the security of the captain's bill on the freighter. The master has no lien at law or in equity in respect of breaches of covenants, in the charter-party, other than those relating to the payment of freight for goods actually carried. **Peninsular and Oriental Steam Navigation Company v Small Bourke O C 309.**

30—Claim for short delivery-Place for preferring claim—Condition precedent.

Where a bill of lading contained a clause to the follwing effect:—" Any claim for short delivery or damage done to goods,and all other claims whatsoever, to be made at the port of Calcutta, and at no other port, and the goods are shipped and this bill of lading granted subject to this express condition," it was held by the Recorder of Rangoon to operate so as to make the preferring of a claim in Calcutta a condition precedent to a suit in this Court. *Held* by the High Court that this opinion was correct, and that a suit for short delivery under the bill of lading could not be maintained without a claim being made in Clacutta. **Mahomed Ishmailjee Nada v British India Steam Navigation Company 9 W R 396.**

31—Short delivery of goods—No evidence as to how goods were lost—Burden of proof—" Or otherwise," meaning of.

The plaintiff was the consignee of a large consignment of goods shipped from Bombay in bags

Bill of Lading-*Contd.*

(4) Construction—*Contd.*

on board the defendants' steam-ship Java for carriage to Zanzibar On arrival of the Java at Zanzibar, the goods were landed by the defendant company and placed in the customs godown, where the plaintiff in due course demanded delivery. Some of the bags were not forthcoming, but the evidence did not show how the loss had occurred. The bill of lading contained the following condition:—"The company's liability shall cease as soon as the packages are free of the ship's tackle, after which they shall not be responsible for any loss or damage, however caused. If stored in receiving ship. godown or upon any wharf, all risks of fire, dacoity, vermin or otherwise shall be with the merchant, and the usual charges shall be paid before delivery of the goods. Fire insurance will be covered by the company's agents on application." In a suit brought by the plaintiff for short delivery of goods,-*Held* that the defendants were liable. They did not show how the loss occurred, and as it might have occurred from causes not covered by the exception (e. g., from misdelivery),they did not bring themselves within the protecion afforded by the exemption. The general words " or otherwise " contained in the tenth clause of the bill of lading could not be read so as to cover all possible losses for that would make them include wilful misconduct on the part of the defendant's servants and general words are not read with such an extended meaning. Nor would they include misdelivery, for that was provided for in the eighth clause.

British India Steam Navigation Co. v. Ratansi Ramji 22 Bom 184.

Notes:—Ref: 16 M L J 573=1 M L T 387; 30 Mad 79; 18 M L J 497; 32 Mad 95.

32—Claim for short delivery—Place for preferring claim.

A bill of lading contained a provision that any claim for short delivery or for damage done to goods should be made at the port of Calcutta, and not elsewhere. Held that this clause did not affect the plaintiff's right of suit in the Court at Rangoon, and that, if the defendants meant to object that no claim had been made in Calcutta before the commencement of the suit, they should have done so in proper time, viz.,in their written statement. An objection on that ground taken for the first time at the hearing of the appeal was disallowed. **British India Steam Navigation Co. v Ibrahim Moosum** 8 W R 35.

Bill of Lading-*Contd.*

(4) Construction—*Contd.*

33—Claim for short delivery to be made at a certain place within a certain time—Reasonable condition—Common carrier, Liability of-Carriers Act, 111 of 1865.

A stipulation by persons carrying on extensive business as carriers that they should be apprised of claims made on them for default on the part of their servants, at a specified place and no other, and within a time which will render enquiry likely to be attended with some result, is not unreasonable. The defendants were owners of a fleet of steam-ships plying periodically along the coast of British India, by which they undertook to convey for freight parcels of goods for all persons indifferently from and to specified ports. They stipulated in their bills of lading that claims for short delivery should be made at the port of Calcutta only, within one month after delivery of any portion of the goods entered in the bill of lading. *Held*,in a suit against defendants for compensation for value of goods short delivered, that this was not an unreasonable stipulation, and that a claim made on the agents of the defendants who were authorized only to retain the goods, receive freight, and give delivery, was not a sufficient compliance with the condition. *Held*, also, that defendants were common carriers, though not for the purposes of the Indian Carriers Act, and that their character of carriers continued so long as the goods remained in their hands and undelivered. **British India Steam Navigation Company v Hajee Mahomed Essack & Co.** 3 Mad 107.

Notes:—Ap: 12 Cal 477. Fol: 3 Mad 240; 26 Bom 562. Ref: 19 Bom 165.

34.—Acknowledgment—Carriers—Non-delivery—Damages.

The plaintiff delivered to defendants 200 cases of oil for carriage from Bombay to Jeddah. The Steamer reached Jeddah on the 11th July 1900, where the defendants' agents delivered only 165 cases and granted to the consignee a certificate that 35 cases were short delivered.On 15th November 1900, plaintiff, on receiving this certificate, made a claim in writing to the defendants in Bombay. On the 18th July 1901, the defendants, at plaintiff's request, wrote to their Jeddah agent for the 35 cases,and handed up the letter to plaintiff for being forwarded to Jeddah. On the 20th December 1901, they again wrote to their Jeddah

Bill of Lading-*Contd.*

(4) Construction-*Contd.*

agent for the cases and entrusted the letter to plaintiff to be despatched to Jeddah. On the 28th January 1902, plaintiff sued defendants for damages for non-delivery of the 35 cases:

Held (1), that the certificate and the two letters contained acknowledgments of liability in respect of the property or right which formed the subject of the suit, and were sufficient to give starting point for limitation under s. 19, Explanation of the Limitation Act, 1877; (2) that Article 31 and not Article 115 of the Limitation Act applied to the case.

Hajee Ajam v. Bombay and Persia S. N. Co. 4 Bom L R 447=26 Bom 562.

35—Delivery of goods to consignee—Cargo unclaimed on arrival of ship—Rights of ship-owner to land goods—Damages by rain—Madras Harbour Trust Act (Madras Act II of 1886).

The defendant's steam-ship arrived at Madras on 4th December 1891, bringing bags of grain consigned to the plaintiffs under a bill of lading by which the defendants were to have the option of delivering the goods into a receiving ship or landing them at consignee's risk and expense, and their liability was to cease when the goods were free of the ship's tackle. The plaintiffs, on the date of the arrival of the goods were not authorized to receive them. The plaintiffs set up a custom that cargo of this description ought to be landed on the beach; but as this could not be done in the absence of the consignees, the defendants landed it the same day on the pier and delivered it into the custody of the Madras Harbour Trust for storage, pending delivery to the consignees. On the 8th of December 1891, heavy rain fell, and on the same date plaintiffs learnt that the cargo had been delivered on the pier. When the plaintiffs came to take delivery on that day, a considerable portion had been damaged by rain, for which they now sued the defendants. *Held* (1) that where the consignees were unable to take delivery in the ordinary way on the beach, the master of a ship has the option of landing and warehousing the goods, and that delivery to the Harbour Trust for custody was not wrongful; (2) that in the absence of proof that the defendants were negligent, or that they failed to deliver the goods, the suit must be dismissed. **British India Steam Navigation Company v. Ibrahim Sulaiman 19 Mad 169.**

Bill of Lading-*Contd.*

(4) Construction—*Contd.*

36.—'Or otherwise' cannot include wilful misconduct.

When a company was sued for non-delivery and the defence pleaded non-liability justified by the words "or otherwise" in the bill of lading which provided "all risks of fire, dacoity, vermin or otherwise shall be with the merchant" *held* that the words "or otherwise" do not include all possible losses; that they do not include wilful misconduct on the company's part nor do they include misdelivery. **E. I. S. N. Co. Ld. v. Ratansi. 1896 P J 272.**

37—Bill of Lading—Stipulation relieving ship-owner from liability as soon as goods free of ship's tackle and before delivery, if enforceable—"Landing agents" at Penang, how far agents of ship-owners—Loss of goods after delivery to landing agent but before delivery to consignee.

Where the bill of lading provided that "in all cases and under all circumstances the liability of the ship-owner shall absolutely cease when the goods are free of the ship's tackle, and thereupon the goods shall be at the risk for all purposes and in every respect of the shipper or consignee," and the goods were delivered overside into lighters and taken to the wharf and kept by a "landing agent," and then disposed of without the production of a bill of lading or a delivery order in fraud of the persons entitled.

Held.—That there was no reason why the clause providing for cessor of liability of the ship-owner on the goods being free of the ship's tackle should not be held operative and effectual although they might have been lost before delivery to the persons entitled. The stipulation was one which the parties were perfectly free to make, unembarrassed by any implied condition or any original underlying obligation, such as exists when a ship-owner seeks to relieve himself of liability to the shipper in case his vessel should be found to have been unseaworthy.

The position of the "landing agents," at the port of Penang indicated.

Semble.—They are intermediaries owing duty to both parties—agents of the ship-owners, as long as the contract of affreightment remains unexhausted, agents for the consignees as soon as the bill of lading is produced with delivery order

Bill of Lading-*Concld.*

(4) Construction—*Concld.*

endorsed. **The Chartered Bank of India Australia and China v. The British India Steam Navigation Co, Ld. 6 M L T 11= 13 C W N 733=19 M L J 316,**

38—Bill of Lading—Interpretation—" Not responsible for marks'—Effect and meaning—Endorsement in blank—Negotiability—Bill of Lading Act—Object of—Whether affects other rights.

Held, that, by endorsing the bill of Lading in blank, it becomes a negotiable instrument, and it could pass from hand to hand by mere delivery, so as to affect the property in the goods and that the plaintiff who obtained delivery of the Bill accompanied by an endorsement became the owner of the goods and was entitled to sue.

Held, also, as owner of the goods, the plaintiff had open to him, under the common law, all the several forms of suit in tort. He could sue the Port Trust in "detinue" for wrongfully retaining the possession of the goods or for "conversion" if they had given to any other consignee.

The Bill of Lading Act was intended to meet the case where the goods in respect of which Bill of Lading purport to be signed, have not been laden on board, and does not affect the rights such as those of the plaintiff.

Held, also, that the object of inserting the proviso " not responsible for marks" is to prevent the Bill of Lading having its ordinary effect of being evidence against the ship that goods marked as stated in the body of the bill were actually shipped, and it lies on the plaintiff to prove that the goods bearing his mark were actually committed to the custody of the Port Trust or were delivered to some other consignee.

The Karachi Port Trust v Ismailji Ameeji. 3 S L R 203.

Bail of sale.

See (1) Evidence—Parol Evidence—Varying or Contradicting Written Instruments.
(2) Vendor and Purchaser-Bills of Sale.
(3) Contract.
(4) Evidence.
(5) Registration.

Bills of Exchange Act (V of 1866).

See Negotiable Instruments, Summary Procedure on.

Birja home Ceremoney.

1.—Succession—Religious institution—Head of Chelas, right of, to succeed—Mahant—Alteration of succession—Ascetic.

The right of succession to the property left by the deceased head of a religious institution depends upon custom and practice which must be proved by evidence in each case. A Chela is primarily entitled to succeed a Mahant of the Sanyasi sect who has to follow a life of celebacy; but where there are more Chelas than one, custom and practice intervene. An ascetic is a mere life tenant and cannot alter the succession to the trust by an act of his own in connection with the status under which he originally acquired the trust. One J who was the Mahanth of a religious institution initiated A who had been his Chela and nominated and installed him as his successor. A after succeeding to the Mahantship executed an ekrarnama in favour of the Mahant of Mirzapur giving him the right of naming or appointing his own successor. *Held*, that the mode of appointment by a Mahanth of a successor from out of his chelas was well known, and the manner of A's own appointment to the guddi indicated that such was the custom and practice of the Barhampore-Paita Asthal; that A had no power to ignore this custom and practice and give away the right of appointment to the Mahanth of Mirzapur. That consequently the ekrarnama was *ultra vires* as an exercise of A's right of electing his own successor. **Mahanth Ramji Dass v Lachhu Dass, 7 C W N 145.**

Notes.—Ref. 5 C L J 360; 8 C L J 499.

Birth-date.

1—Proof of date of birth after lapse of years—Reasonable conviction.

In India it is difficult to prove such facts as the date of birth after the lapse of many years, and it would be unreasonable to demand such a class of evidence as would justly be demanded in England. But evidence must be such as to carry reasonable conviction to the mind.

Nawab Shah Ara Begam v Nanhi Begam. 1 M L T 429=5 C L J 4=11 C W N 130= 17 M L J 32=9 Bom L R 80=29 All 29 (P C)=34 I A 1 P C.

Birt tenures.

See (1) Custom (Punjab)
(2) Hindu Law-Inheritance.

Birt Tenures-*Concld.*

1.—Birt-tenures-Heritability- Transferability.

Persons who hold under the *Birt* or *Birt* zemindari tenure in the district of Gonda in Oudh, have heritable and transferable rights as against the talukdar, in the villages, in respect of which the Birt has been created. **Raja Muhammad Mumtaz Ali Khan v Murad Baksh. 6 C L J 693 =11 C W N 913 (P C)=9 Bom L R 851= 2 M L T 402=4 A L J 737=17 M L J 400.**

See also cases as to other tenures under Land Tenures.

Birt zemindari.

1.—Oudh Estates Act 1869—Under-proprietory rights—Whether heritable-Annexation of Oudh.

Where it was proved that the defendants were in the enjoyment of the Birt zemindari rights before the annexation of Oudh and that their enjoyment was such as to come within the policy declared by Govt. in the circular known as Record of Rights circular, No 2 of 1861. *Held* that the defendants had a heritable & transferable right, as against the Talukdar, in the villages, in respect of which the Birt had been created.

Muhammad Mamtaz Ali v Murad Baksh. 29 All 708=34 I A 142 P C.

Blank space in the body of the will.

See Will.

Blank stamped papers.

—Signature on—

See Estoppel—Estoppel by deeds and other Documents.

Blank Transfer.

—Registration of—

See Company——Transfer of Shares and Rights of Transferees.

Blindness.

See (1) Hindu Law—Inheritance—Divesting of, Exclusion from, and Forfeiture of, Inheritance—Blindness.

(2) Malabar Law—Joint Family.

(3) Hindu Law—Inheritance.

Blindness a disqualification for the office of karnavan.

See Malabar Law.

Boarding-House keeper.

See Hotel-keeper and Guest.

3 Bom H C O C 137.

Boarding house keeper & lodger.

See Damages.

Board Circulars.

1.—IX para. 27—Rule 38 of the Judicial Commissioner's Court—Application for copy—Copy to be sent by post—Deduction of time for obtaining copy—Limitation.

Held, that, where a person applies for a copy to be sent by post, he is entitled to have his wish complied with, and if, instead of complying with his request, a notice is posted on the board to the effect that the copy is ready, and that, if the applicant comes within any reasonable time from the date of his application to make inquiries, he is entitled to have the time, up to the delivery of the copy to him personally, deducted from the period of limitation for filing his copy.

Mussammat Fatimunissa v Ajmad Ali Khan. 8 O C 150.

Board of examiners.

1—Board of Examiners—Raising pass marks.

The Board of Examiners having without giving any notice to the candidates at the annual examination for pleaderships of the Upper Subordinate Grade, the minimum number of marks raised qualifying for a pass certificate, some of the unsucessful candidates petitioned the High Court that the result of the examination might be reconsidered and the former standard reverted to. *Held* that the Court having delegated its powers in connection with the examination to the Board of Examiners, and the Board having exercised its powers legally, properly and for the benefit of the public, there was no cause for interference.

Dwarka Prasad. 9 All 611, 7 W N 148.

2—Duty of, for pleadership examination, on application by a candidate.

Where a candidate applies, to the Board of Examiners for pleadership, to be allowed to pre-

Board of Examiners-*Concld.*

sent himself for the examination, the Board, for the time being, should form its own opinion as to the fitness of such applicant,and should not reject his application on the mere ground that a previous application by him in some past year had been rejected. In such cases, it is competent for the High Court to order the Board to consider his present fitness for admission, and. if satisfied that he possessed the qualifications prescribed by the rules, to allow him to present himself for the examination. **Rudra Narain Roy. 28 Cal 479.**

3——Board of Examiners—Specific Relief Act S. 45-The petitioner presented himself as a candidate for the examination for Mukhtearship in 1893 but the board held an equiry into his fitness and decided that he was not a fit candidate.

In 1900 he again applied to the Board of Examiners for liberty to present himself for the examination but the Board held that they could not go behind the order passed by the Board of Examiners in 1893 and the application was rejected without a fresh enquiry being made by the members of the Board in 1900. On application being made to the High Court under S. 15 of the Specific Relief Act the High Court ordered that the Board should enquire into the fitness of the petitioner in 1900. **Rudra Narain 28 Cal 481.**

Board of Revenue,.Appeal to.

See Pottah.

Board of Revenue, Orders of.

See Act IX of 1847.

Board of Revenue (Mad) order.

1.—Standing orders of the Board of Revenue S. O. No. XV—Rules 1, 5, 7, 11, 13 and 14—Grant of waste land by Tahsildar subject to any appeal—Grant of Pattah during pendency of appeal—Irregularities in issuing a notice—Competency of Civil Courts to go into the sufficiency of the reasons assigned by the Revenue authorities for granting or refusing to grant a darkhast application. Where during the pendency of an appeal from the order of the Tahsildar granting a darkhast application, pattah was issued to the applicant and the grant was subsequently annulled by the Appellate Revenue authority on the ground that there was irregularity in the issuing of a notice by reason of the signtures of adjacent

Board of Revenue (Mad) order -*Concld.*

landholders not having been obtained.

Held. by the Chief Justice;—

As a notice has not been produced, the maximum *Omnia praesumuntur rite esse acta* applied and that the fact that a notice was not signed by the adjacent landholders did not *per se* render the grant by the Tahsildar invalid and that the grant by the Tahsildar was therefore binding on the Crown.

Held, by Benson J.—

That the Pattah being in the nature of a mere bill and not of a grant or conveyance the issue of a pattah has not the effect of confirming the conditional grant by the Tahsildar which appeals under rule 13 were still pending; and it is not open to Civil Courts to discuss the sufficiency or otherwise of the grounds on which the Darkhast authorities whether original or appellate-grant or refuse to grant Government lands to parties applying for them so long as these authorities act within the scope of the authority conferred on them by the Rules as to do so would be an assumption of the appellate jurisdiction by the Civil Court instead of the Revenue authority in whom it vests under the rules. 26 Mad 268; 18 Mad434; 26 Mad 742; 12 Mad 464; 19 Mad 324; 1 M I A 305; 6 Mad 303 ref. **Muthu Veera Vandayan v. The Secretary of State for India in Council. 1 M L T 278=29 Mad 461.**

Notes:—Affirmed: 30 Mad 27=2 M L T 141. F B.

2—Bengal Court of Wards Act S. 23—Collector—Board of Revenue, sanction by—Manager, powers of *Delegatus non potest delegare*.

When the Collector is authorised by the Board of Revenue as Court of Wards under S. 23 of the Act, to raise a loan on mortgage of the Ward's properties, he can delegate his powers to the manager acting under him.

The maxim "*delegatus non potest delegare*" is to be understood with this necessary qualification,that in any particular case,if no authority to delegate has been given, such authority may be implied from the circumstances of the case.

Jogeshwar Narain Singh v Rai Radha Rawan. 3 C L J 165=10 C W N 289.

Board of Revenue, Powers of.

See Settlement—Miscellaneous cases

1—Tenure-holder, holding Mela, liability to pay road-cess, income tax.

A tenure-holder who holds an annual mela on the lands of tenure at a certain part of the year and pays separate rent, for it is not liable to pay road-cess although he is liable to pay income-tax on account of the profits of the mela. **Umed Rasul Soha v. Anath Bandhu Chowdry. 6 C W N 128=28 Cal 637.**

Notes:—Dist: 32 Cal 1031=9 C W N 824 Diss: 6 C L J 342 F B. Dist: 34 Cal 357 =5 C L J 118; 32 Cal 1031. Disap: 35 Cal 82 F B=11 C W N 1053—6 C L J 342.

2.— —Advertisement and notificatation of circular orders of the Board if necessary—— Latest days of payment of Government Revenue in the case of new estate Board's Rules of 1895. Rule 1-Sale for arrears of revenue-No arrears-Sale not legal, setting aside of.

The latest days for the payment of Government revenue in the case of new estate formed after partition of a parent estate must be fixed in accordance with the provision contained in rule No 1 of the Board's Rule issued under the powers conferred by S. 4 of Act XI of 1859 and any revenue circular issued by the Board or any rule framed by the same. in any way affecting rule No I, must be advertised and notified as required by s.3 of Act XI of 1859 before such a circular of a rule may have the force of law and when not so published it is *ultra vires*. Any sale held for arrears of revenue which would not have been due if the kist were fixed under rule 1 of the Borad's Rules is invalid and illegal and therefore liable to be set aside. **Mohomed Jarip v Shyama Sundari Dasi 8 C W N 826.**

3—. Commissioner's power to set aside—Revision—Limitation—*Ex parte* order, how set aside. *B*engal Act VII of 1880 for the recovery of public demands applied cases of road and other cases 14 Cal. 1 (1886), referred to. Where a Commissioner set aside a sale held in execution of a certificate granted by a Deputy Collector in respect of a fine imposed for failure to comply with a notice under sec. 16 of the Cess Act, on the ground that the evidence for the Petitioner

Board of Revenue-Powers of-*Contd*

made out "a *prima facie* case of fraud, or at any rate of irregularities which prevented the Petitioner from obtaining knowledge of the proceedings against him, and caused the sale of his estate at a most inadequate price," *Held*—That the power of revision conferred on the commissioner by sec. 17 of Act VII of 1880, B. C., was amply sufficient to justify the order setting aside the sale. The Board of Revenue also had power to interfere in this case under sec 24 of the Act. Sec. 17 of Act VII of 1880, B C., applied to orders made after as well as before sales in execution of certificates issued under the Act. The periods of limitation applicable in ordinary cases were not binding on the Commissioner when he was acting in exercise of his revisional jurisdiction. It is an elementary principle which is binding on all persons who exercise judicial or *quasi*-judicial powers that an order should not be made against a man's interest without there being given him an opportunity of being heard. In this case the order of the Commissioner annulling the sale was challenged in a regular suit brought in the Civil Court on the ground that the order was made without hearing the purchaser. *Held*—That the proper remedy of the purchaser was to apply to the Commissioner for a re-hearing. **Babu Lalliteswar Singh v Mohunt Ramkishen Das. (P C), 10 C W N 969.**

4-Act IX of 1880 S. 4—Hat, profits from, not liable to Road cess.—

The profits from a *hat* not being rent or revenue or annual value of land within the meaning of S. 4 of the Act are not liable to road-cess. Therefore a land-lord who pays road cess upon such profits cannot recover it from his tenant.

The Rule of the Revenue Board authorizing the assessment of *hats*, being at variance with the provisions of the Bengal Cess Act is *ultra vires*. (6 C L J 342; 11 C W N 1053 (F B), 28 Cal 637). Fol. **Surajdeo v. Narain Mackenzie. 5 Ind Cas 254.**

5.—S. 18-Leave to sue—Sanction—Condition precedent.

It is not a condition precedent that for the exercise of the jurisdiction to grant sanction under s.18 of Act XX of 1863 that the Board of Revenue should have had management of the temple or that its Dharmakartas should have been under the Board's control. 17 Mad 95 disc-

Board of Revenue-Powers of-*Concld.*

ussed. 2 Mad 197; 23 Mad 223 ref to **Sathaluni Seetaramanuja Charyulu v. Nanduri Seetapati. 26 Mad 166.**

Notes:—Fol 34 Cal 587.

6.—Secs. 13, 65, 66 (*3*)—Secondary evidence—Judgments not inter partes, admissibility of—Board of *Revenue.*—In a suit for *khas* possession on the ground that the defendants were trespassers on the death of their ancestor, the grantee, the plaintiff relied on office copies of grants kept in the course of business of the grantor's sherista.

Held, that no notice to the defendants to produce the original was necessary to render secondary evidence admissible as the defendant from the nature of the case, must have known, that they would be required to produce the originals.

Where judgments not *inter partes* were filed to show that similar grants were resumed by the grantor or his heirs on the death of the grantee.

Held, they are admissible in evidence under the provisions of section 13 of the Evidence Act.

Board's letter dated the 26th November 1792 showing that jagirs are resumable on the death of the grantee is inadmissible in evidence. **Syed Mahammad Khan v. Maharaja Nam Narain 7 C L J 90.**

Board of Revenue-Rules of.

See (1) Pre-emption—Construction of Wajib-ul-arz.

(2) Pre-emption—Right of Pre-emption.

Board of Revenue-Sanction of.

See Partition—Miscellaneous Cases.

Bombay Act XVI of 1838 (Suits, Bombay).

Notes—S. 1 (3) rep., *Bom* Act II of 1866, ss 1 (1), 5 rep. in pt, Act XIV of 1870; s. 6 And formal words in ss. 2 to 5 rep, Act XVI of 1874; s 1 (1) rep. in pt., Act X of 1876; s 1 (2) rep, *Bom* Act III of 1876; Declared in force throughout the Presidency of Bombay, except as regards the Scheduled Districts, Act XV of 1874, s. 5.

Bombay Act XIX of 1838 (Coasting Vessels).

Notes—S. 1 rep., Act XIV of 1870; Formal words in ss. 2 to 14 rep, Act XVI of 1874; ss. 9, 15 rep, ss. 12, 13 rep. in pt., Act XII of 1870; Declared in force throughout the Presidency of Bombay, except as regards the Scheduled Districts, Act XV of 1874, s. 5.

Bombay Acts (Act XVI of 1838)-*Concld*

Bombay Act (XX of 1839) Levy of Haqqs, etc,, Bombay).

Notes—Formal words in ss. 1, 2, 3 rep.. Act XVI of 1874; s. 3 am., Act IV of 1894; Declared in force throughout the Presidency of *Bombay*, except as regards the Scheduled Districts, Act XV of 1874, s. 5.

Act XV of 1840 (Agents of Foreign Sovereigns, etc., Bombay).

Notes—Rep. in pt., Acts XVI of 1874; Declared in force throughout the Presidency of Bombay, except as regards the Scheduled Districts, Act XV of 1874, s. 5.

Act XIX of 1844 (Abolition of Town duties, etc., Bombay).

Notes—Declared in force throughout the Presidency of Bombay, except as regards the scheduled Districts, Act XV of 1874, s. 5.

Bombay Act XVIII of 1848 (Nawab of Surat).

Notes—Rep. in pt, Act XIV of 1870; Act XII of 1891.

Bombay Act XI of 1852 (Titles to Rent-free Estates, Bombay).

Notes—Rep. in pt., Act XVI of 1874; Act X of 1876; Act IV of 1894; Application declared, *Bom.* Act V of 1879, s. 127.

1—Rules framed under—The Shet Sanadi discharged by Government without any fault on his part—The lands continued to him on payment of full survey assessment.—The new Shet Sanadi remunerated—The Shet Sanadi lands converted into ryotwari holding—Resumption of lands by Government.

In 1865 a Shet Sanadi on discharged

Bombay Acts (Act XI of 1852)-*Concld.*

without fault from his office by Government was under the rules then in force, allowed to remain in possession of the Shet Sanadi lands, but full survey assessment was imposed therein. The defendant No. 2 who was appointed the new Shet Sanadi was remunerated from the extra assessment levied upon the Shet Sanadi lands. In 1905, the Government resumed the lands and handed them over to the defendant No. 2. *Held* (1) that the order passed and the action taken, under the rule by the Government, had in law the effect of converting the lands from a Shet Sanadi Vatan into a ryotwari holding and investing the holder of the land with the rights of an ordinary occupant entitled to it so long as he paid the survey assessment. (2) That the defendant No. 2 had held the office of Shet Sanadi independently of the lands in dispute; and all that was done in 1865 was his remuneration for that service in a way increased and the enhanced amount was made payable, not from the lands in dispute, but out of the assessment payable to Government by the occupant. (3) That that was an arrangement between defendant No. 2 and Government which could not prejudice the rights of the proceedings adopted by the Collector in 1905 were on the supposition that what was done in 1865 had the effect of continuing the land in dispute as one reserved for Shet Sanadi service but that was not its effect and the proceedings in *question were ultra vires* of the Collector. **Yellappa Ranappa Kuri v Marengappa Chareadappa. (1910) 12 Bom L R 577.**

Bombay Act II of 1863 (Exemptions from Land Revenue in territories subject to Act XI of 1852).

Notes—Rep. in pt., Act X of 1876; Act XII of 1876; rep in pt,and am, Act XVI of 1895; Bom Act III of 1886; Supplemented, and application restricted (Locally), Bom Act IV of 1868; Application Declared, *Bom* Act V of 1879, s. 127.

Bombay Act VI of 1863 [Public Conveyances (Bombay Town Suburbs and Harbour].

Notes—Rep. in pt., Act XII of 1873; Act XII of 1876; Bom Act III of 1886; Bom Act III of 1888; Am., Act XVI of 1895; Bom Act V of 1887.

Bombay Act VII of 1863 Exemptions from land-revenue in territories not subject to Act XI of 1862.

Notes.—Rep. in pt., Act XII of 1873; Act X of 1876, Act XII of 1876 (Locally), *Bom.* Act V of 1879, rep. in pt. and am, *Bom.* Act III of 1886; am, Act XVI of 1895; Supplemented, and application restricted (Locally), *Bom.* Act IV of 1868; Application declared, *Bom* Act V of 1879, S. 127.

Bombay Act II of 1863.

See (1) Service Tenure.
(2) Settlement—Effect of Settlement.

Bombay Acts II of 1864 (Civil and Criminal Justice, Aden).

Notes:—Rep in pt Act XVI of 1891.

—V of 1864.

See (1) Mamlatdars Courts Act, 1864.
(2) Mahomedan Law, Endowment.

Bom. Act I of 1865.

See Bombay Survey and Settlement Act, 1865.

—II of 1865.

See *Bombay* Municipal Act, II of 1865.

—III of 1865.

See (1) Contract—Wagering Contract.
(2) Evidence—Parol Evidence—Varying or Contradicting written Instruments.
(3) Promissory Note.

1—Operation of Act—Contract Act (IX of 1872).—

Bombay Act III of 1865 is still in force, and has not been repealed by the Contract Act. 9 Bom 358, followed. **Perosha Cursetji v Manekji Dossabhoy. 22 Bom 899.**

Notes:—Fol: 1 Bom L R 263. Ref: 5 Bom L R 503; 768. Dist: 24 Bom 227.

—IV of 1865.

See Subsistence Money.

Bombay Act II of 1866.

See Jurisdiction of Civil Court.

1—S. 1, cl. (2)—Act, Interpretation of—Three miles—*Held* that the words "three miles" in Bombay Act III of 1866, s. 1, cl. 2, must be construed as three miles measured in a straight line along the horizontal plane, that being the most convenient meaning of the words, and the most capable of being ascertained.

Reg. v Bhikoba Vinoba. 4 B H C 9.

Notes:—Ref: Rat Un, Cr. 138.

2—S 6—Public Conveyance—Sealed pattern—Police Commissioner—License—Refusal to grant license.

The Commissioner of Police has no power to refuse a license to a public conveyance on the ground that the pattern on which it is built is obsolete or open to objection unless the Commissioner is able to say that in the particular instances before him he has satisfied himself that the defects appearing in the pattern have been reproduced in the conveyance in question, which renders the same unfit for the conveyance of the public. Confirming on appeal. 4 Bom L R 768.

Gell v Taja Noora 5 Bom L R 132 = 27 Bom 307

Notes:—Ref: 28 Bom 25.

See also 4 Bom L R 768.

Bombay Act VII of (1866)

See—Hindu Law—Debts.

IV of 1867.

See (1) Bombay Municipal Act II of 1865. Case No. (1). 9 Bom 217.

(2) Right of suit—Municipal Offices, suits against.

Bom. Act IV of 1868.

See Bombay Survey and Settlement Act Amendment Act.

Bom. Act III of 1869.

See Bombay Local Funds Act, 1869.

—XIV of 1869.

See Bombay Civil Courts Act.

Bombay Act XV of 1871 (Broach Thakur's Relief Act.)

Notes:—Rep Act XIV of 1877.

Bombay Act V of 1872 (Jurisdiction over Sindh).

Notes:—Am Act XX of 1872 ; Act XII of 1891.

—III of 1872.

See Bombay Municipal Act, 1872.

Bom. Act I of 1873.

See Bombay Port Trust Act, 1873.

—VI of 1873.

See Bombay District Municipal Act.

Bom. Act I of 1874

See Bombay Tramways Act.

—III of 1874.

See Cases under Hereditary Offices Act (Bombay).

Bombay Act III of 1875 (Tolls on Roads and Bridges).

Notes:—Rep in pt Act XVI of 1895 ; Act II of 1901 ; Bom Act III of 1886 ; (except in Aden and the City of Bombay), Bom Act I of 1884 ; Am Bom. Act V of 1881; (except in Aden and the City of Bombay), Bom Act I of 1884, S. 77.

—III of 1875.

See Bombay Tolls Act.

Bom. Act II of 1876.

See Land Revenue.

—III of 1876.

See Mamlatdars' Courts Act.

Bombay Act XIV of 1877 (Broach and Kaira Incumbered Estates).

Notes:—Rep in pt Act IV of 1894 ; rep in pt and Am Act XXI of 1881.

Bom. Act IV of 1878.

See Bombay Municipal Act.

Bombay Act V of 1878

See Bombay Abkari Act.

Bom. Act V of 1879 (Land Revenue),

See Bombay Land Revenue Act.

—VI of 1879.

See Bombay Port Trust Act.

—VII of 1879.

See Bombay Irrigation Act.

Bom. Act I of 1880.

See Khoti Settlement Act.

—V of 1881.

See Bombay Tolls Act, Amendment Act.

—II of 1884.

See Bombay District Municipal Act, 1884.

Bom. Act III of 1886.

See Bombay General Clauses Act.

—V of 1886.

See Hereditary Offices Act Amendment Act.

Bom. Act III of 1888.

See Bombay Municipal Act, 1888.

—VI of 1888.

See Gujarat Talukhdars Act.

Bom. Act II of 1890.

See Bombay Salt Act.

1—S. 6, cl. (2)—Non-recognition of adoption —Provision for benefit of Government only.—

The provision in Bombay Act II of 1863, s. 6, cl. 2, as to the non-recognition of adoption by any Civil Court, relates only to the question of the assessability of lands when raised between Government and a claimant of exemption. It is not open to a party to rely upon a provision of which Government only is entitled to take advantage.

Vasudev Anant v Ramkrishna and Shivram Narayan. **2 Bom 529.**

—s, 8, cl. (3)

See (1) Endowment.
(2) Hindu Law—Endowment—Alienation of Endowed Property.

Bombay Act III of 1890.

See (1) District Judge, Jurisdiction of.
(2) Jurisdiction of Civil Court—Rent and Revenue Suits—*Bombay.*

—VI of 1890.

See Master and Servant.

—VII of 1890.

See (1) Bombay Summary Settlement Act.
(2) Cotton Frauds Act.
(3) Magistrate, Jurisdiction of—Special Acts—Bombay Act IX of 1863.

Bombay Act IV of 1903 (Bombay Land Record-of-rights).

Notes—S. 8 am Bom Act IV of 1905.

Bombay Abkari Act V of 1878.

Notes:—Rep in pt Act XVI of 1895 ; rep in pt and am Act III of 1886 ; Am Bom Act III of 1892 ; Bom Act V of 1901 , S. 3 am Bom Act I of 1903 ; S. 18-A am; Bom Act III of 1905 ; S. 45 am; Bom Act IV of 1905.

1—Ss. 14, 20, 64, 65, 66, and 67.—Tree—Toddy producing tree.

The words "any tree" in section 14 and "every toddy-producing tree" in section 20 of the Bombay Abkari Act V of 1878, mean all trees in the Bombay Presidency to which the Act applies, from which toddy is drawn or produced, and not merely those in regard to which no special rights of drawing toddy previously existed.

Ardesir Jehangir v The Secretary of State for India. **6 Bom H C R 398.**

2—Attachment and sale of country liquor—Collector's permission—Abkari Act (Bom Act V of 1878), S. 16.

Country liquor is not exempt from attachment and sale in execution of a money decree passed by a Civil Court. It is saleable property and is covered by the first part of S. 266 of the Civil Procedure Code, 1882.

The Collector's permission is necessary to the sale of country liquor (S. 16 of the Bombay

Bombay Acts (Abkari Act V of 1878) S. 16-*Concld.*

Abkari Act), but it is not necessary to attachment so far as the attachment can be made without removal. **Purshottam Narayan v Balvant Babaji. 10 Bom L R 13=32 Bom 157.**

—s. 24.

See Bombay Revenue Jurisdiction Act (X of 1876) Case No (1) **9 Bom 462.**

3—S. 24—Juice of toddy-producing tree—Land revenue.—Per Birdwood, J.

The expression "land revenue" as used in Act X of 1876 does not include either the duties leviable, under Regulation XXI of 1827,on the manufacture of spirits or the taxes on the tapping of toddy trees, the levy of which in certain districts was legalized by s, 24 of the Bombay Abkari Act, No V of 1878. A farmer of duties on the manufacture of spirits is not authorized to levy a duty on any juice in trees, either under Regulation XXI of 1827, or Act X of 1876, or Bombay Act V of 1878. Juice in toddy-producing trees is not spirit, which includes toddy in a fermented state only. **Narayan Venku Kalgutkar v Sakharam Nagu Koregaumkar 9 Bom 462.**

Notes—Fol: 30 Bom 764. Ref: 20 Bom 803.

4—S.39-The responsibility of a farmer of abkari revenue for acts introduced by his applying under s. 39 of the Bombay Abkari Act to the Collector to recover an amount due to him from a person who has drawn toddy, is not affected by the irresponsibility of the Collector under S 67 of the Act. The Collector is not a necessary party to a suit against the farmer to recover money illegally levied at his instance. *Quœre*, whether any exercise of discretion by a Collector could supersede the jurisdiction of the courts on the question whether the place whereon toddy had been drawn was or was not within the area subject to his authority. **Narayan Venku Kalgutker v Sakharam Naga Korgavkar. P J (1887) 98 =11 Bom 519**

—s. 45.

See Contract Act, s. 23—Illegal Contract—Generally. **12 Bom 422.**

5—S. 53—Principle to be applied to case under the Act—Mens rea——Master's liability for servant's defaults.

Bombay Acts (Abkari Act V of 1878) S. 53-*Concld.*

The principle with regard to Abkari Act, 1878, is that licenses to keep shops are only granted to persons of good personal character, and it is obvious that the object of so restricting the grant of licenses would be defeated if the licensed person could. by delegating the control and management of the house to another person who was altogether unfit to keep it, free himself from responsibilty for the manner in which the shop was conducted.

Mens rea is not required where the acts prohibited by a statute are not criminal in any sense but are prohibited in the public interest under a penalty. This principle is substantially adopted in S. 53 of the Abkari Act with this exception, that it is open to the license holder, according to the section, to prove facts to show that he is not liable for his servant's defaults or acts.

Emperor v Waman Dhanraj. 10 Bom L R 171.

6—S. 55—Construction of Statutes—"Or" read "nor"—Order of confiscation.

S. 55 of the Bombay Abkari Act (V of 1878) provides that "no order of confiscation shall be made until the expiration of one month from the date of seizing the things intended to be confiscated or without hearing any person who claims a right thereto, and the evidence, if any which he produces in support of his claim." Certain casks of vinegar belonging to the plaintiffs were seized by the Collector of Bombay on the 5th November 1891, and an order of confiscation was made on the 17th November 1891. The order was made after hearing the plaintiffs. *Held* that under the provisions of the Abkari Act, s. 55, the Collector could not make a valid order of confiscation before the expiration of one month from the date of seizure. **Framji Manekji Punjaji v Secretary of State for India. 17 Bom 154**

Bombay Bhagdari Act V of 1862.

See Attachment—Subjects of Attachment—Buildings and Houses Materials. Case No (29). **12 Bom 363=21 Bom 588.**

1—Bhagdari Tenure—Partition among narvadars, bhagdars.

Bombay Acts (Bhagdari Act V of 1862)-*Contd.*

There is nothing in Bombay Act V of 1862 which debars a Civil Court from making a decree for the partition of narvadar land among the bhagdars, even though such partition may cause a further division of recognized sub divisions of bhags. **Veribhai v Ragabhai 1 Bom 225**

Notes:—Ref: 13 Bom 263

2.—Dismemberment of bhag—Narva-Bhag-Alienation previous to Bombay Act V of 1862.

The principal object of Bombay Act V of 1862 is to prevent the further dismemberment of bhags or shares in bhagdari villages: it renders null and void any future alienation of any portion of a bhag other than a recognized subdivision, but it does not invalidate previous alienations A sale of a portion of a bhag, previously to the passing of Bombay Act V of 1862 amounts to a dismemberment of the bhag and what remains in the bhagdar's hands continues to be a complete bhag, while the portion separated from it becomes a new bhag. **Bhai Shanker v Collector of Kaira. 5 Bom 77.**

Notes:—Dist 8 Bom 596.

3.—Purchase by stranger of building erected on gabhan.

In a suit brought by a bhagdari,or shareholder in a bhagdar village, to recover possession of a gabhan, or building-site, and a vada, or homestead appurtenant to his bhag,from a stranger who had purchased at an auction-sale a building erected on the gabhan by a third person with the bhagdar's consent.—*Held,*(reversing the decision of the District Court) that the purchaser of the building had only acquired a right to remove the building materials and that he had no right,by reason of his having purchased the building,to continue, without the bhagdar's consent, in possession of the gabhan and vada, which by the Bhagdari Act could not be alienated apart or separately from the bhag or some recognized subdivision thereof.

Pranjivan Gavan v Jaishankar Bhagvan 4 B H C A C 46.

4.—In 1860, prior to the coming into force of the Bombay Bhagdari Act V of 1862, W, a recognized holder of a bhag in the Broach District, divided it equally among his four sons, A, B. C, and

II C. C. 46

Bombay Acts (Bhagdari Act V of 1862)-*Contd.*

D, who immediately entered into possession of their respective shares. In 1876, A and C Sold their shares to the plaintiff B and D protested against the sale as being a dismemberment of a bhag, and the plaintiff was called upon by the Collector, under Sec 3 of the Act, to deliver the deed to be cancelled, but declined to do so, and applied that the sale should be recognized. By an order. the Collector refused to grant his prayar. The plaintiff, therefore, brought a suit to set aside the order. Both the lower Courts rejected his claim. On appeal to the High Court.

Held, confirming the decree of the lower Appellate Court, that the sale to the plaintiff having been effected after the Bombay Bhagdari Act (V of 1862) had come into force was void.

A bhag as contemplated by the Act would seem to mean an aliquot share of a village subject to an aliquot portion of the total land-tax imposed on it, and not any sub-division by partition or otherwise.

Gulab Narotam v The Secretary of State for India P J (1884) 166=8 Bom 596.

Notes:—Ref: 11 Bom 469; 13 Bom 203.

5—A ryotwari village declared bhagdari village by Government for administrative purpose —Bholav village—The change of tenure not to affect the ordinary rules of Hindu Law applying to the parties—Special custom regulating succession of bhagdari lands not applicable to such charge in tenure.

Prior to the year 1833 A. D, the village of Bholav in the Broach District was an ordinary vighotia village. It was declared a bhagdari village in 1833 for reasons of administrative convenience.

Held, that the change imposed on the village ab extra for mere administrative convenience, did not carry with it the abrogation of the ordinary principles of Hindu Law by which the parties were governed before 1833; in other words, the change was never intended, and did not operate, to upset the existing law of succession, so as to confer on agnates thenceforth rights which they had never possessed, and to deprive daughters and their sons of rights which till then they had always enjoyed.

Lalu Dayal v. Lalu Gopal. 12 Bom L R 573 =7 Ind Cas 659.

Bombay Acts (Bhagdari Act V of 1862)-*Contd.*

6—Bhagdaree Act (Bom Act V of 1862)-Bhagdar—Permanent tenant—Alienation of fruit of the trees on land—Land Revenue Code (Bombay Act V of 1879), Sec. 83—Permanent tenant, position of.

There is nothing in the Bhagdaree Act (Bom Act V of 1862) to prevent a permanent tenant of a Bhagdar from alienating the fruit of the trees on the land of which he is a tenant, in the same way as he could alienate the crops or grass upon such land.

The position of a tenant-of a Bhagdaree land—who is presumed to be permanent tenant under S 83 of the Land Revenue Code, 1879, is not affected in any way by the prohibition contained in the Bhagdaree Act against alienation. 24 Bom 51 **Ref.** **Nahanchand v Kekhushru, 9 Bom L R 50=31 Bom 183.**

7.—Sale of portion of bhag before Act.

A sale of a portion of a *bhag* previous to the passing of Bombay Act V of 1862 constitutes what remains in the *bhagdar's* hands a distinct *bhag*, which, after the passing of the Act, could be alienated in its entirety. **Bhaktidas v Manchersha. 1887 P J 66.**

8.—Alienation after Act in force.

R, on whom certain land forming part of a bhag had devolved by marriage and inheritance before the Act came into force alienated it to the plaintiff after the Act came into force.

Held, that the alienation being after the Act came into force fell within its operation. 8 Bom 596 followed, **Rahim v Bai Gulab 1890 P J 5.**

9.—Subdivision of recognized bhag not defined—Assumed from Collector's records—Onus probandi—Unrecognized subdivision

There is no definition in the Act itself of the expression recognized subdivision of a *bhag*. But the Collector's records show what portions of a *bhag* are such, and the Legislature had that circumstance before it when S 3 was enacted. There being a presumption in favour of the legality of an act, it lay upon the defendant, by production of records from the Collector or otherwise, to prove strictly that the deed of sale relates to an unrecognized subdivision. **Suleman v Abraham 1888 P J 9.**

Bombay Acts (Bhagdari Act V of 1862) S, 1-*Contd.*

10.—Ss 1 and 2-Sale of unrecognized portion of a bhag-Application by Collector to set it aside.

N held an unrecognized fourth share in a certain bhag. R obtained a decree against N, and in execution of it sold his right, title, and interest in the Bhag on the 28th February 1876. It was purchased by B. The sale was subsequently confirmed, and B was put in possession of a portion of the land. On the 30th September 1880 the Collector applied to the Court to set aside the sale on the ground that it was illegal under Bombay Act V of 1862. It appeared that the Collector did not know till November 1877 that the land sold was an unrecognized portion of the bhag, and not the whole of it. *Held* that the sale might be set aside under the provisions of s 2 of Act V of 1862, notwithstanding its confirmation and the subsequent delivery of possession. *Quære*—Whether any provision of limitation applied to such application under the Bhagdari Act? **Collector of Broach v Rajaram Laldas 7 Bom 542.**

Notes.—Fol 7 Bom 546; Ref 12 Bom 203.

11.—In 1871 the right, title and interest of three out of four brothers, owners, of a bhag in the Broach district, was sold by the Civil Court and purchased by defendants. They were put in possession of the whole bhag, which was transferred to their names in the revenue book. In 1878 plaintiff purchased the whole bhag from the aforesaid three brothers and the widow of the fourth, and in 1883 brought this suit to obtain possession of the whole. *Held* that the suit was maintainable, as s 2 of Bombay Act V of 1862 contains no provision barring the right of any person prejudicially affected by an illegal sale from suing to set it aside. *Held* further that the sale of an unascertained bhag is not illegal under s. 1 of the Act, and the defendant having obtained peaceable posssession of the whole bhag, could not be evicted by plaintiff as purchaser of the whole bhag. **Bai Kuvarbai v Bhagwan Ichharam P J (1888) 115=13 Bom 203.**

Notes:—Disapp: 15 Bom 172 (F B).

Bombay Acts (Bhagdari Act V of 1862) S. 1-*Contd.*

12—SS. 1 and 3—San mortgage—Bhagdari and narvadari tenures—Mortgage before passing of the Act—Execution of decree—Operation of Act.

The plaintiff in 1874 sued on a san mortgage, dated 15th November 1861,—*i. e.*, five months before the passing of Bombay Act V of 1862, —to recover a sum of money by sale of the mortgaged property, which formed part of a bhag in a bhagdari village, which bhag the defendant had purchased at a Court's sale subsequent to the date of the mortgage. *Held* (assuming s. 1 of the Act to apply) that it does not bar the right of action: that, therefore, a Civil Court would be bound to make a decree, even though it might anticipate that s. 1 of the Act would stand in the way of the execution of that decree. *Semble*—That, after a decree has been passed against a portion of a bhag, the Collector might recognize such portion as a division of the bhag, if assured that justice required that the decree should be executed. *Held*, further, that no retrospective operation can be given to s. 1 of the Act, so as prejudicially to affect existing rights. The words "attachment or sale by the process of any Civil Court," used therein, were intended to prevent attachment and sale under simple money-decrees, and not to prevent the sale of mortgaged property in satisfaction of a valid mortgage. **Ranchoddas Doyaldas v. Ranchoddas Nanabhai 1 Bom, 581.**

Notes:—Dist: 22 Bom. 737. Ref: 6 Bom. 168 F. B. 193 F. B.

13.—Under Section 1 of Bom Act V of 1862, and seizure, sequestration, attachment, or sale by the Civil Court of a portion of a Bhag is null and void. Where, however, a portion has been sold, the Collector, should proceed under sec 2 and not under sec 3 No law of limitation applies to proceedings by the Collector under the Bhagdari Act. **The Collector of Broach v Desai Raghunath. P J (1883) 314=7 Bom 546.**

Notes:—Ref 13 Bom 203; 6 Bom L R 428; 28 Bom 399; 7 Bom L R 186.

14—Ss 1, 5—'Homestead'-Superstructure not liable to attachment.

The superstructure of a house belonging to a *bhag* in a bhagdari village is exempt from attachment. Per Farran, C. J. and Jardine, Parsons, and Ranade, JJ, (Candy J. dissentient). Meaning of the word homestead discussed. **The Collector of Broach v. Venilal. 1896, P. J., 23.**

Bombay Acts (Bhagdari Act V of 1862) S. 1-*Concld.*

15—S. 2—Sale of a portion of a bhag in execution of a decree—Process for sale—Collector's right to get the process quashed.

The appellant was the mortgagee of a portion of a bhag under a mortgage dated 1880, and in a suit brought upon the mortgage obtained a decree for sale of the mortgaged property. An attachment was issued, and an order for sale was made. Thereupon the Collector applied, under s. 2 of Bombay Act V of 1862, to set aside the attachment and order for sale. *Held* that the mortgage of a portion of a bhag was unlawful under s. 3 of the Act, and a process having been issued for the sale of such portion, the Collector was entitled to have it quashed. 1 Bom., 581, distinguished. **Narbheram v Collector of Broach 22 Bom 737.**

16—S. 2-Execution—Sale in execution—Sale, process for, in execution under mortgage of portion of Bhag—Collector, right of, to have the process quashed—Mortgage of portion of Bhag—Mortgage invalid—Bhagdari Act V of 1862 Section 2.

Under Section 2 of the Bhagdari Act V of 1862, the Collector is entitled to move the Court to quash a process issued for the sale of a portion of a *bhag* in satisfaction of a mortgage debt thereon. The remark to the contrary in 1 Bom 581 must be confined to a mortgage made before the Act was promulgated.

The fact that a mortgage, though of a portion of a *bhag*, other than a recognised sub-division, is a mortgage of the whole remaining interest of the mortgagor by reason of a prior sale, similarly illegal, of the rest of his interest in that *bhag*, does not validate the mortgage. **Narbheram v The Collector of Broach P J 1897 P 155.**

Bombay Bhagdari Act V of 1862 S. 3

See (1) Bhagdari Act
(2) Mortgage—Construction of Mortgages
(3) Possession—Adverse Possession

17—S 3-Bhagdari and narvadari tenures, Sale of unrecognized portion of—Civil Procedure Code, 1859, s 213—Undivided share Sale of—Partition

The sale of a portion of a bhag or share in a bhagdari or narvadari village, other than a recognized subdivision of such bhag or share, or of a building site appurtenant to it is illegal under s 3 of Bombay Act V of 1862, and a judgment creditor cannot, in execution of his decree evade the law by describing his debtor's separate portion in a bhag as his right, title and interest in the whole bhag,' for, under s. 213 of the Code of Civil Procedure the creditor is bound to specify the debtor's share or interest to the best of his belief, or so far as he has been able to ascertain the same. *Quære*—If the sale of an undivided share in a bhag be lawful, but even if it be, the purchaser cannot insist upon the possession of any particular portion of the bhag as representing the share of his debtor All he can do is to sue for partition But *quære* if such partition could be made. **Ardesir Nasarvanji v Muse Natha Amiji** 1 Bom 601

Notes.—Fol 7 Bom 542 Ref 13 Bom 203 15 Bom 172 1 B

18—S. 3-Bhagdari tenure—Undivided share of a bhag, Alienation of.

The alienation of an undivided portion of a bhag, or share in the bhag, to a person who is not a bhagdar, is void under s 3 of Bombay Act V of 1862. Birdwood J, dissented. **Parshotam Bhaishankar v Hira Parag** 15 Bom 172

19—S 3.—Alienation of part of Bhag

Where the owner of an entire *bhag* succeeds by inheritance to a share of a survey number, which the Revenue authorities proceed to incorporate with the original *bhag*, this will not prevent the owner from alienating the original *bhag*. Such an alienation is not contrary to the provisions of S 3

There is nothing in that Act which empowers the Revenue authorities to alter or add to existing recognised sub divisions. Much less can the inference be deduced from that Act that the Revenue authorities are empowered to add the property of A to that of B, so as to pervent the amalgamated properties of A and B from being liable to the ordinary incidents of property i. e, sale, mortgage or alienation **Amanji Isa v Javher** 1880 P J 41.

20—S 3—Collector—Adverse possession—Limitation

Under S 3 of the Bhagdari Act, Collector can act at any time and the plea of adverse possession cannot prevail against any order that he may make The law of limitation does not govern the Collector's action under the section **Dala v Parag** 4 Bom L R 797.

Notes—Fol 6 Bom L R 428, 28 Bom 399 Dist: 10 Bom L R 1128, 33 Bom 116

21—Bhag—Narva—Sub divisions of Narva—Compromise—Collector's action—Appeal to Commissioner

Where the parties to a suit arrive at a compromise the effect of which is that a narva is split up into two portions over one of which one party gives up his right in favour of the other and the division so effected is not a recognised sub division the compromise is void under Ss. 3 and 5 of the Bhagdaree and Narwadaree Act, 1862

Where a transaction is not lawful under S. 3 (1) of the Act, the Civil Court is bound to adjudicate upon it independently of the question whether the Collector interferes or not under S. 3 (2) of the Act

Bombay Acts (Bhagdari Act V of 1862) S. 3-*Contd.*

Bombay Acts (Bhagdari Act V of 1862) S 3-*Contd.*

An appeal from an order passed by the Collector under S 3 of the Bhagdaree and Narwadaree Act lies to the Commissioner

The Collector can under S 3 of the Bhagdaree and Narwadaree Act take action at any time and the plea of adverse possession cannot prevail against any order that he may make

Jethabhai v Nathabhai 6 Bom L R 428=28 Bom 399

Notes —Dist 10 Bom L R 1128 33 Bom 116

22—S 3—Bhag—Sub divisions of a Bhag—Limitation

Possession, acquired under an alienation made in contravention of S 3 of the Bhagdari Act, 1862, can become adverse and bar a suit for recovery by the individual alienor or his representatives in interest (4 Bom L R 707 and 28 Bom 398=6 Bom L R 428, Dist, and (1879) 4 App Cas 324 Ref) **Adam Umar Sale v Bapu Bavaji 10 Bom L R 1128=33 Bom 116=1 Ind Cas 663**

23—S 3—Bhag—Unrecognized sub division of a bhag—Alienation prohibition against—Refund of money—Contract Act (IX of 1872) S 65.

The prohibition against alienation of an unrecognized sub division of a bhag, provided by S 3 of the Bhagdari Act 1862 applies to the person in possession of the bhag though he may not be the bhagdar

Where an alienation is declared to be void under S 3 of the Bhagdari Act, 1862, an order for refund of the consideration money which has passed under the impeached transaction may be made

S. 65, Contract Act, 1872 deals with two cases, first, an agreement which is discovered to be void, and, secondly, a contract which becomes void. There is clearly a distinction between the agreement in the first case and the contract in the second case The first deals with agreements void *ab initio*, the second with contracts which become void after they have become contracts.

Jijibhai Laldas v Nagji Gulab 11 Bom L R 693=3 Ind Cas 761.

Bombay Acts (Bhagdari Act V of 1862) S. 3 *Concl.*

24—Act (V of 1862) S 3—Resjudicata Plea of resjudicata prevails even where its effect is to sanction what is illegal—*Bhagdari* and *Narwadari* Act (Bombay Act V of 1862), S 3

A plea of estoppel by *resjudicata* can prevail even where the result of giving effect to it will be to sanction what is illegal in the sense of being prohibited by Statute **Chhaganlal Kishordas v Bai Harkha 11 Bom L R 345=33 Bom 479=2 Ind Cas 530.**

Bombay City Improvement Trust Act IV of 1898.

Notes — Amdt and am Bom Act IV of 1901 S 18 (11) confirmed and supplemented Act XIV of 1904 S 40 (4) am Bom Act III of 1907, when notified ss 47 (1) 50 am Bom Act II of 1908

1 The City of Bombay Improvement Trust —Acquisition of the property—Amount of compensation—Scheme of development—Rent capitalized at a given number of years purchase—Allowance for the risk attendant upon the scheme of development

In fixing the valuation of a property acquired by the City of Bombay Improvement Trust, the tribunal of appeal devided it into two categories, the one of which was regarded as fully developed and was valued at 16½ years purchase while the other that is the position lying at the back was taken as capable of further development, and was estimated at 16 years purchase The Scheme of development that was accepted provided for the erection of 4 blocks of chawls running practically at right angles to the front premises, and according to the scheme these chawls were to have three upper floors and the ground floor was to be used for godown With regard to this, in appeal to the High Court, the parties limited their contentions to three points (1) Whether the Tribunal ought to have allowed four upper floors to the hypothetical chawls thereon, (2) whether the Tribunal was wrong in allowing 16½ and 16 years purchase, and (3) whether sufficient allowance was made by the Tribunal for the risk attendant upon a scheme of development such as that adopted by it as the basis of its award:

Held (1) that, it could not be said that a scheme of development involving four upper floors was so obvious that it would enter into the

Bombay Acts (City Improvement Trust Act IV of 1898-*Contd.*

calculations of an intending purchaser and influence his offer; and that there were no materials that would justify the High Courts upholding the contention that, contrary to the Tribunal's conclusion four upper floors should be allowed.

(2) That the amount of purchase fixed by the Tribunal was fair and reasonable; for the difference between the 16½ years purchase for the front and 16 years purchase for the back was due to the allowance of a 2 years' rental as a reward for enterprise and a compensation for risks, the purchase having been treated as a 6 per cent. investment,

(3) That the allowance made by the Tribunal at 2 years' rental for the risk attending upon the proposed scheme of development was adequate. **Anandrao Vinayak v Secretary of State.** **7 Bom L R 580=29 Bom 565.**

2.—City Improvement Trusts Act—Tribunal created by no Court—Provincial Legislature, power of, to create new courts or to confer jurisdiction on High Court.

The tribunal of appeal constituted by the city of Bombay Improvement Act 1898 is not a Court of justice. The High Court of Bombay has no appellate or revisional jurisdiction over the decision of the Tribunal of Appeal, except the qualified appellate jurisdiction provided by the Act itself.

The notice of suit prescribed by s 424 of the Civil Procedure Code, is necessary even when the remedy sought in the action is only an injunction.

The Court has jurisdiction to grant an ex parte injunction; but in exercising the discretion the greatest care should be exercised.

The tribunal created by Bombay Act IV of 1895 is not a court, but a body free from the control and superintendence of the High Court except so far as its intervention by way of appeal might be sanctioned by its president. *Quære*:—Whether the creation of a court is an unauthorized invansion of the Crown's prerogative or whether the creation of a new court within the limits of the Presidency is within the

Bombay Acts (City Improvement Trust Act IV of 7898-*Contd.*

Legislative powers of the Governor in Council. Bombay Act IV of 1898 being a local Act, cannot confer on the High Court any jurisdiction to deal with appeals from a tribunal created by itself, inasmuch as the power to so confer jurisdiction is with the Imperial Parliament and the Viceroy's Council only. **Hari v. Secretary of State for India.** **5 Bom L R 431=27 Bom 424.**

3—Acquisition of land with buildings thereon—Amount of compensation—Principles upon which the amount to be fixed—Civil Procedure Code (Act XIV of 1882), S 561—Cross-objections.

Section 48 (11) of the City of Bombay Improvement Act, does not provide for leave to appeal being granted to any individual, but for a certificate that the case is a fit one for appeal that is the whole case and not any particular part of it. The consequence of the grant of this certificate is that there shall be an appeal to the High Court from the award, or any part of the award and this must mean that there shall be a right of appeal, or to use the language of the Civil Procedure Code, that an appeal will lie to the High Court. And the respondent is entitled to object to the award in the manner provided by s. 561 of the Civil Procedure Code.

In calculating the amount of compensation to be awarded upon acquisition of lands, with buildings thereon, by the City of Bombay Improvement Trust, the rental should be the basis of calculation, so that after arriving at the net rental, what has to be ascertained is the rate of return investors in this class of property expect; for that serves to determine the number of years purchase it is proper to allow, after giving due weight to any special conditions that may affect the property advantageously or otherwise.

As to the contention that the property was at the date of the declaration capable of fetching a higher rental which was apparent from the fact that the rents of their property had been steadily rising for 16 years previous to 1899.

Held, that though for the purpose of this inquiry it was legitimate to have regard to the passed history of the rental, it could not be taken

Bombay Acts (City Improvement Trust Act IV of 1898-*Contd.*

for granted that enhancement would continue possible for ever, and still less that there was such a certainty of this as to make it a basis for fixing a higher purchase price.

As to the contention, that in arriving at the valuation the tribunal of Appeal following the Collector, had deducted 4 per cent in respect of water-tax, whereas the water supply to the premises was measured by meter and the average payment for water was Rs. 16 per annum:

Held, that the Tribunal was right in deducting 4 per cent, for water-tax from the rental.

The Collector allowed 20 years purchase as the value of the property. On appeal, the Tribunal took an average of the instances adduced before them and allowed the claimants 21-50 years purchase:

Held, that the striking of an average as done by the Tribunal might be a crude method of calculation; but it could not, on evidence be said that the claimants had been awarded too little.

Raghunathdas Gopaldas v Secretary of State. 7 Bom L R 569=29 Bom 514

Notes.—Ref: 10 Bom L R 931; 701.

4.—Tribunal of appeal—Jurisdiction to apportion compensation money among several claimants—Questions of title among claimants can also be decided.

The tribunal of Appeal constituted under the provisions of the City of Bombay Improvement Act, 1898, has the power to deal with and decide questions relating to the apportionment of the moneys payable as compensation. It has also the power to go into and decide the question of title raised by the claimants *inter se*.

Pandurang Bhiwaji v Gangaram Ganu. 14 Bom L R 22.

5.—Land acquisition—Market value of land-City of Bombay Improvement Act (Bombay Act IV of 1898), S. 49 (2)—Consolidation of references.

The Government of Bombay, acting on behalf of the Trustees under the City of Bombay Improvement Act, 1898, acquired a piece, consisting of nine parcels of land, belonging to J. The land was such that the whole piece consisting of the nine parcels formed in itself a valuable quarry. At the date of the notification, issued under the Land Acquisition Act, 1894, J was in unencumbered ownership of only one of the parcels the remaining ones being let on permanent leases as building sites. Between the dates of notification and acquisition, J bought out the interest of the tenant of one more parcel. The Collector dealt separately with the nine parcels, assessed the value of the plots on a rental basis and refused J's claim to receive compensation on a quarrying basis. At J's instance all the nine cases were referred to the Tribunal of Appeal. After the Collector had made his award and before the references came on for hearing, J bought out all the remaining tenants. At the hearing before the Tribunal of Appeal, J applied successfully that the references should be consolidated and that his claim for compensation on a quarrying basis should be allowed. On appeal by the Trustees:—

Held, (1) that the consideration was rightly allowed;

(2) that the land here had an adaptability value on the footing of its possibility as a quarry, but it was not a realised possibility, nor was it competent to J to convert it into a realised possibility by the expedient of buying out the permanent tenants after the Collector's award: that therefore, the land could not be assessed on a quarryable basis;

(3) That J was only entitled to the market value of the land in its existing character, plus a special allowance for its adaptability as a quarry at some future date.

Per Batchelor J.—The method contemplated by the Land Acquisition Act, 1894, is to ascertain first the market value of the land on the footing that all separate interests combined to self; and, then, to apportion or distribute the sum among the various persons found to be interested, (1908) 10 Bom L R 657 foll.

The market value of the land under acquisition has to be ascertained on the assumption that all separate interests combine, that is, the separate interests are taken to combine so as to give com-

Bombay Acts (City Improvement Trust Act IV of 1898-*Concl.*

plete title to the assumed purchaser and the acquiring body not so as to impress upon the land a character which it did not bear, or to give to it a value which it never had in the market

The 'market value of the land means the price which would be obtainable in the market for that concrete parcel of land with its particular advantages and its particular drawbacks both advantages and drawbacks being estimated, rather with reference to commercial value than with reference to any abstract legal rights

Per Heaton J.—In ascertaining compensation under the Land Acquisition Act 1894 the market value of the land to be acquired must be computed as a whole The City should estimate its value by what it would have fetched in the market at the date of the acquisition it should not give to the owner what it considers the land to be worth to the acquirer after acquisition

Taking the scope of the Land Acquisition Act 1894, and its words it seems that neither the method of ascertaining compensation by valuing separately each interest in the land nor the method of valuing the land as a whole and then apportioning to each person interested the share to which he is entitled, is excluded what is intended is a fair and reasonable estimate of the compensation to be awarded and this is to be arrived at by taking into consideration certain specified matters and excluding from consideration others The Act leaves a great deal to the discretion of the Collector and the Court and among st the other matters it leaves it to their discretion to ascertain the market value of the land by either of the two methods The Trustees for the Improvement of the City of Bombay v Jalbhoy Ardeshir Sett 11 Bom L R 674 33 Bom 483

Bom-City & Land Revenue.

1—S 8—Assessment—Specific limit Superior holder—Collector—Enhancement of assessment

A piece of land consisting of three plots was acquired by the Trustees of the Free Church of Scotland Mission from the Government. Of these, one plot of land was conveyed to the Mission Trustees "their heirs and assigns for ever"

Bombay Acts (City & Land Revenue Act) S. 8 *Cont'd.*

subject no doubt to a right of resumption but without any mention of assessment the other two plots of land were also conveyed to the Mission Trustees their heirs executors administrators and assigns for ever but in this case it was expressed to be 'subject to the payment of all taxes rates charges assessments leviable or payable in respect of the premises or anything for the time being thereon

On the 20th December 1867 an indenture was executed by the Secretary of State for India, as representing the Government, to the Mission Trustees It was thereby recited that the trustees, with the approval of Government, had resolved to sell the pieces of land and that the Government with a view to facilitating the sale had agreed to grant to the trustees all their revision and estate in the premises and that the trustees had agreed with Janardhan for the absolute sale to him of the pieces of land By the operative part of the same the Government granted all their revision and estate in the pieces of land to the trustees, their heirs & but subject to the payment of taxes rates charges, &c in respect of the premises

On the 16th January 1898 these lands were conveyed in purchase to Janardhan The parties to the conveyance were the Mission Trustees, the Secretary of State and Janardhan The deed recited that the Mission Trustees had entered into an agreement with Janardhan for the absolute sale of the pieces of land, and that the Trustee with the knowledge and consent of Government conveyed the same to Janardhan subject to the payment of all rates taxes, &c

Prior to the completion of the purchase Janardhan sought information as to what assessments were leviable in respect of the premises, when he was told by the Collector that the land would be assessed at the rate of nine pies per square yard no hint was given at the time that there would be a right to enhance the assessment in future

In 1903 the property became vested, under a partition in the plaintiff Janardhan's son Up to 1899 the fixed assessment of nine pies per square yard was paid and accepted

On the 24th August 1899, the Collector without making any inquiry of Janardhan as to the

Bombay Acts-(City & Land Revenue Act)-*Contd.*

circumstances under which the property was acquired from Government, increased the assessment to nine times its original amount

On the 26th September 1899 the plaintiff having regard to the terms of the Bombay City Land Revenue Act (Bom Act II of 1876) commenced the present suit for a declaration that he had a right in limitation of the right of Government to hold these lands for ever on the payment of the fixed assessment and that Government had no right to enhance the same.

On the 6th January 1900, a Resolution of Government was published ratifying what the Collector had done

Held, (1) that, under the circumstances of the case, a specific limit of nine pies per square yard per annum was established within the meaning of section 8 of the Bombay City Land Revenue Act and that the Government was bound to it, whether it be put on the ground of collateral contract or of estoppel.

(2) that the plaintiff was, therefore, entitled to the declaration sought

Dadoba v Collector of Bombay
3 Bom L R 603=25 Bom 714

Notes:—Ref 25 Bom 752.

2.—S 9—Settlement of assessment-Enhancement of assessment—Superior holder Notice.

The phrase "settlement of assessment" in s 9 of the Bombay City Land Revenue Act, 1876 does not by itself imply the necessity of prior notice to the superior holder before the assessment is enhanced The pharse means no more than that when the settlement is fixed the fact shall be communicated to the superior holder.

Vinayak v The Collector of Bombay
3 Bom L R 910=26 Bom 339.

3.—Acquisition of land-Encroachment—Collector-Assessment fixed in the beginning-Enhancement in assessment subsequently made by the Collector

The plaintiff's father acquired from Government a piece of land consisting of three plots, each of which was acquired at different times.

II C C. 47

Bombay Acts-(City & Land Revenue Act)-*Contd.*

The first plot was acquired in 1890 by a purchase from the Collector "at the rate of one rupee a square yard and ground rent at 30 pies per *burga* of 60 square yards per annum" The second plot was the result of an encroachment. The plaintiff's father, having encroached upon it by erecting steps and a gallery projecting from his house, was required by the Collector to remove them on his failure to do so, the Collector purporting to act under section 26 (2) of the Bombay City Land Revenue Act charged him with five times the value of the land and fixed an assessment of five times the ordinary annual land revenue on the plot and caused it to be entered in his name The third plot was bought from the Collector in 1885, on terms similar to those relating to the first plot.

Assessment over these lands was paid at the rates originally agreed down to 1899

On the 18th August 1899, the Collector sent a notice to the plaintiff's father that assessment over the lands was fixed at three annas per square yard

The plaintiff then brought this suit, under the Bombay City Land Revenue Act, for a declaration that he had the right, in limitation of the right of Government, to possess and hold the land at the rate originally fixed

Held, (1) that as regards the first plot, since the sale was expressly stated to be a ground rent of 30 pies per *burga* the rate should form the establishment of a specific limit to the assessment.

(2) that as to the second plot, the Collector having charged the maximum price and imposed the maximum assessment without reserving to himself any right, could not enhance the assessment

(3) that regarding the third plot, the reasonable inference from the circumstances was that as in the first so in the second purchase, the limit of the assessment was fixed

(4) That therefore, the enhanced assessment should be set aside

Jethabhoy v Collecter of Bombay.
3 Bom L R 621=25 Bom 659.

Bombay Acts-(City & Land Revenue Act)-*Concld.*

4.—S. 26 (2).

The meaning of S. 26 (2) of the Bom. City Land Revenue Act, 1876, is that the Collector can, if the encroacher so desire, permit him to acquire the property at the assessment named in the section; that is, in effect, that subject to the limitations imposed by the section, the Collector can sell the land, on which the encroachment has been made. **Jethabhoy v Collector of Bombay. 3 Bom L R 621= 25 Bom 652.**

Bombay Acts (City Municipal Act II of 1865.)

1.—S. 33—Civil Procedure Code (Act XIV of 1882), Sec. II—The Municipal Act gives sole jurisdiction to the Chief Judge of the Small Causes Court in suits relating to election matters-Election suits not triable by other Courts—Election-Jurisdiction of Civil Court.

Where a special tribunal, out of the ordinary course, is appointed by an Act of legislature to determine questions as to rights which are the creation of that Act, then, except so far as otherwise expressly provided or necessarily implied, the jurisdiction of that tribunal to determine those questions is exclusive. It is an essential condition of those rights that they should be determined in the manner prescribed by the Act, to which they owe their existence.

The Chief Judge of the Small Causes Court at Bombay is the sole tribunal indicated under the City of Bombay Municipal Act to determine questions relating to disputed elections. No other Court has jurisdiction to hear suits arising under the Act.

The word "election" in s. 33 of the City of Bombay Municipal Act is designed to express something wider than a legally valid election. The words used in this section are consistent with the view that an election, which in fact took place under conditions that made it possible that there should be a valid election, can be questioned.

There is enough in s. 33 of the City of Bombay Municipal Act to bring it within the exception to section 11 of the Civil Procedure Code and bar the cognisance of suits falling under the

Bombay Acts-(City Municipal Act II of 1865) *Contd.*

Act by any other Court. The jurisdiction of Courts can be excluded not only by express words, but also by implication. **Bhaishankar v Municipal Corporation of Bombay. 9 Bom L R 417= 31 Bom 604.**

2.—S. 394—Commissioner—License——Milch-cow stables.

The power to grant a license, by the Municipal Commissioner of the City of Bombay for the stabling of milch-cows, under S. 394 of the City of Bombay Municipal Act, includes the power to refuse the license.

Haji Esmail Hajee Essale v Municipal Corporation of Bombay. 5 Bom L R 1001= 23 Bom 253.

Notes—Ref· 11 Bom L R 1181.

Bombay City Municipal Act (III of 1872.

1.—Ss. 337 (2), 342 and 349 (c)—To erect a building—"To re-erect" "to re-construct"—Frame buildings—Height of—Notice to Municipality.

The term 're erection" applied to all buildings which are not included in s.337 (2) of the Bombay City Municipal Act, 1888. A building with a ground-floor to which, after it has been in existence for some years, the owner wants to add one or more storeys would fall within "re-erection," provided it is not of the description mentioned in the definition of erection.
Emperor v Nanabhoy. 9 Bom L R 932.

2.—S. 349-B—Limit of height of buildings—Re-constructing a house burnt down—Set back of five inches—Abutting on street.

Where the owner of a house destroyed by fire pulls down its remaining walls to six feet above the plinth, and the house abuts on the street, the height to which he can raise his new building is governed by the provisions of S. 348-B of the City of Bombay Municipal Act, 1888. Where in re-constructing a house, the owner set it back by five inches from the street on which it originally abutted:—*Held*—That the house should be taken as abutting on the street notwithstanding the set back. **Ali Mahomed Gulam Hossein 9 Bom L R 737.**

Bombay Acts-(City Municipal Act III of 1872)-*Concld.*

3.—S. *381*—Commissioner's power to require the owner to fill up low ground.

S. 381 of the City of Bombay Municipal Act, *1888*, empowers the Commissioner to require the owner of low ground to cleanse and fill up the same; but it does not permit him to issue an order that an indefinite quantity of low lying ground shall be filled up much less that it shall be filled to some particular level or filled up with sweet earth or that it shall be sloped in a particular direction. **Municipal Commissioner of Bombay v Hari Dwarkoji. 1 Bom L R 518.**

Bombay City Municipal Act III of 1888.

Notes.—Rep. In Pt, Act II of 1901 ; Bom Act I of 1897 ; Rep. In Pt. And Am. Act XVI of 1895 ; Bom Act Iv of 1888 , am Bom. Act I of 1894 ; Bom Act II of 1899, Ss. 5 (1). *5 (3)*, 6 (1) Bom. Act II of 1900 , Bom. Act Ii of 1901 ; Supplemented. Act XII of 1888 ; Act II of 1889: Bom. Act V of 1890 ; Bom. Act I of 1898 , Bom Act II of 1899 ; S. 74 (2) (*c*) am. Bom. Act V of 1903 ; Ss 3 (*u*) 26 (*i*), 28 (*i*), (*m*), (*p*), *33* (1), (2), 68 (2), 77(*d*), 118 (*c*), 120,220.221 228.229,230 (1), (4) 231, 232, 233 (1), (2). 234 (*2*), 236, 238 (1), 239, 241. 242 244, 246 (*c*), 247, 248, 253, 255, 256, 257, 258 260, 272, 273, 281, 287, (2), 297, 302, 303, (1), 304, (1), (2), 338, 342, 344, (2), 347, 379, 470, 471,472,489 (3) am. ss. 220-A, 232-A, 233-A, 246-A, 249-A, 251-A, 251-B, 257-A, 259-A, 273-A, 287-A, 344-A, 349-A, 349-B, 349-C, 353-A, 354-A, 379-A, Schs. S. T. ins; ss. 226, 259 (2) rep., ss. 337 (*1*), 343, 348 (1), 461 rep. in pt. and am., Bom. Act V of *1905*; ss. *39* (1), (5), (6), (*10*), (40) and 121 and heading thereto rep. in pt , ss. 39 (*3*), (7), (8), 80, *92*, 118, 518 (*1*) am , ss. *39* (9). 461 (u) rep. in. pt and am , ss. *62*-A, 62-B, 62-C, 68-A, 76-A, 76-B, *89*-A to 89-F, schs. U & V ins., Bom. Act III of 1907, when notified; ss. 61, 62, 111 am. s. 62-D ins., s. 63 (a) and s. 120 and heading thereto rep., Bom. Act III of 1907.

1.—S. 297—Municipal Commissioner—Regular line of the street-Subsequent alterations.

Under the provisions of section 297 of the City of Bombay Municipal Act, 1888, a line can only be once prescribed as the regular line of the street, and it is not competent to the Municipal Commissioner from time to time to alter the line once prescribed. **Essa Jacob v Municipal Commissioner. 2 Bom L R 810= 25 Bom 107.**

Bombay Acts-(City Municipal Act III of 1888)-*Contd.*

2.—Instalment-bond—Bond payable by instalments—Fraud—Defence—Limitation.

The defendant signed on the 4th June 1893 a Ruzu acknowledging Rs. 11,*534-15*-0 to be due by him to the plaintiff's firm. On the *19*th June 1894, he paid Rs. 400 cash and a Hundi for Rs 600 and for the balance Rs. *10*,634-*15*-0 passed an instalment bond payable by yearly instalment of Rs. 1,000 each.

The Hundi having been dishonoured, the plaintiff's firm brought suit No. 249 of 1895 to recover the amount of the Hundi from the defendant. The latter pleaded want of consideration and impeached the correctness of the accounts. The Court appointed a Commissioner to examine the plaintiff's accounts, and the Commissioner reported that the debt due was Rs. *3*,016-4-0 and not Rs 11,534-15-0 as stated in the Ruzu. Upon this the Court without going into other question raised by the defence, decreed the claim.

In 1897, the first two instalments under the bond having become due, the firm sued the defendant (Suit No 105 of 1897) to recover Rs. 2,000. The defendant admitted the claim, and the suit ended in a consent decree.

The defendant then instituted suit No. 412 of 1898 against the firm for cancellation of the instalment bond alleging that it was obtained by misrepresentation and fraud, and was void in law and passed in respect of wagering transactions and nothing was due as under it. The litigation went up to the High Court, which without giving any decision on the merits, dismissed the suit as time barred.

In 1902, the plaintiff sued to recover 3rd, 4th and 5th instalments under the bond. The defendant pleaded that the bond and prior Ruzu were obtained from him by fraud and misrepresentation and that the debt due was one arising from wagering contract unenforceable by law. The Subordinate Judge held that the defendant was barred by the decrees in suits Nos. 249 of *1895*

Bombay Acts-(City Municipal Act III of 1888)-*Contd.*

and 105 of 1897 from raising any of his contentions, and passed a decree in plaintiff's favour. On appeal, the District Judge held that the defendant was barred by *res judicata* from pleading that the bond was voidable for fraud or from pleading that the bond was void by reason of its consideration being a wagering debt.

On appeal to the High Conrt:—

Held, by Aston J., that unless it be established that the pleas which the defendant had raised in the present suit and had not been allowed to prove, would, if proved in the Hundi Suit No. 249 of 1895, have reduced the amount actually due by him in June 1893 to less than Rs. 600 *plus* the Rs. 400 paid in cash, the decision in the Hundi suit could not operate as *res judicata* in respect of the said pleas, for the matter which might and ought to be made a ground of defence in the Hundi suit must be a ground of defence to "the claim actually made in the said former suit.

(2) that the plea that the consideration for the instalment bond partly failed because of the reasons set up in the pleas aforesaid, would have been irrelevant in suit 195 of 1897, unless by setting up these pleas and proving them the claim in that latter suit for Rs. 2000. would have been reduced.

Held, by Scott J., that before the present suit was brought the issue as to consideration had not been raised except with reference to the Hundi and had been heard and determined in Suit No. 249 of *1895*, with reference to that document alone. The defendant was therefore. not barred by *res judicata* from pleading in this suit that the bond was no longer supported by consideration.

(2) that the lower Court was wrong in holding that the defendant was barred by S. 13 of the Civil Procedure Code, from raising the questions of fraud or wager as vitiating the bond as a security for the payment of the remaining instalments. The issue in Suit No. 249 of 1895. was a sufficient issue for the disposal of the case on the Hundi and in that suit the defendant's liability under the Hundi was the only matter in issue, in Suit No. 105 of 1897, there was no hearing and

Bombay Acts-(City Municipal Act III of 1888)-*Concld.*

disposal of any matter in issue: the provisions of S. 13—did not, therefore apply.

(3) that the fact that the defendant was owing to the bar of limitation only denied the specific relief of cancellation claim in Suit No. 412 of 1898, could not prevent him from raising defence on the merits as a defendant in this suit. (6 Bom L R 592 Fol; 7 Bom L R 773 Not Fol). **Minalal v Kharsetji: Kharsetji v Minalal.**

8 Bom L R 296=30 Bom 395.

3—S. 3 Cl 10—Street passage kept open having houses on both sides of it.

The owner of a large piece of land divided it into several small building sites and sold them to different persons. These sites were ranged on either side of two proposed roads, which ran through the land and which touched a high road at the one end and a wall on the other. Each of the purchasers entered into a covenant with the owner whereby he agreed to prepare and keep for passage so much of the road as lay in front of his site. Under these circumstances the question arose whether the proposed road fell within the meaning of the term 'street' as used in the City of Bombay Municipal Act 1888. *Held*, that the proposed road would constitute a 'street' within the meaning of the City of Bombay Municipal Act, 1898.- **The Municipal Commiss'oners of Bombay v. Mathorabai.**

(1906) 8 Bom L R 4357=30 Bom 558

4.—Breach of statutory duties-Action-Notiee —Action on a contract—Suit in contract—Distinction between—Procedure—City of Bombay Municipal Act (Bom. Act III of 1888). Sec. 527—Municipality—Refund of town duty.

A person seeking the protection of an Act cannot claim that his conduct has any relation to the " execution of the Act " if he knowingly and intentionally acts in contravention of its provisions.

It is an established principle of law that notice is not required where the action is brought on a contract. The exemption from this requirement, however, does not apply to all suits in contract as distinct from suits on a contract; since a tort may give rise to a suit in contract. **Runchhordas Morarjee v. The Municipal Commissioner for the City of Bombay.**

3 Bom L R 158=25 Bom 387.

Bombay City Police Act,

1-Ss. 28,129—Police Commissioner—Notice—Prostitutes, segregation of—Specific Relief Act, S. 45—Enforcement of public duties-Public servant

The Commissioner of Police at Bombay, acting under section 28 of the Bombay City Police Act 1902, issued a notice upon the applicants requiring them to vacate the premises occupied by them and intimating that " failure to comply with this notice will render you liable to punishment under S. 130 of the Act. " The applicants applied to the High Court under S. 45 of the specific Relief Act 1877, for a rule against the Commissioner of Police to show cause why the notice should not be cancelled and why he should not be restrained from carrying the same into effect.—*Held*, that the cancellation of the notice or the non-enforcing of it is an act clearly incumbent by law upon the Commissioner of Police, so as to bring it within S. 45 (*b*) of the Specific Relief Act 1877. Under S. 28 of the Bombay City Police Act 1902, the Commissioner of Police can only serve the notice upon the person who comes within the scope of the section. He is not entitled to serve it upon any person whom he merely suspects to be guilty of the conduct therein referred to. The misconduct or immoral conduct must be a matter of fact and not a mere matter of suspicion. A Magistrate would not be justified in convicting any person under S. 129 of the Bombay City Police Act, 1902, unless and until he is satisfied that the notice under S. 28 of the Act was not only duly served, but also that the woman really had conducted herself in the manner imputed to her under S. 28. **Tarabai Ibrahimpurkar.** **7 Bom L R 161.**

Bombay Civil Courts Act (Act XIV of 1869.)

Notes—Rep in pt., Act XIV of 1870; Act XII of 1876; Act VII of 1889; Act VIII of 1890; Act XII of 1891; Am., Act X of 1876; Act IX of 1880; Act XV of 1880, S. 3; Bom Act III of 1895; Bom Act I of 1900.

Bombay Civil Courts Act (XIV of 1869.)

See (1) Appeal——Bombay Acts— Bombay Civil Courts Act.

(2) District Judge, Jurisdiction of.

(3) Execution of Decree—Transfer of Decree for Execution, etc.

Bombay Acts-(Civil Courts Act XIV of 1869)-*Contd.*

(4) Subordinate Judge. Jurisdiction of.

(5) Valuation of *Suit*—Suits.

1—S 2—Civil Courts—Jurisdiction—Suit against Admministrator-General.

A suit brought against the Administrator-General must be instituted in the District Court: and it makes no difference if the Administrator General is not a party to the suit in his official capacity, but is sued simply as representing the estate of a private individual. **Antone v Administrator-General of Bombay.** **6 Bom L R 546; 28 Bom 529.**

2—Ss. 8. 26—Suit for declaration and injunction—Claim valued at Rs. 540 for Court-fees—Valuation for assessing pleader's fees fixed by consent at Rs. 10,000—Decree by first class Subordinate Judge—Appeal to the High Court—District Court—Jurisdiction Court-fees Act (VII of 1870), S. 7. (IV), (c), (d)—Suits Valuation Act (VII of 1887), S. 8—Practice.

A suit for declaration and injunction, in which the claim was valued at Rs. 540 for the purposes of Court-fees, was instituted in the Court of a Subordinate Judge of the First Class. Shortly before the judgment was delivered, the pleaders of the parties put in a *purshis* in which it was stated "By consent of both parties in suit, the value of the property in suit is settled for Rs. 10,500." The Subordinate Judge decided the suit; and from his decree an appeal was presented to the High Court.

Held, (1) that, as the suit fell within S. 7, para (IV), Sub-Ss. (c) and (d) of the Court Fees Act, 1870. and as the value determinable for the computation of Court-fees and the value for the purposes and jurisdiction was the same (S. 8 of the Suits Valuation Act, 1887), the appeal lay to the District Court and not to the High Court (Ss. 8, 26 of the Bombay Civil Courts Act 1869);

(2) that, as, according to the statutory method of valuation, the value of the suit was less than Rs. 5,000, consent of the parties could not make it more than Rs. 5,000, for the purposes of jurisdiction. **Pherozshaw Jamsetji Comissariatvalla v Waghji Kuverji Kaje Shirke.** **13 Bom L R 158.**

Bombay Acts (Civil Courts Act XIV of 1869)-S. 16 *Contd.*

Bombay Civil Courts Act XIV of 1869 ss. 9 and 10.

See High Court, Jurisdiction of—Bombay—Civil.

3—S. 16—Claim heard by Assistant Judge under the Land Acquisition Act (I of 1894)—Value of the subject-matter not exceeding Rs. 5,000—lies, to District Court and to High Court.—

Where, in a compensation case under the Land Acquisition Act, 1894, heard by an Assistant Judge, the amount does not exceed Rs 5,000, the appeal lies to the District Court and not to the High Court. 10 Bom L R 924=32 Bom 634, Appl: **Ranchhodbhai Valavbhai v The Collector of Kaira. 11 Bom L R 317=33 Bom 371=2 Ind Cas 492.**

4—The Bombay Civil Courts Act XIV of 1869, Sec 16—Cases referred by District Judge to Assistant Judge for trial—"Miscellaneous applications"—Land Acquisition Act X of 1870—Reference to District Court by the Collector—Act VII of 1889—Act VIII of 1890—Applications under Special Acts.

Although the expression "miscellaneous applications" in Section 16 of the Bombay Civil Courts Act XIV of 1869 may be large enough to include references by the Collector under the Land Acquisition Act X of 1870, the latter part of Section 16, as it stood before that Section was amended by Acts VII of 1889 and VIII of 1890, indicates that it was not the intention of the Legislature to empower a District Judge to refer to an Assistant Judge applications under Special Acts for disposal. **First Assistant Collector Prant Bsasin v Ardesir Framji. P J 1891 p. 196; 16 Bom 277.**

5—S. 16—Probate and Administration Act (V of 1881) Ss. 86, 51, 52—District Judge—Assistant Judge deciding applications wherein the subject-matter does not exceed Rs. 5,000 in value—Appeal to District Court—No direct appeal to High Court—Power of Local Legislature to amend an Act passed by the Supreme Legistative Council—India Councils Act (55 and 56 Vic., C. 14), S. 5.

The Probate and Administration Act, 1881, being a law made by an authority in India, is subject to the powers of repeal or amendment granted to the local legislature by S. 5 of the India Councils Act, 1892 (55 and 56 Vic., C. 14.) Hence, the provisions of the Bombay Civil Courts Act (Act XIV of 1869) S. 16, by which a probate matter can be tried in the first instance by the Assistant Judge and by which the appeal in cases where the amount of the subject-matter does not exceed Rs. 5,000 will lie to the District Court, is one which the Local Legislature was competent to make. **Laxmi Tatya v Aba Appaji. 10 Bom L R 924=32 Bom 634.**

Bombay Acts-(Civil Courts Act XIV of 1869)-S. 16-*Concld.*

6—Bombay Civil Courts Act (XIV of 1869), S. 22—Jurisdiction—Special jurisdiction—First Class Subordinate Judge—Jurisdiction over lands valuing less than Rs. 5,000 in value, situated outside his ordinary jurisdiction but within his special jurisdiction.

In execution of a decree lands belonging to plaintiff which were situated in the Gadag Taluka and below Rs. 5 000 in value were attached and sold by order of the First Class Subordinate Judge at Dharwar. The plaintiff then sued to set aside the sale and to recover possession of the lands. This suit was brought in the Court of the First Class Subordinate Judge at Dharwar. The defendants contended that the lands having been within the jurisdiction of the Gadag Court and the defendants also having been residents of Gadag, the suit ought to have been instituted in the Gadag Court. It appeared that Gadag was within the ordinary jurisdiction of the Gadag Court: and that it was further under a special jurisdiction of the Court of the First Class Subordinate Judge at Dharwar. in suits of Rs. 5,000 and upwards.

Held, that the First Class Subordinate Judge at Dharwar, had no jurisdiction given him by law to try any case relating to immoveable property outside the local limits of his ordinary jurisdiction unless the value of the subject matter was Rs. 5,000 in value. **Shankerappa v Kotrappa. (8 Bom L R 516).**

—S. 24.

See. Valuation of Suit-Suits.

7.—S. 24—Plaintiff valued his claim at Rs. 510 and filed the plaint in the Second Class Sub-Judge's Court. He returned the plaint holding

Bombay Acts (Civil Courts Act XIV of 1869)-S. 24-*Contd.*

that though the plaintiff valued his claim at Rs 510, the value of the subject matter exceeded Rs. 5,000. *Held* that as the plaintiff sued for an account the Second Class Sub-Judge had jurisdiction to try and determine the suit. **Vahalabhai v. Kakubhai 1896 P J 224.**

8.—S.24—Partition suit—Value according to plaintiff's share—Court Fees Act 7.

The value of the whole land was over Rs. 5,000 but the plaintiff's share was valued in the partition suit at Rs. 250. Under the Court Fees Act, 1870 section 7 IV (*b*) the amount of fee payable would be according to the valuation of the relief in the plaint. Under the Suits Valuation Act, 1887, section 8, the valuation for Court Fees and for purposes of jurisdiction is the same. *Held*, therefore, that the value of the subject matter was Rs. 250 and that the suit was properly brought in the Court of a Second Class Sub Judge. **Motibhai v. Haridas 1896 P J 385.**

9.—S. 24—Transfer of case-District Judge—Assistant Judge—Order of transfer of a claim upwards of Rs. 10,000 from the Court of first Class Subordinate Judge to the District Court—Order passed by Assistant Judge—Bombay Civil Courts Act (XIV of 1869.)

A suit, wherein the plaintiff claimed Rs. 18,197-13-0 from the defendant, was filed in the Court of the First Class Subordinate Judge at Poona. After the suit had been heard by that Judge for some days, the defendant applied to the Court of the District Judge for transfer of the suit to another Court. The District Judge transferred the application to the Assistant Judge for disposal. The latter heard the application and ordered that the suit be transferred to the District Court of Poona for trial. The plaintiff objected that this order was without jurisdiction:

Held, (1) that it appeared from the Bombay Civil Courts Act (XIV of 18869) that an Assistant Judge was not a Judge having jurisdiction co-ordinate with that of the District Judge. He was, therefore not a Judge of the District Court, which alone had jurisdiction to transfer the case under S. 24. Civ. Pro Code, 1908.

(2) That, under S. 24 of the Code, the District Court might withdraw any suit *and* try and dispose of it. Here the suit withdrawn was for a sum exceeding the pecuniary jurisdiction of the Assistant Judge; and he therefore could not try and dispose of it. He therefore, was not a Judge of a District Court as contemplated by the section, which must be a Court of unlimited pecuniary jurisdiction. **Haji Umar Abdul Rahiman v Gustadji Mancherji Cooper. 12 Bom L R 854=6 Ind Cas 518=34 Bom 411.**

10—S. 24-S. 4 (IV) (c) (d)—Suits Valuation Act (IX of 1887), S. 9—Suit for declaration that adoption invalid—Suit valid for Court-fee purposes—Jurisdiction of the second-class subordinate Judge to entertain the suit-Mahomedan Law—Converts—Molesalam Girasis—Custom of adoption—Burden of proof.

A suit for a mere declaration that an adoption is invalid can, if so valued, lie in the Court of the Subordinate Judge of the Second Class, even though the property affected by the adoption be more than Rs. 5,000 in value.

The Mahomedan Law does not recognise adoption. In the case of converts, the ordinary presumption is that, as a necessary consequence of conversion from Hinduism to Mahomedanism, the law of adoption recognised by Hindu law and usage has been abandoned by them. He who alleges that the usage and the law in question has been retained must prove it. **Bai Machhbai v. Bai Hirbai 13 Bom L R 251.**

11.—S.24-Suits Valuation—Jurisdiction-Civil Court value of property—Value mentioned in plaint-Trial in Court which would have no jurisdiction if the value was correct-Parties raising no objection to trial—In appeal jurisdiction cannot be questioned—Evidence Act (I of 1872) S 58:

See 12 Bom L R 712=7 Ind Cas 950.

Bombay Acts-(Civil Courts Act XIV of 1869)-S. 25-*Contd.*

—s. 25

See (1) Jurisdiction—Question of Jurisdiction—Wrong Exercise of Jurisdiction.

(2) Valuation of Suit—Suits.

12—S. 25-Amount of the claim not recklessly swollen to give jurisdiction, mentioned in the plaint, *prima facie* determines jurisdiction.
Gulabchand v Fulchand 1889 P J 192.

13.-S.25-For the purposes of jurisdiction encumbrances mentioned but not admitted by the plaintiff cannot be properly taken into account in determining the valuation of the subject-matter in dispute, which is presumably the property mentioned in the plaint. **Pahadsing v Mohanbava 1888 P J 143.**

14-S.25-A Talukdar died leaving a widow plaintiff and a minor son. The Mamlatdar under orders of the Collector sealed up some of the moveables, made an inventory of all the moveables and also locked up some of the rooms. The plaintiff brought this suit against the Mamlatdar and the Collector in their private capacity to remove the locks and to have the property and rooms restored and for damages.

Held, per Jardine J., that the Subordinate Judge had jurisdiction to entertain the suit under Section 32 of Act XIV of 1869.

Ranade J., *held* that the Subordinate Judge had no jurisdiction.

Question discussed at some length.
William Allen v Ba Shri Dariaba. 1894 P J 361

15—S. 25—An appeal being preferred against the above it was *held* that the question as to the proper Court turned not on whether the acts were legal or illegal but on whether the acts were or were not official acts i. e., done by the officer acting and purporting to act in an official capacity ; this question could not be determined by the description given by the plaintiff himself of his suit, but must be determined from the contents of the plaint and a consideration of the position occupied by the defendant.
William Allen v Bai Shri Dariaba. 1896 P J 138.

16-S.25-*Held* that the Patel and Kulkarni did not act with due care and attention or under colour of office in seizing the plaintiffs' bullocks ; that the law that impressment was not allowed was well known ; that the allegation of an official justification must be shown to be something more than a mere pretext ; that the tortious act was not done in the discharge of some legal duty ; and that the suit was properly brought in the Sub Judge's Court. **Budho v Keso. 1896 P J 238**

17—S.25—Defendant was a Supervisor in the Public Works Department. He borrowed moneys from the plaintiff. *Held* that, as he had usually no authority to borrow for the Public Works Department or to pledge the credit of Government, the loan was in his private and not official capacity and that the Sub-Judge had jurisdiction.
Hanmant v Rajmal. 1896 P J 254.

—s. 26.

See (1) Valuation of Suit—Appeals.

(2) Civil Procedure Code, 1882, S 586.

18—S. 26—Adoption.

Though the nominal value was put down at Rs. 260, the real value was over Rs 5000, *held*, that the appeal lay to the High Court and not to the District Court.

Held, that among Chudasama Garasias there was no custom prohibiting adoption.

Held that though H's son L survived his father H could not adopt, as L died a minor before completing his 16th year and unmarried and before he attained full ceremonial competency.
Ajubhai v Bai Hiraba. 1896 P J 327.

19-S 26-Mortgage, suit by, to recover possession of the mortgage land—Subject-matter—Valuation.

The value of the subject matter of a suit by the mortgagee, to recover possession of the mortgaged land, is not the value of the mortgaged land, but that of the mortgagee's interest, which cannot be valued at a sum in excess of the mortgage-debt. If the value of the land exceeds the debt, the excess represents the mortgagor's interest, and cannot be taken into consideration for the purpose of S. 26.
Balwantrav v Malhare. 1885 P J 222.

20—S.26-Subject-matter—Appeal.

The responsibility of determining whether a subject-matter does or does not constitute a cause of action, and whether a claim is or is not proper,

Bombay Acts (Civil Courts Act XIV of 1869) S. 26-*Concld.*

ly valued, rests with the Court in which a suit is instituted ; if then a Subordinate Judge of the First Class tries and determines a question of claim or right, and the amount or value of the subject-matter of the suit exceeds Rs. 5,000, an appeal lies direct to the High Court, although the Subordinate Judge may have erred in law in supposing that a part of the claim constituted any cause of action ; e. g., where in a suit for partition originally valued under Rs. 5,000, the plaintiff subsequently includes other property raising the valuation to more than Rs. 5,000 but at the same time says he has parted with his interest *in rem*. **Anandrav v Ramchandra 1874 P J 290.**

21—S. 27—Power "to hear" appeals—Power to hear question of limitation—Practice

Where a District Judge admits an appeal filed beyond time, and the appeal is referred for disposal to a Subordinate Judge with appellate powers, the Subordinate Judge has the power to consider whether the delay in presenting the appeal is sufficiently accounted for. The power "to hear" an appeal conferred by s 27 of the Bombay Civil Courts Act (XIV of 1869) includes also the power to hear any question as to limitation relating thereto. **Mulla Amad v Krishnaji Ganesh Godbole. 14 Bom 594.**

Notes:-Fol: 2 C W N 461. Ref : 22 Bom 819.

22—Bombay Civil Courts Act, (XIV of 1869) Sec. 28—Jurisdiction—Pecuniary limit—Small Causes Court-Appeal-Practice.

On the 24th October 1899, plaintiff filed a suit to recover Rs. 19 as damages for breach of a contract, in the Court of Small Causes of the Subordinate Judge of Yeola, then presided over by a Subordinate Judge, who was invested with Small Causes Court powers up to Rs. 50 On the 22nd November 1899, the defendant filed his set off claiming Rs. 120 as damages under the same contract. In December 1899 the Subordinate Judge was succeeded by another Subordinate Judge who also had Small Causes Court powers up to Rs 50. The claim and the set off were tried by him as one suit, it was registered as a regular suit ; and the evidence was recorded as in a regular suit. The Subordinate Judge was, in the meanwhile, in-

Bombay Acts (Civil Courts Act XIV of 1869) S. 28-*Concld.*

vested with Small Causes Court jurisdiction up to Rs. 200. He then decided the suit, on the 5th April 1902, by a judgment which was written as in a regular suit.

Held, (1) that the plaintiff's suit which was a suit cognizable by a Court of Small Causes, and instituted at the time when the Court of the Subordinate Judge had already become invested with the jurisdiction of a Court of Small Causes, did not cease to be a suit cognizable by the Court of Small Causes or cease to be so tried merely because the Subordinate Judge at a later stage dealt with it as if he were trying it under his ordinary jurisdiction.

(2) that the plaintiff's suit did not cease to be a suit cognizable by a Small Causes Court by reason of the defendant having by way of set off made a counter claim for Rs. 120, when the pecuniary limit of the jurisdiction of the Court invested with the jurisdiction of a Court of Small Causes was Rs. 50.

(3) that the suit and counter-claim must be treated as decided under the Small Causes jurisdiction of the Subordinate Judge's Court invested with the jurisdiction of a Court of Small Causes, subject to the bar of a right to appeal from the decree of such a Court. **Balchand v Balaram 5 Bom L R 398.**

23.—S 28—Sirdar of the Deccan-Subordinate Judge with power of Small Causes Court.

A First Class Subordinate Judge invested under Act XIV of 1869 with the jurisdiction of a Judge of a Court of Small Causes, is not a Court of Small Causes constituted under Act XI of 1865, and cannot entertain a suit against a First Class Sirdar of the Deccan. **Rajaram v Yeshwant 1880 P J 145.**

24. –Ss 28, 8 – Civil Courts Act XIV of 1869.

An appeal lies to the District Court when a khoti sharer had sued for his share of the profits provisionally valuing his claim at less than Rs 50, and the Second Class Sub-Judge possessing Small Causes Court powers up to Rs.50 has awarded more than Rs 50, additional Court Fees being paid by the plaintiff. **Gangadhar v Vinayak 1896 P J 417.**

—S 32.

See (1) Civil Procedure Code s. 424.
20 Bom 697.

Bombay Acts (Civil Courts Act XIV of 1869) S. 32-*Contd.*

(2) Collector 1 Bom 318, 628.

(3) Mamlatdar, Jurisdiction of. 23 Bom 761.

25.—Bombay Revenue Jurisdiction Act (X of 1876), s 15—Guardian under Minor's Act XX of 1864—Officer of Government.

The Nazir of a Civil Court, who is appointed guardian of the estate of a minor under Act XX of 1864, is not an officer of Government within the meaning of s 32 of Act XIV of 1869 as amended by s 15 of Act X of 1876. An officer of Government in order to come within those enactments, must be party to a suit in his official capacity. **Mohan Iswar v Haku Rupa.** 4 Bom 638.

Notes.—Ref: 5 Bom 306.

26-27-S 32:-A Sub Judge has no jurisdiction to entertain a suit against a minor represented by a Collector in his official capacity. **Parashram v Bhikaji** 1881 P J 252

Nor, under S 3, Act XV of 1880, where the Collector has been appointed in his official capacity under S 11 of Act XX of 1864 to take charge of a minor's estate. **Dipchund Bhimaji v Raisingji.** 1882 P J 11.

28-30—Officer of Government suit against.

Under S 32 a Subordinate Judge cannot receive and register a suit against a Patel or Kulkarni for an act done by them in their official capacity. **Martand v Mahadji** 1875 P J 161. **Moro v Balnath.** 1884 P J 212.

Mamlatdar or Nazir, Administrator of minor's estate.

Or against a Mamlatdar, or Nazir of a District Court, appointed in his official capacity administrator of a Minor's estate. **Somabhai v Juvi** 1877 P J 310. **Vasudev v Narayan** 1878 P J 227.

Or guardian ad litem. **Trimbak v Shivram** 1879 P J 576.

But see as to the Nazir 4 Bom 638, where Trimbak v Shivram, ubisupra, is dissented from.

31.—Forest Officer acting officially.

A Forest Officer appointed under Act VII, of

Bombay Acts (Civil Courts Act XIV of 1869) S 32-*Concld.*

1878 can be sued only in the District Court (Act X of 1876, S 15) for improper and illegal seizure of carts containing forest produce. The plaintiff cannot give jurisdiction to an inferior Court by stating in the plaint that he does not sue defendant in his official capacity. **Waman v Dipchand.** 1888 P J 121.

32.—A suit against a Patel and Kulkarni for disobeying prohibitory order by a Civil Court, directing them to pay to plaintiffs certain *haks* collected by them as officers of Government, can only be heard by a District Court. (Act X of 1876 S 15). **Wamanji v Balkrishna** 1888 P J 122.

33.—In a suit brought in a Court of Small Causes the Patels and Kulkarnies were joined as defendants in their official capacities, but at a late stage their names were struck out. *Held*, that as by S 15 of Act X of 1876 the Court of Small Causes had no jurisdiction to "receive or register the suit," all proceedings were taken herein without jurisdiction and the plaint should be returned to the plaintiff. **Kashinath v Balvantrav.** 1890 P J 1882.

Bombay Cantonment Act III of 1867.

Notes.—Rep Act VIII of 1889.

Bombay Contract, Wagering Contract Act III of 1865

See Contract—Wagering Contract.

Bombay Cotton Frauds Act IX of 1863

See Cotton Frauds Act.

Bombay Dekhan Agriculturists Relief Act.

See Dekhan Agriculturists Relief Act.

Bombay District Judge Jurisdiction of Act III of 1863.

See District Judge Jurisdiction of

Bombay Acts (District Municipal Act XXVI of 1850).

See Right of Suit—Municipal Officer Suits Against. **7 Bom A C 33=22 Bom 384.**

1.—Ss. 2 cls. (a) and (c), and 139-Agreement by Municipality under Old Act XXVI of 1850, to allow a person to sell meat in a shop—Validity.

Where a Municipality sold a shop to the plaintiff respondent in 1862, on the agreement that "the shop was to be used for selling goat meat," and he contended that the Municipality cannot now exercise the powers conferred by S 139, Act III of 1901, of preventing him from using the premises for the sale of meat, *held*, that the Commissioners, who acted under the old Act XXVI of 1850 which was in force in 1862, had no power under that Act to enter into such a contract, and that the plaintiff acquired no right which was saved from the operation of s 139 of the Act of 1901, and that he was not therefore entitled to any relief. **The Shikarpur Municipality v Yasaid 3 S L R 49=2 Ind Cas 368.**

Bombay Acts (District Municipal Act VI of 1873).

See Collector **1 Bom 628.**

Notes—Rep. Bom Act III of 1901.

1.—Permissive nature of rules under–Institution of civil suits not affected by rules.

This was a suit for an injunction brought against the defendant municipality. The Court of first instance passed a decree in favour of plaintiff-appellants which the District Judge reversed on the ground that the suit was not maintainable as the appellants had not complied with the provision of Rule 16 framed under the District Municipal Act (VI of 1873), directing that "parties dissatisfied with the decision of the managing committee may appeal to the Municipality whose decision shall be final." On second appeal the High Court held, reversing the decree of the District Judge, that the rules framed under the Act must be construed in consonance with the intention of the Legislature, and Rule 16 must therefore be construed as permissive and not mandatory. It was framed with reference to departmental procedure only and could not affect the right to the institution of a civil suit.

Vasudavacharya v Municipality of Sholapur 22 Bom 384.

Bombay Acts (District Municipal Act VI of 1873) S. 2-*Concld.*

2.–S 2–Water connection–Rules framed by the Municipality—Construction of the rules.

The plaintiff, the owner of a house in Surat, took in 1898 a water connection from the main pipe laid by the defendant Municipality. Under the rules, he was chargeable with one rupee a month for the water supplied to him and the condition was that his house was not to be inhabited by more than three families. The defendant Municipality made a new set of rules in 1905, under which they called upon the plaintiff to take a separate water connection for each of the families living in his house: and they threatened to cut off the connection in case of non-compliance. The plaintiff brought this suit to restrain the Municipality from so doing.

Held, that under the rules so long as the plaintiff occupied a house not inhabited by more than three families, he was entitled to the water supply. **The Surat City Municipality v Tyabali Daudhai. 10 Bom L R 622= 32 Bom 460.**

3.—Sec. 3—Place, Definition of—Ota of a house.—

The word "place," as defined in section 3 of Bombay Act VI of 1873, does not include a house, or *Ota* of a house. **Paba Khoji. 9 Bom 272.**

4—Court yard proved to have been originally private property does not become public property, because the houses which surround it have passed into the hands of different people and have ceased to belong to one family. The mere fact of the owners of the various houses having rights of way in the Court yard, does not make it a street under Section 3 of Bom Act VI of 1873. **Kalidas Gokaldas v The Municipality of Dhandhuka. P. J. (1882) 295=6 Bom 686.**

Notes.—Ap: 20 Bom 83; 146. Ref: 24 Bom 600; 27 Bom 221. Dist: 30 Bom 558= 8 Bom L R 457.

5.–S.11 cl(1)–In a suit to recover a tax illegally levied by the Municipality of Dakore, it was held (1), that the suit was not time-barred, no final order of the Municipality having been sent to the Plaintiff; (2) that the Court has authority to

Bombay Acts (District Municipal Act VI of 1873) S. 11 cl (1)-*Contd.*

inquire into the legality of a Municipal tax, although sanctioned by Government; (3) that the house tax was illegal, not having been imposed with the prescribed formalities.

Joshi Kalidas Sevakram v The Dakore Town Municipality. P J (1883) 135= 7 Bom 399.

Notes.—Dist : 20 Bom 732. Ref : Rat Un Cr 574 ; 21 Bom 630.

6.-S.11 cl (1)-Bombay Municipal Act (Bombay Act II of 1884), S.57-Liability to pay taxes-Halalkhore tax—Water tax—Notice by Municipality —Burden of proof—Presumption—Evidence Act, I of 1842, S. 177, ill (c).

A defendant who, in answer to a claim for arrears of taxes by a Bombay district municipality, alleges that the taxes were illegal (1) because no notice had been given him under S. 57 of Bombay Act II of 1884 ; (2) because no notice had been issued by the municipality to the Commissioners under S. 11 of Bombay Act VI of 1873, must prove the defence ; and, in the absence of such proof, the Court will presume that the municipality has used the regular procedure, and that the common course of business has been followed in the particular case. The liability to pay the halalkhore tax does not arise until after notice has been given under s. 57 of the Act (Bombay Act II of 1884).

Municipality of Sholapur v Sholapur Spining and Weaving Company. 20 Bom. 732.

Notes :—Fol : 19 All 493.

—S 14.

See Right of Suit—Municipal Officers, Suits Against. 22 Bom 384.

7.—Bombay District Municipal Act VI of 1873, Section 17—Public street—Street— Construction of Act—The City of Bombay Municipal Act III of 1888, Sec. 3.

In a suit brought by the plaintiff against the Municipality of Ahmedabad, the question was whether a street was a public street within the contemplation of the Bombay District Municipal Act VI of 1873. The District Judge, on the evidence and having regard especially to the fact that the street in question was protected by a gate closed at night by a *police* or watchman, who

Bombay Acts (District Municipal Act VI of 1873) S 17 *Contd.*

lived over the gate, and, was under the control of and paid by the owners of the houses in the street, *held* that there had been no dedication of the land to the public, and that the public had not acquired such a right of going over it as to make it a public street vested in the Municipality. On second appeal by the defendant the High Court refused to interfere with the decision of the Lower Court.

In the absence of a definition of a public street in the Bombay District Municipal Act VI of 1873 the High Court refused to apply the definition contained in the City of Bombay Municipal Act III of 1888. **Ahmedabad Municipality v Manilal.** P J 1894 p 478= 20 Bom 146.

8-Bombay District Municipal Act VI of 1873 S.17-Municipal Fund—Suit to present misapplication of Municipal Fund—Person having direct personal interest—Specific Relief Act I of 1877 Sec 56 cl (k).

Any person having a direct personal interest, however small in the proper application of the Municipal Fund created by Sec. 17 of the Bombay District Municipal Act can maintain a suit to prevent that fund being applied to purposes not allowed by the Act. The personal interest exists in the case of every individual tax-payer, since every person who contributes and is liable to contribute to the fund is personally interested in the due application of it and does not therefore fall within the prohibition of clause (k) of Sec. 56 of the Specific Relief Act 1 of 1877. L R 3 Ch. p. 272; L R 20 Equity Pp. 480-81. I Y & C Ch C p. 417. **Waman Tatyaji v The Municipality of Sholapur** P J 1897. P 54.

9.—Street—Public street-Private street-Sweeping and lighting the street.

The mere facts that Municipal sweepers are employed in sweeping a street and that the Municipality keeps up lamps in that street are not sufficient by themselves to establish that the street is a public one. **The Ankleshwar Municipality v. Rikhavchand.** 2 Bom L R 1076= 25 Bom 315.

10 Special General Meeting—President calling a meeting.

Bombay Acts (District Municipal Act VI of 1873) S. 17 *Contd.*

The Special general meeting of a District Municipality to be a valid meeting under s. 27 (2) of the Bombay District Municipal Act (11 of 1884) must be one called by the President. If the meeting is not so called, the defect cannot be cured by s. 17 (2) of the Act. **Abaji v The Trimbak Municipality. 5 Bom L R 689= 28 Bom 66.**

Notes.—Con: 29 Mad 360; 9 Bom L R 188. Diss: 27 All 592=2 A L J 321=(1905) W N III.

11—S. 17 and s.33—Street—Authority of the Municipality under s. 33—Civil Court's interference with the discretion given to public bodies.—

The word "street" in s. 17 of the Bombay District Municipal Act (VI of 1873) means and includes not merely the surface of the ground, but so much above and below it as is requisite or appropriate for the preservation of the street for the usual and intended purposes. The plaintiff proposed to make a balcony projecting over a public road. The municipality objected to the work as an encroachment on a public street. He therefore sued the municipality to establish his right to build the proposed balcony. *Held* that, so far as the column of space standing over the street was vested in the municipality, the plaintiff had no right to occupy it with a balcony, which by intercepting light and air would greatly impair the use of the area as a street. S. 33 of the Bombay District Municipal Act, 1873, gives the municipality a discretion to issue such orders as it thinks proper with reference to a proposed building. Civil Courts cannot interfere with that discretion, unless it is exercised in a capricious, wanton, and oppressive manner. The plaintiff was the owner of two houses on each side of the passage of a khidki, or open square, containing three or four other houses. He proposed to connect the two houses by building a story across the passage at such a height as not to interfere with the passage of those who were entitled to go to and fro. He applied to the local municipality for permission to build in the manner he proposed. The municipality forbade the work, on the ground that it was likely to interfere with the access of light and air to the neighbouring houses. The plaintiff thereupon sued the municipality to establish his right to build the proposed

Bombay Acts (District Municipal Act VI of 1873) S. 17—*Concld.*

structure. It was contended for the plaintiff that the municipality ought not to have refused permission in the interests of the neighbouring house-holders, who were able to protect their own rights in case of injury. *Held*, that the suit would not lie as the order of the municipality refusing permission was not an unreasonable one under the circumstances of the case, *Held*, further, that the authority of the municipality was not in any way affected by the circumstance that the proposed erection might be an encroachment on private rights subjecting the plaintiff to an action by the persons injured.

Nagar Valab Narsi v Municipality of Dhandhuka. 12 Bom 490.

Notes.—Dist: 14 Bom 180. Ref: 21 Bom 187; 22 Bom 712; 2 Bom L R 572; 3 Bom L R 817; 25 Mad 118. Fol: 27 Bom 221.

12—S. 21—Disposal by Government of objections to tax—Jurisdiction of Civil Court.

S. 21, which enables the Government to dispose of objections made to a tax by the inhabitants of a town, is quite consistent with the well-established jurisdiction of the Civil Court to decide as to the validity of any fresh tax or impost, and affords no sufficient ground for the conclusion that the intention of the Legislature was to take away that jurisdiction.

Joshi Kalidas Sevakram v Dakor Town Municipality. 7 Bom 399.

Notes:—Dist: 20 Bom 732. Ref: Rat Un Cr 571; 21 Bom 630.

13—Octroi duties—Imposition of tax—Inhabitants' objections—Consideration by municipality and opinion.

The requirements of cl. 2, s. 21 of Bombay District Municipal Act, VI of 1873, which enacts that "any inhabitant of the municipal district objecting to such tax, toll, or impost, may, within a fortnight from the date of the said notice, send his objection in writing to the municipality, shall take such objection into consideration and report their opinion thereon to the Governor in Council," is not satisfied by the Chairman of the Managing Committee considering the objections of the inhabitants and reporting his opinion to the Governor in Council or his representative the Commissioner of a Division. The provision for

Bombay Acts (District Municipal Act VI of 1873) S. 21-*Contd*

forwarding the opinion of the municipality on the objections is an essential part of the machinery provided by that section for the legal imposition of a tax. **Municipality of Poona v Mohanlal. 9 Bom 51.**

Notes:—Ap: 21 All 348

14—S. 21, cls. (1) and (2)—Bombay District Municipal Act Amendment Act (Bombay Act II of 1884), s. 27, cl. (7), and s. 32—Tax imposed by municipality.

In 1891 the municipality of Surat appointed a committee to revise the taxation of the city, proposing to reduce some of the existing taxes and impose others with a view (*inter alia*) of obtaining a better water-supply for the city. A scheme of taxation drafted by the committee was subsequently adopted by the municipality, and it included a new house and property tax. The municipality then issued a notice with regard to this last-mentioned tax under the provisions of s. 21 of Bombay Act VI of 1873, setting forth the particulars of proposed tax and requiring objections to be lodged within a fortnight from the date of the notice. A number of objections were received which were laid on the table for twenty-one days for perusal and consideration by the municipal commissioners. At the end of the time a special meeting of the Commissioners was held, at which it was resolved that the objections were invalid, and the scheme and the rules with regard to the levying of the tax were forwarded to Government and were sanctioned. The plaintiffs sued for an injunction restraining the municipality from levying the tax, contending that it was illegal, on the ground (1) that there was no municipality desirous of imposing the tax for any of the purposes allowed by the Act, inasmuch as the commissioners who passed the resolution to impose the tax did not know for what purpose the tax was to be imposed; (2) that the resolution imposing the tax was illegal because the notice calling the meeting of the commissioners which passed the resolution did not specify this tax as the object of the meeting; (3) that the notice given under s. 21 of Bombay Act VI of 1873 was bad, as it did not state the purpose of the proposed tax; (4) that the nature and the amount of the tax were not sufficiently stated in the notice; (5) that the notice ought to have stated the mode in which the valuation of property for the purpose of the tax was to be made; (6) that the objections of the rate-payers were not sufficiently considered; (7) that it did not appear whether the tax was to be paid in advance or not, and (8) that the assessment of the tax was made on a wrong basis. *Held*, (1) that the purpose of the tax was sufficiently known to the commissioners; (2) that the resolution imposing the tax was not invalid, although the notice convening the meeting did not specify the object of the meeting; (3) that the notice need not specify the purpose of the tax; (4) that as to the nature and the amount of the tax, the notice was sufficient, as it stated that the amount would depend on the valuation of the property; (5) that the notice need not define the mode of valuation; (6) that the objections were sufficiently considered; (7) that the tax was to be paid partly in advance; (8) that the assessment would not affect the validity of the tax, but would give a right of appeal to have the valuation set right. *Held*, therefore, that the tax was legally imposed. **Surat City Municipality v Ochhavaram Jamnadas. 21 Bom 630.**

Bombay Acts (District Municipal Act VI of 1873) S. 21-*Concld.*

—S. 24.

See Jurisdiction of Civil Court—Municipal Bodies.

15—s. 33—Sanad under the Bombay City Survey Act (Bombay Act IV of 1868)—The right of the municipality to call for the production of the sanad.

Under s. 33 of the Bombay District Municipal Act (Bombay Act VI of 1873), the municipality has no right to insist on the production of a sanad issued under s. 10 of the City Survey Act (Bombay Act IV of 1868) before granting permission to build. **Jamnadas Dulabdas. 15 Bom., 516.**

Notes—Ref: 19 Bom 27.

16—Bombay District Municipal Act VI of 1873, Sec. 33—Building—Damages.

Plaintiff having built a new wall on the site of an old wall including the old foundations, the Municipality pulled the wall down. Plaintiff thereupon sued the Municipality for damages. The Judge rejected the claim for damages.

Bombay Acts (District Municipal Act VI of 1873) S. 33-*Contd.*

Held, that the building of a new wall on the site of the old wall including the old foundations was not an addition to the existing building within the meaning of Sec. 33 of the District Municipal Act (Bombay VI of 1873). The Municipality was, therefore, liable in damages for any expenses which the plaintiff was put to by their pulling down the wall.

Krishnaji Narayan v. The Municipality of Tasgaon, P. J. 1893. p 426; 18 Bom. 547.

Notes;—Fol: 23 Bom 248. Dist: 2 Bom L R 572. Ref: 22 Bom 230.

17-S.33-Notice of proposed building–Right of municipality to demolish building erected without permission to build.

On the 18th August 1890, plaintiffs sent a notice to the town municipality of Umreth, intimating their intention to erect a building on their land, and giving a rough sketch plan of the land intended to be built upon. In this notice plaintiffs did not expressly state their intention to build the wall in dispute. On the 28th August 1890, the municipality wrote to the plaintiffs, requiring them to furnish a plan showing the design of the proposed building with its measurements. On the 30th September 1890, the plaintiffs, without furnishing the plan as required, built a wall on their land. Thereupon the municipality gave a notice to the plaintiffs requiring them to pull it down, as it has been built without their permission. The plaintiffs having failed to comply with this notice, the wall was demolished and its materials were carried away by the municipal servants. Thereupon the plaintiffs sued the municipality to recover damages for the wrongful demolition of the wall. *Held* that the plaintiffs had contravened the provisions of cl. 1 of s. 33 of Bombay Act VI of 1873, inasmuch as they had built the wall without giving any notice, or (if they did) gave notice without affording the information required by the municipality. The municipality were, therefore, justified in ordering the wall to be demolished.

Dave Harishankar v. Town Municipality of Umreth

19 Bom., 27

Notes:—Fol; 2 Bom L R 572. Dist; 27 Bom 221.

Bombay Acts (District Municipal Act VI of 1873) S. 33-*Contd.*

18.—S 33—Building beyond area for which permission is granted—Omission to give notice of building—Power of municipality to order alteration or demolition of a building erected without notice or in excess of the permission.

Under the Bombay District Municipal Act, where an owner, having obtained permission under s. 33 to build on one portion of his land, builds on another portion without having obtained fresh permission, if such part of his building as is outside the limits for which permission has been granted is built without notice, the municipality can in their discretion order it to be demolished. **Bhawanishankar v Surat City Municipality. 21 Bom 187.**

Notes—Fol; 2 Bom L R 572. Dist: 27 Bom 221.

19.—S.33–Municipality–Private street-Balconies-Dakkalis–Right of Municipality to order removal of balconies :—(Per Chandavarkar and Aston, J J Batty J., dissenting).

A District Municipality can under the provisions of S.33 of the District Municipal Act (Bom Act VI of 1873), order the removal of balconies put up by a person to his house abutting on a private street and constructed in defiance of the order issued by the Municipality. Per *Chandavarkar*. J.—Reading the whole of S.33 of the Bombay District Municipal Act (Bom. Act VI of 1873) by itself and having regard to its general terms, it is clear that the legislature has given to every Municipality the power to regulate the construction of buildings, whether they abut on a public or a private street. The power may be exercised,as the Municipality "think proper;" that is, it should be exercised, not capriciously or arbitrarily, but reasonably, provided the order is "not inconsistent with the provisions of the Act." Per *Batty*, J.-The orders passed by a Municipality under S. 33 of District Municipal Act, (Bom Act VI of 1873) if justifiable, must be shown to be consistent with the powers conferred by the Act; otherwise they are neither within the meaning of cl. 1 nor are legal orders within the meaning of cl. 3 of the section. The land affected not being a public street is not vested in the Municipality by S.17 of the Act, and no general power to interfere with buildings on private

Bombay Acts (District Municipal Act VI of 1873) S. 33-*Contd.*

property is conferred by any section of that enactment. Such interference would necessarily involve an encroachment on the ordinary rights of the subject; and wherever the Legislature intended to authorize such interference, it conferred the power by apt words. Per *Aston* J,—The words "may in writting issue such order *not inconsistent with this Act* as they think proper *with reference to such building*" in S.33 of the Bombay District Municipal Act, (Bom Act VI of 1873), are very wide and give elastic powers to the Municipality in the matter of regulation of new buildings as private property, and there is no reference to a street public or private in the section. The words "not inconsistent with this Act" appear to mean not inconsistent with the aim,scope and object of this Act as shown by its provisions.

Trichoran v Ahmedabad Municipality.
5 Bom L R 48=27 Bom 221.

20.—Bom. Acts VI of 1873 and II of 1884, Sec.33—Municipality—Building a house-Gully.

A Municipality, in granting permission to a person to erect his building, can legally impose a condition that he should leave a gully of a certain dimension.

Municipality of Thana v Fazal Karim.
3 Bom L R 842.

Notes.—Ref: 27 Bom 221: 261.

21.-S.33 and s.42—Discretion of municipality to take action under s.33, cl (3) Court's power to interfere with such discretion.

A suit for an injunction to restrain a municipality from removing a certain building or construction is not an action "for anything done, or purporting to have been done, in pursuance of the Act" within the meaning of s. 18 of Bombay Act II of 1884. Such a suit can, therefore, be brought without giving previous notice to the municipality. Apart from the provisions of s.33 of Bombay Act VI of 1873, it is only if the site of a building is vested in a municipality under s. 17 that this body is empowered, whereby s. 42 or by any other section, to take steps for the removal of the building. The discretion of taking action or otherwise under the 3rd clause of s. 33 is vested in the municipality, which alone can

Bombay Acts (District Municipal Act VI of 1873) S. 33-*Contd.*

determine whether or not the removal of a building erected contrary to the provisions of s. 33 is or is not a measure likely to promote the public convenience. If the municipality adopt the proper procedure, no Court can review its decision on the ground that in the opinion of the Court the removal of the building is not likely to promote public convenience. The legislature has confided to the municipality, and the municipality alone, the duty of deciding what measures within its legal powers are for the public convenience, and its discretion is not subject to control by the Courts. **Patel Panachand**

Girdhar v Ahmedabad Municipality.
22 Bom 230.

Notes.—Ref: 27 Bom 221.

22.—S. 36—Privy, power of municipality to order to be built by owner of a house-Such order not imperative, but permissive——Discretion of Court.

The term of s. 36 of Bombay Act VI of 1873 are not imperative in requiring a municipality to call on the owner of a house to build a privy, but are permissive leaving it to the discretion of the municipality to determine when the power conferred on them shall be exercised. Accordingly, where the plaintiff complained that the defendant had erected a privy so close to his house as to be a nuisance, and the lower Appellate Court found it to be a nuisance, but rejected the plaintiff's claim on the ground that the defendants had erected the same under the orders of the municipality issued under s. 31 of Act:—*Held*, reversing the decree of the lower Appellate Court, that the municipality had no authority to order the defendants to erect the privy regardless of the plaintiff's right, and that the defendants, therefore, could not plead that they acted under the orders of the municipality. The High Court directed an injunction to remove the privy within three months from the date of its decision. **Jafir Saheb v Kadir Rahiman.**
12 Bom 634.

Notes —Dist: 26 Mad 118; 137: 25 Bom 118.

23 —Bombay District Municipal Act VI of 1873, Secs. 42, cl. (1), 48 and 75—Public street—Obstruction—Removal -Notice—Corporate bodies —Practice.

Bombay Acts-(District Municipal Act VI of 1873)-S. 48 -*Concl'd.*

Under the District Municipal Act (Bombay Act VI of 1873) a Municipality has power to have all obstructions in a public street removed, whether the obstructions were placed there lawfully or not. The only distinction which the Act draws, is between obstructions erected or placed before the Act came into operation and those which have been erected or placed since it came into operation. As to the former, Sec. 42, clause (1) of the Act provides that notice should be given, and if legally placed on the street, compensation should be awarded for their removal. As to the latter, the Municipality can remove them under Sec. 48 even without giving any notice.

The public have a right of passing over the whole of a street if it is a public street.

It is not the practice of the Court to interfere with corporate bodies "unless they are manifestly abusing their power." **The Ahmedabad Municipality v Manilal Udenath. P J 1894, p. 50; 19 Bom 212.**

Notes.—Appl: 25 Bom 315. Ref: 24 Bom 600; 27 Bom 221; 30 Bom 558.

24.—S.48—Municipality—Suit—Notice—Act done—Act intended to be done.

S. 48 of the Bombay District Municipal Act, 1873, requires notice only when the suit is for an act already done or purporting to have been already done under the powers conferred; but no notice is required when the suit is not for an act already done, but to prevent an act from being irremediably and irrevocably done. The Court has for the purposes of S. 48 only to look to the real object of the suit. **Municipality of Parola v Laxmandas. 2 Bom L R 857=25 Bom 142.**

25.—S. 66-Selling vegetables in verandah of house.

Selling vegetables on the ota of a house is not using the ota "as a market" within the meaning of s. 66. Accordingly, a person who sold vegetables on the ota of his house was held not thereby to have committed any offence under s. 66 of the Municipal Act (Bombay) VI of 1873. **Paba Khoji. 9 Bom 272.**

Notes:—Ap. 10 Mad 216. Ex 11 Bom 106; Ref: Rat Un Cr 399; 797.

Bombay Acts-(District Municipal Act VI of 1873)-S. 84-*Concld.*

26—S. 84—As amended by Bombay Act II of 1884—Arrears of rent—Penalty—In addition to arrears of rent.

S. 84 of the Bombay District Municipal Act (Bombay Act VI of 1873) allows penalties to be imposed in addition to arrears of cesses or taxes, but it does not provide for the imposition of a penalty in addition to the arears of rent. **Rangu 22 Bom 708.**

27—S. 84—Taxation—Duty on goods imported within Municipal limits—"Imported"—Meaning of the word.

A rule of the Thana Municipality provided for the levy of octroi duty on certain articles "when imported within the Thana Municipal District." *Held* that goods merely passing through the Municipal District in the course of transit to Bombay were "imported" within the meaning of the rule, and were, therefore, liable to duty. **Rahimu Bhanji 22 Bom 843.**

28—S. 84—Bias-Judge-Municipality-Member of, trying civil suit by or against same Municipality—Bombay District Municipal Act VI of 1873, Sec. 84.

Although Sec. 84 of the Bombay Municipal Act enables a Magistrate who is a member of the Municipality to deal with a prosecution instituted by the Municipality, that Section is only permissive and does not directly authorize him to try a Civil case in which the Municipality is interested as plaintiff or defendant, and does not militate against the general principle that a Magistrate or Judge should not himself try a case when the circumstances show that he may have a bias in favour of either party. **Vinayak v. The Municipality of Barsi, P. J. 1897, P. 107.**

—S. 86.

See (1) Bombay District Municipal Act, 1884, s 48 case No (2) **18 Bom 19.**

(2) Limitation Act, 1877, s. 14. **8 Bom 529.**

29—S. 86— Municipality-House-tax—Civil suit.

Where a Municipality imposes a tax, a person contending that it is illegally levied can at once

Bombay Acts-(District Municipal Act VI of 1873) S. 86-*Contd.*

file a suit therefore against the Municipality in a Civil Court: S. 86 of the Bombay District Municipal Act, 1901, does not provide a preliminary which one must necessarily resort to before he can file an action in a Civil Court.

There is neither principle nor authority for restraining by injunction one who alleges that he has a money claim against another from enforcing that claim in the manner sanctioned by law.

Chunilal v. Surat City Municipality. 5 Bom L R 267=27 Bom 402.

30—S. 86-Suit against Municipality for damages.

S. 86 of Bombay Act VI of 1873 is not applicable to suits in the nature of actions of ejectment, but only to suits for damages.

Joharmal v Municipality of Ahmednagar. 6 Bom, 580

Notes.—Fol: 16 Mad 296. Ref. 16 Mad 317; 474; 3 M L J 223; 8 Bom 421; 22 Bom 289 F B; 25 Bom 142.

31-S.86-Illegal tax-Notice of action for refund —Time within which to bring suit—Limitation.

On the 18th March 1880, the Dakor Town Municipality, acting under the powers conferred upon them by the Bombay Act VI of 1873, convened a meeting at which it was resolved to impose a house-tax on the town; and also another meeting on the 2nd of April 1880 at which a classification of the houses was made and the rates fixed. The Revenue Commissioner, N. D., on behalf of the Government, sanctioned the resolutions on the 2nd of June 1880. Notice of the meeting of the 18th of March 1880 was not served on three of the commissioners, they being absent at the time from Dakor, and no notice specifying the business to be transacted therein was posted up at the kutchhery as required by s. 11, cl. (1) of the Act. *K*, a householder, sent a notice to the Municipality on the 25th of January 1881, impeaching the legality of the tax. On the 3rd of June 1881, he paid the tax—namely, R2—for which he had been rated, and on the 6th of January 1882 he sued for a refund of the said sum from the Municipality. *Held* that the suit was not brought too late to satisfy the requirements of s. 86 of the Act. When the notice of the 25th of January 1881 was sent by *K*, he had no cause of action against the Municipality for anything done; no notice, therefore, such as is contemplated by s. 86, was ever sent by *K*, and consequently there could be no final order on such notice from which the three months prescribed by that section would run.

Quære—Whether s. 86 of the Bombay Act VI of 1873 applies to an action for money had and received. **Joshi Kalidas Sevakram v Dakor Town Municipality. 7 Bom 399.**

Notes—Dist: 20 Bom 732. Ref: Rat Un Cr 574; 21 Bom 630

32-33 S.86 A person suing a municipality constituted by Bombay Act VI of 1873 for the refund of money illegally levied from him as house-tax, is bound to serve a previous notice on the municipality as required by sec 86, which is not confined to an action of damages, but is applicable to every claim of a pecuniary character arising out of the acts of municipal bodies or officers, who, in the *bona fide* discharge of their public duties may have committed illegalities not justified by their persons. **Patel Ranchhod Varajbhai v The Dakore Town Municipality. P J (1884) 110 =8 Bom 421.**

34—S. 86-House tax—Valuation—Civil Court —Jurisdiction.

A Civil Court has no power to interfere in the matter of valuation of houses made by a Municipality. **Morar v Borsad Town Municipality. 9 Bom L R 417=24 Bom 607.**

Bombay Acts (District Municipal Act VI of 1873) Ss. 88, 12.

See—C P C O 1, r. 8 (1).

88 P J 137.

Bombay District Municipal Act (II of 1884) S. 23.

See Superintendence of High Court—Civil Procedure Code, s. 622.

1—S. 23—District Municipality—Costs of inquiry—Costs—Separate suit.

A District Judge has authority under s. 23 of the Bombay District Municipal Act, 1884, to award costs of the inquiry and the order of the District Judge as to costs is capable of being enforced by a separate suit. **Ramlal v Bhagubhai. 2 Bom L R 960.**

2—Suit against Municipality for ejectment—Bombay District Municipal Act, Amendment Act (Bombay Act II of 1884), Sec. 48—Bombay District Municipal Act (Bombay Act VI of 1873), Sec. 86.

The words "in the case of any such action for damages" in Sec. 48 of the Bombay District Municipal Act, Amendment Act (Bombay Act II of 1884) clearly show that it was contemplated that there might be actions of another description to which the provisions in the former paragraph would be applicable. The section does not contemplate only "suits to recover monetary compensation for a wrongful act." A suit in ejectment—not being a suit brought to recover damages for an act done or intended to be done"—was excluded under Sec. 86 of the Bombay District Municipal Act (Bombay Act VI of 1873), but being an "action for an act done," that act, being the dispossession by the Municipality with a view to being restored to possession, falls under the provisions of the first paragragh of Sec 48 of Bombay Act II of 1384. **Nagusha v Municipality of Sholapur. P J 1892, p. 395; 18 Bom 19.**

Notes.—Over: 22 Bom 289 F B. Dist. 22 Bom 283. Ref: 19 Bom 407; 26 Bom 142; 19 M L J 333 F B; 32 Mad 371 F B.

Bombay Acts-(District Municipal Act II of 1884)-S. 48 *Contd.*

3—S. 48-Suit against municipality for injunction—Notice of action.

A suit for an injunction to restrain a municipality from removing a certain building or construction is not an action "for anything done, or purporting to have been done, in pursuance of the Act" within the meaning of s. 48 of Bombay Act II of 1884. Such a suit can, therefore, be brought without giving previous notice to the municipality. **Patel Panachand Girdhar v Ahamedabad Municipality. 22 Bom 250.**

Notes.—Fol 33 Bom 509=11 Bom L R 85. Ref: 2 Bom L R 845.

4—S. 48 & Bombay Act VI of 1873, s. 86—Purchase from mortgagee by municipality—Suit by mortgagor to recover possession—Ejectment-Limitation—Notice.

A mortgagee (defendant No.1) refused to give up part of the mortgaged land when the mortgage was paid off in 1881. He remained in possession and in 1888 he sold this land to the Municipality of Mahad (defendant No. 2). The mortgagor subsequently sued the municipality and its vendor to recover possession. The municipality contended that the suit was barred by limitation under s. 48 of the DistrictMnnicipal Act, 1884, *Held*, that the suit was not barred by s. 48. That section does not apply to actions of ejectment brought against a municipality. Such an action brought to try the title to land is not an action for anything done or purporting to be done in pursuance of the Act. 18 Bom., 19 distinguished. **Kashinath Keshav Joshi v Gangabai 22 Bom 283.**

Notes:—Ref: 22 Bom 289 F B; 25 Bom 142.

5—S.48-Ejectment suit against municipality—Notice.

The plaintiff was the inamdar of the village of dakor.He filed an ejectment suit against theMunicipality of Dakor,alleging that the municipality had illegally and wrongfully encroached upon a portion of the Gomti Lake at Dakor by laying the foundations of a building which they intended to erect for the purpose of a dharmshala. The municipality pleaded (*interalia*) that the suit was bad for want of notice of action under s. 48 of the Bombay District Municipal Act, 1884. *Held* (by a

Bombay Acts (District Municipal Act II of 1884) S. 48 *Contd.*

majority of the Full Bench) that the provisions of s. 48 of Bombay Act 11 of 1884 do not apply to actions for the possession of land brought against a municipality. *Per* Parsons, J.—The provisions of s. 48 apply only to actions for the possession of land whereof the plaintiff has been dispossessed by the municipality acting or purporting to act under some section of the Municipal Act, which empowers them to take possession of, or oust any one from, that land. *Per* Ranade, J.—S. 48 does not generally apply to suits for the possession of land, except in those cases where the claim arises on account of some act or omission of the municipality when it acts in pursuance of its stautory powers, and encroaches upon private rights. 18 Bom., 19 overruled. **Manohar Ganesh Tambekar v Dakor Municipality 22 Bom 289.**

Notes:—Fol: 22 Bom 605. Ref: 28 All 600; 22 Bom 636; 637; 25 Bom 142; 32 Mad 371 F B; 19 M L J 333 F B.

6—S. 48—Suit for damages, possession, and injunction—Notice of action.

In a suit brought against a municipality to recover possession of a piece of land taken by it, for damages for pulling down a wall on the land, and for an injunction,—*Held* that, as regards damages, the suit came under s. 48 of the District Municipal Act, 1884, but, as regards possession and injunction, notice of action was not necessary under the section **Shidmallappa Narandappa v Gokak Municipality 22 Bom 605.**

7—S. 48—Suit for specific performance of a contract or for damages for breach thereof.

S. 48 of the Bombay District Municipal Act, 1884, does not apply to a suit for the specific performance of a contract or for damages for breach thereof. **Municipality of Faizpur v Manak Dulab Shet 22 Bom 637.**

8—S. 48—Suit for an injunction to restrain municipality.

A suit was brought by the plaintiff against a municipality for an injunction to restrain them from laying water-pipes on his land. The lower Courts dismissed the suit for want of notice under s. 48 of the District Municipal Act, 1884. *Held*, reversing the decree, that the suit was not a suit for anything done in pursuance of the Act, but

Bombay Acts (District Municipal Act II of 1884)-S. 48-*Contd.*

to prevent the municipality from doing what the plaintiff alleged to be an illegal act, and that s. 48 did not apply. **Harilal Ranchodlal v Himat Manekchand 22 Bom 636.**

Notes.—Ref: 25 Bom 142.

9—S 48-Suit against Municipality—Suit for specific performance of contract or for damages for breach—Bombay District Municipal Act 11 of 1884. Sec. 48 of the District Municipal Act does not apply to a suit for specific performance of a contract or for damages for breach thereof, as such a suit is not an action for anything done or purporting to be done in pursuance of that Act. P. J. 1896, P. 768, referred to. **Municipality of Faizpur v Manak Dulab Shet P J 1897 p 140.**

10-S. 48-Bombay District Municipal Act VI of 1873, Sec. 48—Notice of action—Suit for possession—Injunction—Damages.

A suit was brought to recover a piece of land taken by a District Municipality, damages for pulling down a wall on it, and for an injunction.

Held, that as regards damages the suit came under Sec. 48 of the Bombay District Municipal Act, but as regards possession and an injunction, notice was not necessary under the Section. 5 Ch D. P 347, referred to as showing that the injunction is only ancillary to the ejectment suit and in regard to such relief notice has always been held to be unnecessary. **Shidmallapa v The Gokak Municipality P J 1897 p 1.**

11.—S. 48.—Injunction—Bombay District Municipal Act VI of 1873, Sec. 48—Notice.

A suit was brought by the plaintiff against a District Municipality and another for injunction to restrain them from laying pipes on his land.

Held, that notice under Sec. 48 of the District Municipal Act VI of 1873, was not necessary for the maintenance of the suit. P. J. 1896, p. 768; and P. J. 1897, p. 1, refered to. **Harilal Ranchhodlal v. Harinat Manukchund, P. J. 1897, p. 17.**

Bombay Acts-(District Municipal Act II of 1884)-*Concld.*-S. 48-*Concld.*

12.——Bombay Act II of 1884, section 48—Notice—Official capacity.

The defendant an officer of Government was appointed President of the Municipality. *Held* that his acts as President did not become the acts in an official capacity, *held also* that in a suit against him for defamation he was not entitled to notice under Bombay Act II of 1884 as the defamation cannot be said to be an act done or purporting to be done in pursuance of the Act. **Gopal v. Mahadev.**

1896 P J 325.

—S. 57.

See Bombay District Municipal Act 1873 S. 11 Case No. (6) **20 Bom 732.**

—S. 217.

See *B*ombay District Municipal Act, 1873, s. 21, Case No (14). **21 Bom 630.**

Bombay District Municipal Act III of 1901.

Notes.—[Supplemented, Bom. Acts V of 1890 and II of 1899 (Saved by S. 2 (C) of Bom. Act III of 1901) ; A. M, Bom. Act III of 1902 ; S. 52 Rep. in Pt., Ss. 188 (1), 189 A M., Bom. Act III of 1903 : Ss. 25 (A), 48 (1), 83 (1) (B), 84 (3), 113 (1), 122 A. M, Ss. 46 (E), 59 Prov. (C) 96 (6), 174 (1) Rep. in Pt Bom. Act IV of 1904.].

1.—S. 22—Municipality—Election—Omission of a candidate's name from the candidates' list prepared by the Receiving Officer—Suit for declaration and injunction.

A Receiving Officer, appointed by the Collector under the Election rules, refused to accept the nomination paper of the plaintiff, a candidate at a by-election for a councillorship of the Surat City Municipality : and the list of candidates that was published omitted plaintiff's name for it. The plaintiff thereupon sued the Municipality for a declaration that he was entitled to come forward as a candidate and for an injunction to prevent the Municipality from carrying on the by-election without accepting plaintiff as a candidate :

Held, (1) that the suit for declaration failed since the Municipality neither denied nor was interested to deny the character or right which the plaintiff sought to establish. It was the Receiving Officer that was concerned with the question and over him the Municipality had no control ;

Bombay Acts (District Municipal Act III of 1901) S. 22-*Concld.*

(2) that the claim for injunction too could not be sustained, since the Municipality had done no wrong and was threatening to do no wrong ; it only proposed to proceed in accordance with the Act and the Rules so far as they related to it. **Surat Municipality v Chunilal.**

8 Bom. L R 209 = 30 Bom. 409.

2—S. 24—Land acquisition—Jurisdiction—Civil Court—Land Acquisition Act (1 of 1894), Sec. 6.

A Civil Court has no jurisdiction to entertain a suit for an injunction to restrain a District Municipality from acquiring through the medium of Government, under the Land Acquisition Act, 1894, a piece of land for the purpose of widening a street-way. **Shastri Ramchandra v. Ahmedabad Municipality.**

2 Bom. L R 395, 24 Bom. 600

3.—S. 30—Liability—Non-feasance—Damages—Liability to be sued—Municipality—Non-repairs of roads.

A corporation cannot be held liable for damages arising from a mere non-feasance. Hence, no suit can lie against a Municipality for damages suffered owing to non-repair of roads ; the statute not imposing upon them a duty towards the plaintiff which they negligently failed to perform. **Achratlal v. The Ahmedabad Municipality.**

6 Bom. L R 75 = 28 Bom. 340.

4.—S. 30—Binding character of the contract.

In a suit for damages for breach of an executory contract, it is open to the defendant to show that it is not binding upon him inasmuch as it is not binding upon the plaintiff. **The Ahmedabad Municipality v Sulemanji.**

5 Bom. L. R. 592 = 27 Bom. 618.

5.—S. 54 (1) (c)—Refuse cart—tort.

The provision of refuse carts is an obligatory duty necessarily deducible from the obligatory duty of cleansing the public streets laid upon a Municipality by S. 54 (1) (c) of the Bombay Act, III of 1901.

An action in tort will not lie against the Municipality in respect of the exercise with judgment and caution of powers conferred by the Legislature. **Hansraj Hirji v. The Karachi Municipality.**

4 S L R 65.

Bombay Acts-(District Municipal Act III of 1901)-S. 54-*Contd.*

6.—S. 54—Municipal Corporation acting bona fide—Imperative duty and permitted act - Karachi Municipality—Dust-bins— Nuisance—Court, how far can interfere with acts of a Corporation.

Where the plaintiff sued for an injunction prohibiting the Municipality from placing a common dust-bin on the corner of a garden immediately in front of his house, *held*, that as s. 54 of Bombay Act III of 1901 imposed an imperative duty on the Municipality to make reasonable provision for cleaning public streets, as the streets could not be kept clean, under the circumstances obtaining in Karachi, without keeping dust-bins in some specified spaces; and as it was not shown that the Municipality was either negligent or not acting with *bona fides* in placing one at the particular site, the plaintiff was not entitled to the injunction sought for, although the dust-bin in this instance was a source of nuisance to him.

Held, also, to ascertain whether or not a nuisance is such as to give one a right of action, inquiry should be made into the authority under which the Municipality purported to act, the law on which point may be thus summarised

(1) Apart from the terms of the statute which constitutes it, the corporation has no more authority to infringe a private right than the ordinary citizen.

(2) The corporation can do an act which constitutes a nuisance, if, and only if the power to do the act is expressly set forth in the statute or is necessarily deducible therefrom.

(3) Where the corporation has merely permissive and not imperative authority to do a thing, the inference is that the discretion should be so exercised as not to prejudice the common law rights of others.

(4) If the corporation acts within its express or implied authority without negligence and with *bona fides*, no action lies against it at the suit of a person who sustains a private injury by its exercise.

5) The Courts put a wider and more liberal construction on the powers vested for the benefit of the public as a body, such as a Municipal Corporation. **Hansraj Hirji v. The Karachi Municipality.**

1 Sind L R 228.

Bombay Acts (District Municipal Act III of 1901)-S. 54-*Concld.*

7.—S. 96.—Notice of new building-Balconies erection of—Provisional order by Municipality—Municipality passing no orders for a year—Erection of balcony—Injunction—Any provisional order—Interpretation.

The plaintiff applied to the defendant Municipality on the 3rd July, 1903, for permission to re-construct his house, and building balconies on the southern and eastern sides. The Municipality gave to the plaintiff,on the 25th *idem*, permission to re build his house; as regards balconies, it said that the matter was referred to the Managing Committee and until it was decided, he should not construct them. For nearly one year, the Municipality did nothing.The plaintiff after waiting for some time built his balconies. This was reported to the Municipality on the 15th July, 1904; and it called upon the plaintiff, on the 4th August, 1904, to remove the balconies. The plaintiff sued the Municipality for an injunction restraining it from removing his balconies.

Held, that the order passed by the Municipality as to the balconies must be referred to sub s. 3 (*a*) of S. 96 of the Bombay District Municipal Act, 1901, that it was spent after the expiry of one month; and that thereupon the plaintiff became entitled under sub-s. 4 of S. 96 to proceed with the proposed work.

Under the Bombay District Municipal Act, 1901, an applicant is not to be restrained from proceeding with his work merely because a provisional order, which is expressly limited to one month, may have been issued months, or even years, earlier.

The words "any provisional order" in sub s. 4 (*a*) (ii) of S. 96 refer only to a subsisting provisional order. **Ahmedabad Municipality v. Ramji Kuber.** **13 Bom L R 914.**

8.—S, 151 sub-secs. (1) (*a*), (2) and (3)—Flour mill worked by camel—Objectionable smell arising from negligent user—Right of Municipality to issue notice—Unauthorized notice issued by Municipal Officer—Nuisance.

Bombay Acts-(District Municipal Act III of 1901)-S. 151 -*Concld.*-

S. 151 (o) of the Bombay District Municipalities Act refers to a manufactory which is such that offensive or unwholesome smells arise from it as the natural result of working the factory in the ordinary way. The mere fact that an objectionable smell arises inside the factory by negligent user is not sufficient to bring a factory within S. 151 (o); there must be an offensive or unwholesome smell issuing from the premises so as to create a possibility of its causing a nuisance to the neighbourhood.

A flour mill worked by a camel is not such a manufactory as is contemplated by S. 151 (o)

S. 151 only authorises a Municipality to issue a notice, if it is satisfied that the smell which issues from the factory in the ordinary course of ordinarily careful user, is so offensive as to cause annoyance to the neighbourhood: if amoyance is caused to the mighbourhood only when and because there is improper user, then the smell must be actually dangerous to life, health or property, before the Municipality can prohibit the further use of the premises as such factory A notice not authorized by, but issued by an Officer of a Municipality, is not subject to the consequences specified in subsections (2) and (3) of S. 151. **Pahlajrai Chapumal v The Karachi Munipality, 9 Ind. Cas 886.**

9.—S, 160 Municipality—Acquisition of land—Proposal to acquire—Acceptance of proposal—Difference as to price—Completed Contract—The price can be fixed by the Court in case of difference.—

The Poona City Municipality having determined to acquire a portion of the plaintiff's house for the purpose of widening a street, the plaintiff expressed his willingness to allow the Municipality to acquire the same: but they could not agree as to the price. That question was referred to arbitration as required by s. 160 of the Bombay District Municipal Act. 1901; but the proceedings before the arbitrators were not successful. The plaintiff then applied to the District Judge, under s.160 (3 of the Act,requesting him to ascertain and determine the compensation payable. The District Judge made his award. The Municipality appealed from the award contending that they no longer required the plaintiff's premises and that there never was a completed contract with the plaintiff.

Bombay Acts (District Municipal Act III of 1901)-*Concld.*-**S 160**-*Concld.*

Held. (1) that there was a contract of sale at a fair valuation, where the Court not only can provide, but under a special statute is compelled to provide, the means of ascertaining the price: and of such a contract specific performance would be awardable.

(2) That therefore there was a Contract between the parties from which the Municipality could not resile. **The Poona City Municipality v. Ramchandara G. Karve. 10 Bom L R 617**

10—S. 3 (10)—Selling or exposing for sale fish intended for human food-Sale from a basket placed on the foreshore of Chowpatti-Place between high and low water mark—Private market—Burden of proof City of Bombay-Bombay General Clauses Act, (Bom. Act I of 1904), Sec 3 (10).

The accused was charged with selling or exposing for sale, without license from the Municipal Commissioner, fish intended for human food on the Chowpatti foreshore, contrary to the provisions of s. 410 (1) of the Bombay Municipal Act. 1888. The sale was from a basket which the accused had placed on the sand at some distance from the water, the place being between the high and the low water mark. The fish sold was fresh fish and it had been recently brought from one of the boats then in the Back Bay:—

Held, that the accused was liable under s. 410 (1) since it was impossible to say that fresh fish was sold from a vessel, when as a matter of fact it had been sold from the basket on the shore, it having been brought from the vessel which was in the water.

Held, in answer to the contention that the place where the fish was sold was a private market, that it was difficult to see how a place like the whole of the foreshore of Chowpatti could be held to be a private market: and, even if this were not so, since the Municipality started their case by showing that the place in question was the foreshore of Chowpatti, that was sufficient to throw the *onus* upon the accused to show that the foreshore of Chowpatty was a private market within the meaning of s. 398 of the Bombay Municipal Act, 1888.

Held, also that the Bombay Municipal Act, 1888, applied to the spot in question.

Emperor v Budhoobai. 7 Bom L R 726= 30 Bom 126.

Bombay District Police Act VII of 1867

Notes.—S. 34 rep. in pt. and am., Bom Act III of 1886; rep. (save ss. 33 and 34), Bom. Act IV of 1890; ss. 33 and 34 rep. (Locally and temporarily), Bom. Act 1 of 1889.

1—Mukhi, appointment of—District Police Act (Bom. Act VIII of 1867)—Salary of Mukhi-Payment by Jivakdars. Plaintiff sued for a declaration that the defendants were liable to pay the salary of the Mukhi of the village of Kamijla, who was nominated by him and appointed by the District Magistrate under Bombay Act VII of 1867, and to recover from them the arrears paid by him. The plaintiff alleged that the village of Kamijla was held by the defendants as *jivakdars* on *jirai* tenure and formed a component part of the estate of Patri, of which he was the ruling chief. The defendants contended that they were quite absolute owners of the village and were independent of the plaintiff and that they were not liable to pay the salary of the Mukhi nominated by the plaintiff. The lower court decreed the plaintiff's claim, holding that the salary of the Mukhi was a charge upon the revenues of the village by custom and that the right of nominating the Mukhi for the said village was vested by custom in the plaintiffs. *Held* that Bombay Act VII of 1867 did not affect the customary right of the plaintiff to recover the salary of the Mukhi from the defendants. That the Government Resolutions of 1880 and 1894 created no fresh contract between Government and the plaintiff such as could absolve the defendants from the liability to pay the Mukhi's salary, and therefore the plaintiff was entitled to a decree.

Bawabhai v Surajmulji. 4 Bom L R 264.

Bombay District Police Act (IV of 1890.

—ss. 51 and 52.

See Abatement.

1—S. 53, cl. (2), and s. 65—Refusal to attend in order to make a panchnama.—

The accused refused to attend to make a panchnama regarding an obstruction to a public road caused by a grain-dealer by keeping his grain bags on the road. He was thereupon convicted under s. 53, cl. (2), and s. 65 of the Bombay District Police Act, 1890. *Held* that the conviction was illegal. Non-attendance to make the panchnama in question was not an offence punishable under the Police Act. **Bholashankar.** 22 Bom 970.

Bombay Acts-(District Police Act IV of 1890)-*Concld.*

Bombay Endowment Act II of 1863 s. 8 cl. (3).

See Endowment.

Bombay Estates Partition Act V of 1897.

Notes:—Declared in force in the Sonthal Parganas. Reg. III of 1872, S. 3 as amended by Reg III of 1899, S. 3.

Bombay, Evidence-Parol Evidence -Varying or Contradicting written Instruments. Act III of 1865

See Evidence—Parol Evidence—Varying or Contradicting written instruments.

Bombay General Clauses Act (III of 1886.

See (1) Registration Act, s. 17.

(2) Small Cause Court—Mofussil—Jurisdiction—Immoveable Property.

Bombay Government Resolution.

See Hereditary Offices Act, s 4.

Bombay Gujarat Talukdars Act VI of 1888.

See Gujarat Talukdars Act.

Bombay Hackney Carriage Act VI of 1863.

See Hackney Carriage Act.

Bombay Acts (Hak› Act).

See Duties.

Bombay Hereditary offices Act III of 1874.

See Hereditary offices Act (Bombay.)

Bombay Hereditary offices Act-Amendment Act V of 1886.

See Hereditary Offices Act Amendment Act.

Bombay High Court Rules-Rule.

577—Application under S. 15—Specific Relief Act, frame of—Case in which a petition was treated as a notice of motion.—See

4 Bom L R 768.

Bombay High Court.

1—Civil Court of Resident at Aden—High Court—Transfer of case. The Civil Court of Resident at Aden, as constituted by Bombay Act II of 1864, is subject to the superintendence of the High Court of Bombay, within the meaning of cl. 13 of the Letters Patent, 1865; and the High Court of Bombay can, therefore, remove a suit from the Court of the Resident and try and determine the same. **Municipal Officer Aden v Haji Ismail.** 8 Bom L R 4= 3 C L J 5=1 M L T 1=3 A L J 53= 10 C W N 185=16 M L J 73= 30 Bom 246 (P C).

Bombay Hindu Heirs Relief Act VII of 1866

Notes.—Rep in pt., Act XII of 1873, Bom Act III of 1886

—S. 2—See Hindu Law—Debts,

Bombay Insolvent Traders Act XXVIII of 1865

Notes.—Rep , Act VIII of 1868

Bombay Irrigation Act VII of 1879.

Notes.—Rep in pt Act XVI of 1895; Bom Act III of 1880; Bom Act III of 1886.

1. Ss. 8; 285—Nala—Canal—Watercourse—Natural stream in a nala—Right of the Irrigation

II C C 50

Bombay Acts-(Irrigation Act VII of 1879)-S 8-*Contd.*

Department to prevent the flow—Natural rights of riparian owners.

The defendant was in possession of a piece of land, which derived water from a nala. The nala was crossed at a considerable distance from this land by a Government irrigation canal and existed long before the canal. The water flowing in the nala was derived from two sources (1) from rain water from the hills and catchment area of the nala, and (2) from percolation water or waste from the canal. Apart from abnormal periods of drought, the second of the two sources was perennial and the more important of the two. Before the Government canal was made, there was a surface flow in the portion of the nala near the defendant's land: for seven hundred yards below the point of contract the nala was normally dry and gravelly for many months, but after that point there was a spring which furnished perennial stream in the nala. And quite a part from this, the nala held, throughout the rainy months, a fair body of water. At a point little above the defendants' lands the Irrigation Department erected an earthen dam in the nala for the purpose of irrigating an adjacent field. *Held* (1) that apart from the Bombay Irrigation Act the defendant had the right of a reparian proprietor to the usufructuary interest in the water in the nala, which was an incident to the possession of the adjacent soil and consequently, whatever the nature of the tenancy might be, he, as the occupant of the land abutting on the stream, and not the Government was entitled to the enjoyment and benefit of the water as it flowed past. (2) That as the defendant had a right to all the water which actually formed a part of the stream in the nala as soon as it became a part whether such water came by ordinary natural means, as from springs or from the surface of the adjacent hills or from rains or was added by percolation from the artificial channel of the canal; and if the canal water had by percolation augmented the stream and became part of it, no distinction could be made between the original natural stream and the accession to it irrespective of the source from which it came. (3) That the nala in question was not a canal within the meaning of S. 3 of the Bombay Irrigation Act, 1879. (4) That the Irrigation department was not entitled to prevent the flow of water to defendant's land by erecting any

Bombay Acts-(Irrigation Act VII of 1879)-S. 8-*Concld.*

dam in the nala. (5) S 8 of the Bombay Irrigation Act only empowers a canal officer to enter on any land &c., and in no way defines what he may do for the proper regulation and management of the canal. (6) S 28 of the Act contemplates the supply of water to a water course and to a person. It does not deal with the supply of water to any person but only what the supply of water to any person *entitled to such supply* which means *entitled under* the Act to such supply. A natural stream though its flow of water be in part derived by percolation from a canal is not a canal until the Governor-in-Council has applied to it the provisions of S. 5 of the Bombay Irrigation Act. Statutes which encroach on the rights of the subjects. Whether as regards person or property, must receive a strict construction. **Secretary of State v Balwant 5 Bom L R 790=28 Bom 105**

2.—s. 48—Bombay Revenue Jurisdiction Act (X of 1876), s. 4 (b)—Water-rate—Land revenue—Percolation of canal water - Opinion of the canal officer—Jurisdiction of Civil Court.—

Where water-rate is levied under s, 48 of the Irrigation Act (Bombay Act VIII of 1879), the question as to the jurisdiction of Civil Courts in a suit for the determination of the legality or otherwise of such levy depends upon whether the incidence of the rate is authorized by the provisions of the section. Under it, the condition precedent to levying the rate is not the fact ascertained by evidence whether the water in dispute has percolated from the canal, but the opinion of the canal officer that it has so percolated, he and not the Civil Court being made the Judge of such percolation for the purposes of the Act. Such water-rate falls within the denomination of land revenue. **Balvant Ganesh Oze v Secretary of State for India 22 Bom 377.**

3.—s.48-The Bombay Irrigation Act (Bombay Act VII of 1879)—Jurisdiction—Possessory suit, question to be decided in—Defences to a possessory suit—Canal——Water-course——Leakage—Irrigation Department can charge water-rate only.

Semble:—Water which has leaked from an

Bombay Acts-(Irrigation Act VII of 1879) S 48-*Contd.*

irrigation canal into the land of other persons would not belong to the Irrigation Department so that the latter would have the right to follow it up and claim it as their own. Ordinarily it would belong to the owner of the soil, and Bombay Irrigation Act, 1879, only gives the Department the special right of charging a water-rate on the land which derives the benefit from the leakage (s 48 Bombay Irrigation Act). If the leakage flow was such that it itself had become in the eye of the law a canal or water-course, then the rights of the persons through whose lands it flowed would be governed by the law applicable to canals or water-courses.

Balwantrav v Sprott. 1 Bom L R 414.

Notes—See 23 Bom 760; 761.

4.—Bombay Irrigation Act VII of 1879 sec 48—Rate—Water rate—Land-Revenue.

Where water rate is levied under Sec. 48 of the Bombay Irrigation Act VII of 1879, the question as to the Jurisdiction of Civil Courts depends upon whether the incidence of the rate is authorized by the provisions of the Section. Under it the condition precedent to levying the rate is not the fact ascertained by evidence whether the water in dispute has percolated from the canal, but the opinion of the canal officer that it has so percolated, he and not the Civil Court being made the judge of such percolation for the purposes of the Act. Such water rate falls within the denomination of land revenue. P J 1892 P 21 referred to. **Balvant Ganesh Oze v the Secretary of State P J 1896 P 472.**

5.—Continuous—easement—Sale of land Common—acquisition of easement.

On a severance of land from the tank from common ownership the owner of the tank claimed a right to insist on the purchaser of the land to keep the tank in good repair; and to restrict the cultivation at the tank bed.

Held that the sale of the land did not in any way enlarge the right of the owner beyond that which he was entitled to on its severance.

Abhoy Chetty alias Authippa Chetty v K C Desika Chariar. 8 M L T 241.

6.—Irrigation—Right of Government to in-

Bombay Acts-(Irrigation Act VII of 1879)-S. 48 *Contd.*

crease height of dam or widen channel—Suit by riparian proprietors in representative capacity—Indian Easements Acts S 7, illustration (h)-Meaning of the word "interruption"-Right of Government to divert water to non-riparian tenements.

Where certain riparian land owners sued for a declaration that Government had no right to increase the height of a dam so as to obstruct the natural flow of water or to increase the width of an old channel so as to diminish the supply of water to the lower riparian owners.

Held that the Government could not be held to have violated the rights of private owners of land, unless the party alleging damage proved that he had sustained injury and that the amount of water which he had been accustomed to utilize had been diminished.

The Government as riparian owner is entitled to divert so much of the water as they put into the stream before it reached the lower proprietor if, in so doing, they did not injure any lower riparian owner.

Where plaintiffs sued as lower riparian owners and on behalf of others alleged to have the same interest, but the water which some of the latter used for irrigation was outside the area of their riparian tenement, it is a question whether the plaintiffs can sue in a representative capacity since the cause of action of each plaintiff is distinct and each would have to prove damage.

In exercising their right of control, Government have always claimed and exercised the right to carry water to non-riparian tracts of country, the very object of diverting water by means of dams being to enable them to do this: it could not however be suggested that for the purposes of their right of control, Government would be warranted in committing an act of trespass.

In this country, riparian owner has no higher rights against Government in regard to works of irrigation carried out by them in connection with natural streams than that of not being damaged by any diminution in the supply of water which he has been accustomed to utilize. But the rights of Government as upper riparian owner are higher than those of a private upper riparian owner.

Bombay Acts-(Irrigation Act VII of 1879)-*Concld.* S 48-*Concld.*

According to English Law, proof of damage is necessary where the use by the upper riparian owner is a use for the purpose of his upper riparian tenement, but not necessary where the use is for a purpose unconnected with his riparian tenement, but according to the American Law, the quantity of water taken to non-riparian land must, to give the lower owner a form of complaint, be sufficient to inflict a perceptible injury on him,

The word "interruption" which occurs in illustration (h) to s 7 of the Easements Act means such interruption as results in material alteration in quantity. (28 Mad 72 Appr: 5 M H C R 6; 1 I A 364 Expl: 31 Mad 171,7 Bom 209;1904 A C 801, 1 Scotch and Divorce Appeal Cases 47 Dist; 27 Ch D 566, 1902 1 Ch 649, 1906 A C 72, 24 Cal 865; 7 H L E and 1 697; 11 C W N 85 Ref:).

Robert Fischer v Secretary of State for India 5 M L T 149=19 M L J 131= 32 Mad 141=2 Ind Cas 325.

7.—Irrigation—Right of melvaramdar to irrigate with water of tank in the village of the kudivaramdar—Liability of the Crown to supply water.

As between the Crown and the ryot, consideration of a different character from those applying to the kudivaramdar and the melvaramdar arise. The Crown claims the right of periodical revisions of assessment and the right is to distribute the water for the benefit of the public subject only to the ryot's claim for such supply as is sufficient for that purpose. The melvaramdar has neither the right of such revision of assessment; nor is he under any obligation for the distribution of the tank water.

Whatever may be the case as between the crown and the ryot, the right of the kudivaramdar to the customary supply of water from the tank is a proprietary right appurtenant to their ownership of the lands. 24 Mad 36 Dist; 16 Mad 333; 28 Mad 72 (81) Ref. **Nynappa Servai v. Veeran 5 M L T 143**

Bombay Jurisdiction Civil Court Act II.

See Jurisdiction of Civil Court.

Bombay Acts (Jurisdiction of Civil Court Rent and Revenue Suits Act III of 1863.)

See Jurisdiction of Civil Court Rent and Revenue Suits.

Bombay Karachi Port Trust Act VI of 1886.

Notes:—Rep-in-pt Act 11 of 1901; Rep in pt and Am Bom Act 11 of 1902; ss 18 (9), 61 Am. ss 59-A to 59 ins S 74 Rep in pt Chs VI to IX remembered VII to X Bom Act 11 of 1909.

1—'Person'—Whether includes the Port Trust Board—Suit brought six months after accrual of cause of action- Bar of limitation——Port Trust carrying goods for no fee-Not carrier—Art 30, Limitation Act.

The word 'person' in S 87 of the Karachi Port Trust Act must be deemed to include the Karachi Port Trust Board also, and a suit against the Port Trust for anything done in pursuance of the Act must be brought within six months from the accrual of the cause of action.

Where the Port Trust conveys goods from the wharf to the Import yard, there being no fee charged or chargeable for such conveyance, the Port Trust cannot be said to act as a carrier.

It is essential that the conveyance of the goods should be for hire or reward, otherwise the person carrying goods is not technically a carrier.

Prag Narain Baragva v The Karachi Port Trust 4 S L R 236.

Bombay Khoti Settlement, Act I of 1880.

See Khoti Settlement Act.

Bombay Land Revenue Act II of 1876.

See Land Revenue.

Bombay Land Revenue Act V of 1879.

Notes:—Rep in Pt Bom Act III of 1886 Rep in Pt and Am Act XVI of 1895, Bom Act VI of 1901 (Locally) Bom Act I of 1880 s 89, Bom Act VI of 1888, Ss 3, 33, As Am By Bom Act II of 1905; Am Bom Act VII of 1879, S 2; Bom Act IV of 1886 Ss 3 (1) 38, 43, 52, 80, 187, 214. Heading Above s 40 Sch B Am S 144 Rep in Pt Bom Act V of 1905: Rep (In Coorg) Reg I of 1899 S 85 and Part of S. 58 Declared Not to be in Force in the Punch Mahal Act VII of 1905.

Bombay Acts-(Land Revenue Act V of 1879) *Contd.*

Bombay Land Revenue Act.

See Bom Act (V of 1879).

Bombay Land Revenue Act V of 1879.

See Bombay Land Funds Act 1869
17 Bom 422.

1.—Ss 3 and 203—Forest Officer. Revenue Officer.—

A Forest Officer is not a Revenue Officer within the definition in s 2 of the Land Revenue Code (Bombay Act V of 1879), and does not become one merely by being placed under a Revenue Officer for purposes of control. **Narayan Ballal v Secretary of State for India**
20 Bom 803.

2—Bombay Act V of 1862, Sec. 3—Suit against stranger for land in joint khatah,-Partition-suit—Parties.

The Suits referred to in Section 3 of Bombay Act V of 1862 are such as are instituted by persons against whom the order of the Collector is made or whom it affects injuriously and which are brought to try the validity of the order of ouster. The Collector is not competent under the Section to pass any order as to the title of the shares in the *Narwa*. One R owned two Khatas, one of which stood in his own name, the other, in the joint names of himself and G. Plaintiff purchased R's interest in the latter Khata. The lands of the other Khata were purchased at a Court-sale by B. At the time of the sale, R's mortgagees were in possession of his lands. On B's application, the Collector removed the mortgagee from possession and placed B in possessions of R's lands in both the khatas. B then transferred his interests and possession to the defendant. Subsequently plaintiff brought the present suit to recover the land of the joint Khata purchased by him from R.

Bombay Acts-(Land Revenue Act V of 1879)-S 3-*Contd.*

Held, that the suit was not barred by Section 3 of Bombay Act V of 1862 because instituted more than 3 months after the date of the Collector's order ; that as plaintiff alleged that defendant had no interest in the Khata in suit his proper remedy was not a suit for partition against the defendant ; and that though plaintiff alleged that he had purchased R's interest in the joint Khata of R and G, yet he had sufficient interest in the lands in dispute maintain the present suit as defendant did not object that plaintiff could not alone bring the suit and the other sharers including the plaintiff appeared to be in possession of their respective shares, and the defect of parties, if any could be cured by joining by either as plaintiff or defendant. **Haribhai v Gokal, P J 1897, p 109.**

3—Ss. 3 (11), 109, 197, 217—"Holder'—Occupant—Alienated village—Entry in Revenue Register—Rectification—Oversight—Custom of Thana District—Varkas land—User.

The right of tenants of rice lands over adjoining waste land of their superior holder is, by custom in the Thana District, confined to the use of portions of the waste for obtaining the manure, without which the rice lands could not be cultivated or the assessment on the rice land earned and paid.

Before a person can claim the benefit of S. 217 of the Land Revenue Code, he must be shown to be a "holder" within the meaning of S. 3 (11) of the Code.

Where the entry in the Revenue Registers was due to a misunderstanding of a certain order.

Held, that the cause of the error being of the same nature with "oversight" falling within the description of errors in S. 109 of the Land Revenue Code, the rectification of the Register so as to bring it in accord with the order made after hearing both the parties was not contrary to natural justice It was a case in which the Revenue officer concerned was authorized under S. 197 of the said Code to dispense with any judicial or quasi-judicial inquiry. **Vasudeo v Govind. 14 Bom L R 124.**

4—S. 3, cl. 19—'Alienated'—Village of Ghatkooper—Kowl (lease) for ninety-nine years—Alienated village—Agricultrural lease—Builidngs erected by occupiers on their respective lands—Extra assessment levied by Government—Right to levy extra assessment not parted with under the Kowl—Regulation XVII of 1827, S 20.

The kowl (lease) of the village of Ghatkooper in the Thana District granted by Government on the 31st December 1845 for ninety-nine years provided *inter alia* that the grantee should pay to Government annually a fixed sum with respect to the land which had already been under cultivation and "that as to waste lands, the grantee should bring them all into cultivation within forty years and on the expiration of that period the full assessment, according to the prevailing usage of the country, should be collected annually from the grantee on such land as might be under cultivation as well as on such quantity as might remain waste out of the present waste, entered in the public accounts." The *kowl* further provided—"In respect of the above named village you (grantee) are to consider yourself as farmer thereof. You are, therefore, to exercise the authority vested in farmers by Chapter VI of Regulation XVII of 1827, or such as may be hereafter vested in them by any new enactment shall also be exercised by you and in the event of your acting contrary to the above-said enactments, you will be subject to such penalties as are now or may hereafter be provided for by Regulation."

Subsequently some of the occupants of the village having built upon their respective lands Government levied extra assessment from them under the provisions of the Bombay Land Revenue Code (Bom Act V of 1879). The grantee under the *kowl* himself claimed the right to levy extra assessment on the ground that the village was an alienated village within the meaning of cl. 19 of S. 3 of that Code, and was, therefore, not liable to the provisions of the Code. He, therefore, applied to Government for a refund either wholly or in part of the extra assessment collected by them, and the Government having refused to grant his request, he brought a suit against the Secretary of State for India in Council praying (1) for a declaration that (a) the extra assessment imposed by the defendant upon lands appropriated for building sites in the village was illegal, (b) the Bombay Land Revenue Code was not applicable to the village, and (c) the resolu-

Bombay Acts-(Land Revenue Act V of 1879)-S. 3-*Contd.*

tion of the Government to the effect that the kowl was agricultural was erroneous, (2) that the defendant be restrained by a permanent injunction from levying the extra assessment, (3) that in the event of its being found that the Government were entitled to levy the assessment, it be declared that that the plaintiff was entitled to receive the same, and (4) that the amount, if any, received by the defendant on account of such assessment be awarded to him.

The Court dismissed the suit.

Held on appeal, that having regard to the terms of the *kowl*, it was a lease of the revenue of the village on certain conditions. The object of the lease was agricultural and Government never parted with their right so far as the right to build was concerned.

The *kowl* was no more than a lease. The Government parted with their rights as lessors in favour of the grantee as lessee and imposed upon him certain conditions none of which brought the contract within the definition of the term "alienated" village in cl. 19 of S. 3 of the Bombay Land Revenue Code, 1879.

The clause in the kowl, that the grantee was to consider himself a farmer of the village, was to "exercise the authority vested in farmers by Chapter VI of Regulation XVII of 1827 or such as may be hereafter vested in them by any new enactment shall be exercised by you and you will be subject to such penalties as are now or may hereafter be provided for by Regulations," brought the village within the operation of the provisions of the Bombay Land Revenue Code.

Haji Abdulla Haji Sumar v The Secretary of State for India. 13 Bom L R 883.

5.—S. 3-Land Revenue Code—"Rent"—"Land Revenue."

Plaintiff brought this suit to recover five years' assessment in respect of some lands held by defendant No. 2 through defendant No. 1. Defendant No. 2 contended that plaintiff's claim for the first three years was time-barred by Articles 62, 110 or 115 of Schedule II to the Limitation Act, and that he was in possession only of three lands, the other two lands being held by defendant No. 1. The Court of first instance held

Bombay Acts-(Land Revenue Act V of 1879) S. 3-*Concld.*

that Article 132 or 120 applied, and it awarded the claim for all the five lands as they stood in defendant No 2's *khata*, and he was, therefore, under section 136 of the Land Revenue Code, responsible as the superior holder of the two lands. A decree was accordingly passed against both the defendants for the full sum claimed. In appeal, the District Judge held that neither Article 110 nor 115 nor 132 applied, that the case was governed by Article 120 as the claim of plaintiff was of the nature of land revenue and not of rent, and that the defendants were liable to the whole claim:—

Held, by Ranade and Whiteworth, JJ., that the defendants were not tenants but inferior holders, under the plaintiff; that the payment made by them was land revenue and not rent; that the Article 120 of Schedule II of the Limitation Act applied to the case.

Per Whiteworth, J.—The term rent is used in the Land Revenue Code only with reference to those superior and inferior holders between whom the relationship of landlord and tenant subsists and not with reference to those superior and inferior holders between whom that relationship does not exist.

Held, by Crowe, J. (*dissentiente*), that Article 110 of the Limitation Act applied to the case, and that the plaintiff's claim was limited to arrears for three years preceding the date of the suit. The expression "rent" and "land revenue" are used indiscriminately in section 3 (19) of the Land Revenue Code to denote the amount payable by the occupant to Government and it seems impossible to hold that the law contemplated any thing different in the connotation of the two expressions. **Sadashiv v Ramkrishna. 3 Bom L R 135.**

Bombay Land Rev. Code—S. 10—Mamlatdars' Courts—Revisionary powers over. **See Act II of 1906 (Mamlatdars' Courts), 13 Bom L R 1031.**

6.—S. 13—Suit for the claim of rent for a particular year—Second suit for another year, on the ground of custom.

The plaintiff brought a suit against the defendant in 1898, *inter alia*, for rent in respect of betel-nuts for the year 1897-98. In his plaint he

Bombay Acts-(Land Revenue Act V of 1879)-S. 13-*Concld.*

alleged that the defendants were liable to pay *thal* to him and he gave the value of the fruits and grain due to him as *thal* for the year 1897-98. He did not, however, then specifically allege that according to practice he was entitled to rent for every year. The suit was decided in his favour. In 1899, the plaintiff brought a second suit against the defendants to recover *thal* for 1898-99. The defendants objected to the suit as *res judicata*:—

Held, that the second suit was not barred as *res judicata*, because the first suit merely decided that *thal* was payable in respect of betel-nuts for the year 1897-98 as alleged and claimed in the plaint and not according to practice. **Vishnu v Ramling. 3 Bom L R 450**

—S. 15.

See Mamlatdars' Courts Act, 1876, s. 3.

7.—Land Revenue Code (Bom Act V of 1879 Sec. 15.

It is not competent to a substitute designated under section 15 of the Bombay Land Revenue Code, 1879, to exercise the powers conferred by the Mamlatdars Courts Act, 1876, on the Mamlatdar to whose office he has temporarily succeeded. **Deorao v Narayandas. 2 Bom L R 1106 =25 Bom 318.**

8.—S. 21—Settlement Officer, decision of—Suit to alter or modify decision—Limitation—Starting point.

The starting point of limitation for bringing a suit to have the decision of a Settlement Officer set aside or modified is the date when the decision is duly pronounced after notice to the parties and that is *prima facie* the date the decision bears. But if due notice was not given and the party affected became aware of the decision only subsequently he will have six years from such later date within which to bring his suit.

Gopal v Krishna. (1900) 3 Bom L R 420

9.—S. 24—Land Revenue Code S. 24—Land Revenue Code (Bombay Act V of 1879), section 214, Rules 19, 21—Khar lands—Reclamation, meaning of.

The plaintiff obtained, on the 16th June, 1885, certain lands from Government under a lease

Bombay Acts-(Land Revenue Act V of 1879)-S. 24-*Concld.*

whereby the plaintiff acquired occupation might over the land let to him in a perpetuity subject to the payment of assessment on his promise to reclaim it. The chief condition of the lease was "if half the area may be resumed." During the stipulated period, the plaintiff succeeded in putting up embankments on the lands which prevented the sea water from washing the land, but he could bring only 5 acres of the land under cultivation. In October 1895, the Government issued a notice to the plaintiff, to the effect that he had broken the terms of the contract which required him to bring the whole land into cultivation in ten years, and on the 6th March, 1869, the plaintiff's khata was cancelled. The plaintiff brought this suit for a declaration that the Government had no right to cancel etc plaintiff's khata:—

Held, that the work of erecting the embankments (the only work specified in the lease) had been done, and the land had been reclaimed from the sea; and that the work of making it fit for cultivation was evidently not included in the lease; and that, therefore, Government had no right to cancel the khata.

Reclamation means, in the case of submerged or overflowed land, the rescuing of it from being submerged. The rendering it fit for cultivation is not the original meaning in regard to submerged land. This would be its meaning in regard to the reclamation of unarable land. **Shamrao v The Secretary of State. 2 Bom L R 499= 25 Bom 32.**

10.—Land Revenue Code Act V of 1879, Secs. 27 and 28—Occupant, perpetual, right to determine lease of, when condition to determine lease does not arise—Condition, construction of, in lease—Lease—Landlord and tenant—Tenant—Kabulayat, condition in—Construction of condition in Kabulayat—Fraud—Powers, exercise of.

K was holding some lands as an occupant under Government in perpetuity upon the terms of a Kabulayat, one of the conditions of which was that the occupant will deliver to Government "should the whole of the *Thikan* or a part thereof have to be taken, on Government feeling a necessity for some reason &c."

Held, that the condition must be construed

Bombay Acts-(Land Revenue Act V of 1879) S. 27-*Concld.*

like other contracts according to the intent of the parties to be collected from the words, and that it meant that Government *qua* Government should need the land. It appearing on the evidence that Government *qua* Government did not want the land but that some third parties (the defendants) did.

Held, that the condition as to the right to determine the lease did not arise.

Held also, that if under such circumstances the Commissioner had exercised his power of determining the lease, who had ordered the lands to be given to the defendants under Secs. 27 and 28 of the rules under the Land Revenue Code which relate to unoccupied land only, it would have been in the nature of a fraud, to which the principles applicable to the exercise of powers generally would have applied. I W and T L Cases p. 437; L R 39 Ch. D., p. 648, referred to.

Kashi kom Narayan v Sadashiva Sakharam. **P J. 1897. p. 159**

10A—S. 31—Talukdari estate—Wanta lands—Bombay Land Revenue Code (Bom Act V of 1879)—Alienated land Sarsa Wanta.

Wanta lands are lands held by Rajputs or their representatives of the Rajputs who after the Mahomedan conquest of Gujrat received one-fourth of the land of certain villages on condition of keeping order in those villages The lands are held either rent-free or at a small quit rent Where Wanta land is entered as alienated land under the Land Revenue Code, 1879, it cannot be regarded as land held upon Talukdari tenure in the strict sense of the word. The words "Talukdari estate" in s. 31 of the Gujrat Talukdars' Act are used in a technical sense limited to the Talukdari interest in the estate held by a Talukdar by reason of his status as such.

(9 Bom L R 1122, 11 Bom L R 736. Fol).

The Talukdari Settlement Officer v. Chagan Lal. **12 Bom L R 903 =8 Ind Cas 624**

—S. 37.

See Declaratory Decree, Suit For - Orders of Criminal Courts. **17 Bom 293.**

Bombay Acts (Land Revenue Act V of 1879)-S. 37-*Concld.*

11.—S. 37—Khots have a right to cultivate land left dry in a river adjoining their land—Alluvion —Khots as farmers.

Where the Khots of village claimed a right to occupy and cultivate land left dry in the river bed as far as the middle of the bed opposite their Khoti village.

Held, that they were entitled to this right, and that s. 37 of the Land Revenue Code was not a bar to such a right.

Held, further, that the soil of land covered with water may, together with the water and the right of fishing therein, be specially appropriated to a third person, whether he has land or not on the borders thereof, or adjacent thereto. **Secretary of State v Wasudeo. 9 Bom L R 719=31 Bom 456.**

—Ss. 38 and 39.

See Jurisdiction of Civil Court—Rent and Revenue Suits, Bombay. **21 Bom, 684**

12.—38—Trespass to goods—Compensation—Damage—Land Revenue Code—Natural product—Imposition of fees for excavated stones and earth—Trees.

The plaintiff took a plot of land at Matheran from the Government (defendant), under a lease, the conditions of which were that he (plaintiff) should build one bungalow and that he should not carry on any excavation on the land without the previous permission in writing of the Collector. The plaintiff then applied for right to dig stones for building purposes. This permission was given Later on, while the bungalow was in course of construction, the plaintiff was required by the Superintendent of Matheran to erect boundary pillars on his land : in constructing these he used stones which had previously been excavated under the permission already granted. Upon this the defendant called upon the plaintiff to pay for the stones so used and on his declining to do so, the sum (Rs 2-8-0) was realized by attachment and sale of the plaintiff's moveable property. The plaintiff there-upon, filed this suit praying *inter alia*, for damages (Rs 200) in recovering the amount realized from him.

Bombay Acts-(Land Revenue Act V of 1879)-S. 38-*Concld.*

Held, (1) that the suit was one for damages in respect of trespass to goods, and that he was entitled to recover from the defendant Rs. 2-8 0

(2) that the plaintiff was not liable under sec. 43 of the Land Revenue Code, 1879, for unauthorisedly recovering "any other natural product" from the land, since the expression does not include excavated stones.

(3) that under Rule 38 of the Land Revenue Code. 1879, the Collector was not justified in recovering fees for excavated stones used by the plaintiff in erecting boundary pillars.

Madhavdas v Secretary of State 6 Bom L R 1117

12A—Secs. 48 and 65—Agricultural lands —Principles in granting compensation.

In acquiring lands, under the Land Acquisition Act (I of 1894), the question for enquiry is not what was the original price paid for the land or the money spent on its present disposition, or the actual income received, but what was the market or sale value of the land if laid out in the most beneficial manner.

The elements which confer on lands their natural value as building sites are the suitableness of its situation, its salubrity, its vicinity to a large and growing industrial or populous centre and the demand for such additional building accommodation.

It does not follow, from sections 65 and 48 of the Land Revenue Code. 1879, that the payment of fine and assessment is a preliminary condition without which no agricultural land can be appropriated for the building purposes

It is clear that the Land Revenue Code, contemplates appropriation both with and without permission, the fines in the one case being larger than in the other. **Bhujabalappa v Collector of Dharwar. 1 Bom L R 454.**

13—S 48 (b) Land appropriated for agricultural purposes—Special user of land by stacking timber in fair season—Additional assessment for special user—"Appropriated for any purpose" —Interpretation—Construction of statute.

The plaintiff was the occupant of land used

Bombay Acts-(Land Revenue Act V of 1879) S. 48-*Concld.*

for agricultural purposes, and had been paying to Government assessment chargeable on land appropriated for those purposes under s. 48 (*a*) of the Bombay Land Revenue Code, 1879. During the seasons when the land was not used for agricultural purposes, the plaintiff used to let it out for stacking timber and thereby derived profit. With respect to this special user Government levied an additional assessment under s. 48 (b) of the Code.

Held that no additional assessment for the special user could be levied under cl. (b) to s. 48 of the Code.

The expression "appropriated for any purposes" in s 48. cl. (b) of the Code means "set apart for that purpose in exclusion of all other uses."

The Bombay Land Revenue Code, 1879, is a taxing enactment, and must be construed strictly in favour of the subject. **The Secretary of State v Laldas Nurandas.**

12 Bom L R 16 = 34 Bom 239 = 5 Ind Cas 610.

14—S. 52-Collector—Assessment-Occupants —Alienated villages.

The effect of s. 52 of the Bombay Land Revenue Code, is to give the Collector the discretion to fix the assessment ; and the effect of s. 217 of the Code is to render the occupants in alienated villages subject to a settlement like the occupants in unalienated villages. But neither section takes away any legal right which an occupancy tenant may have acquired independently of his bare status as an occupancy tenant liable to pay the land revenue according to survey rates.

Lukshuman v Govind ; Govind v Lukshuman. 5 Bom L R 694 = 28 Bom 74.

—s. 56.

See (1) Mortgage—Redemption—Right of Redemption.

(2) Sale for Arrears of Revenue—Setting aside sale—Irregularity.

15.—Land Revenue Code s. 56—Registered Occupant—Failure to pay Government assessment

Bombay Acts-(Land Revenue Act V of 1879) S. 56-*Contd.*

—Forfeiture—Collector allowing the person in possession to be registered occupant on his paying all arrears—Rights of such person of the original registered occupant—Liability, to pay rent.

When a registered occupant's occupancy is forfeited under section 56 of the Land Revenue Code 1879, and that forfeiture is not followed by sale of the occupancy, but the Collector allows the person actually in possession to be registered as occupant, on his paying up all arrears of Government revenue due on the lease, the lease, by which the person actually in possession was holding from the former registered occupant, is not destroyed by the forfeiture, and the person actually in possession cannot be considered to hold the land from the date of the forfeiture free from any liability towards his landlord. Such a person is liable to pay rent to his landlord even after the date of the forfeiture minus the Government assessment paid by him. **Ganparshibai v. Timmaya.**

1 Bom L R 505=24 Bom 34

Notes:—Con: 30 Bom 466=8 Bom L R 360.

16.—S. 56, Old Rules 32, 62. 63—Occupancy—Assessment, non-payment of—Forfeiture of occupancy—Occupancy given to a stranger under Kabulayat—Restoration of forfeited holdings—Collector, powers of.

Where an occupancy, forfeited under S. 56 of the Bombay Land Revenue Code, 1879, for non-payment of assessment, is thereafter disposed of by the Collector as provided for by rules 32 and 62, to a person who signs a Kabulayat in Form B, it is not open to the Collector to subsequently order the occupancy to be taken from that person and restore it to the occupant before the forfeiture.

Rule 63 empowers a Collector to restore a forfeited occupancy to the original occupant. When a forfeited occupancy has been disposed of by grant to a new tenant, it ceases to be a forfeited occupancy and the rule has no longer any application. **Dharma v Balamiya.**

13 Bom L R 968.

17.—Ss. 56 and 153: When for the levy of charges incurred on account of boundary marks, the Collector has declared the occupancy of the land on which the arrear was due forfeited to Government under s. 153 of the Land Revenue Code and has sold it under s 56, the land is sold free of all encumbrances created by the occupant. But the Collector has sold only the right, title and interest of the occupant under s. 155, the rights of the encumbrancers are not touched by the sale. **Venkatesh Ramkrishna v Mhal Pai bin Naru Pai P. J. (1890) 140=15 Bom 67.**

Notes.—Ref: 21 Bom 381.

Bombay Acts-(Land Revenue Act V of 1879)-S. 56-*Concl.*

—S. 57.

See (1) Mortgage—Redemption—Right of Redemption. **16 Bom 134.**

(2) Sale for Arrears of Revenue—Setting aside sale—Irregularity.

21 Bom 381.

18.—Ss. 57, 153—Arrears of assessment-Non-payment of Khatedar—Lands in possession of a holder under a mortgage—Forfeiture of lands for non-payment of assessment—Re-grant of the lands to the holder by the Government—Relations between the original mortgagor and holder:

Forfeiture ordinarily implies the loss of a legal right by reason of some breach of obligation. When arrears of assessment are levied by sale, then s 56 of the Bombay Land Revenue Code, 1879, in pursuance of an obvious policy, empowers the Collector to sell, "freed from all tenancy incumbrances and rights created by the occupants... or any of his predecessors-in-title or in anywise subsisting as against such occupant." Should the Collector otherwise dispose of the occupancy, the section affords no such protection, and the legal relations must be determined by reference to the ordinary law. So judged the effect of a forfeiture and subsequent acquisition of the forfeited property are subject to the control of equities arising out of the conduct of the parties. **Amolak v Dhondi.**

8 Bom L R 360=30 Bom 466.

19.-S.61 Two plots of land were a part of Inam lands of the plaintiffs and used to be separately numbered at the old survey. At the new survey they had no numbers given to them, for which reason the Courts below held that they had been made a part of the village site over which the plaintiffs had no right of cultivation. The lower Appellate Court held that under, s. 61 of the Bombay Land Revenue Code, 1879, Govern-

Bombay Acts-(Land Revenue Act V of 1879)-S. 61-*Concld.*

ment were competent to set apart a portion of the lands comprised in the sanad of the plaintiffs for a village site. *Held*, in second appeal that s. 61 of the Code relates back to s. 38, and both refer only to lands, the property of Government in unalienated villages or unalienated portions of villages. That they do not empower the Government to confiscate any land belonging to an Inamdar and to confer it upon the persons who live in his village. The mere omission to number a plot of land cannot have the effect of turning it into a part of the village site or take away any rights of the plaintiffs to cultivate it. The fact that Government under Act No. VII of 1863 chose to assess only a portion of the holding and to allow the plaintiffs to enjoy the rest free of assessment for more than twenty years, would not have the effect of cutting off the latter from the holding and of placing it at the disposal of Government. *Held*. also that the plaintiffs being the owners of the whole village as Inam were also the owners of the bed of a rivulet that lay within the boundaries of their village. The fact that the bed was not numbered or measured so as to be expressly included within the survey numbers formed at the new survey and was not assessed in the sanad did not affect the ownership of the plaintiffs. Neither the giving nor the omission to give a number to land worked any change in its title and the inam-holding of the plaintiffs would remain the same under the new as it was under the old survey. The omission of Government to assess land separately would not deprive the plaintiffs of it or make it the property of Government. S. 37 of the Land Revenue Code deals only with what is not the property of individuals and does not make the bed of a stream belonging to private individual public land.

Vinayakrao Keshavrao Palkar v. The Secretary of State for India.

P J (1897) 465= 23 Bom 39.

20.—S. 66—Permission to turn agricultural land to non-agricultural uses-Acknowledgment—Period runs from the date of acknowledgment.

In order that a person can appropriate a land to a non-agricultural purpose without incurring the penalty of the fine provided in s 66, Bombay Land Revenue Code, 1879, it is necessary that he must wait for three months from the date of the acknowledgment of the application required

Bombay Acts-(Land Revenue Act V of 1879) S. 66-*Concld.*

to be given by the Collector or by s. 65 of the same Code. It is no defence to plead that the Collector though he received the application omitted to send an acknowledgment. **Nayak Purushotam v. Secretary of State.**

1 Bom L R 669=24 Bom 240.

—S. 71.

See Jurisdiction of Civil Court—Registration of Tenures.

21.-S. 71; and ss. 79. 85, 86, and 87-Deshmukhi vatan—Alienated land—Registered occupant—Superior holder—Payment of rent to co-landholder.

In 1892, V, a Deshmukhi vatandar, died, leaving five sons—four by one wife, of whom K was the eldest, and one son B by another wife. K and B each claimed to be the eldest son of V. On the 16th June 1893, the Collector of Satara, in proceedings under s. 71 of the Land Revenue Code (Bombay Act V of 1879), ordered K's name to be registered in the revenue books in place of V's. Prior to this, however, the plaintiff and other tenants paid B rents for 1892—94. K then applied for and obtained from the Collector an order, under s. 86 of the Code, rendering him assistance in recovering these rents. The plaintiff, in August 1894, brought this suit to restrain K from recovering the rents and to avoid the order for assistance. The Subordinate Judge granted the injunction, but the District Judge reversed that decision and dismissed the suit on the ground that K was the registered occupant of the land, and that the order for assistance was valid, and that payment of rent to B did not discharge the tenants. On appeal to the High Court, —*Held*, reversing the decree of the District Judge and restoring that of the Subordinate Judge, that, the lands in question being alienated land, s. 71 of the Land Revenue Code did not apply, and K was not a registered occupant under the Code. The lands passed on V's death to his five undivided sons, unless a custom of primogeniture existed in the family, and payment by the plaintiff to B, a co-landlord, was a valid discharge. **Sambhu v Kamalrao Vithalrao.**

22 Bom 794.

Bombay Acts-(Land Revenue) Act V of 1879) S. 74-83-*Contd.*

—s. 74.

See Landlord and Tenant—Abandonment, Relinquishment or Surrender of Tenure.

22—S. 79 A—Collector—Summary eviction—Persons in wrongful possession—Possession under decree of the Civil Court.—

The powers given to the Collector by S. 79 A of the Land Revenue Code, 1879, can be exercised only in cases of wrongful possession. It does not extend to cases where possession is obtained under the decree of a Civil Court. The Collector has, for the exercise of the power to form his own opinion and decide whether in any particular case the possession is wrongful ; but there is no provision in the Code which gives finality to the Collector's order of eviction so as to exclude the jurisdiction of a Civil Court to decide that the person evicted by that order was in rightful occupation. **The Talukdari Settlement Officer v Umiashankar Narsiram Pandya. 12 Bom L R 837=35 Bom 72.**

—S. 81.

See Right of Occupancy—Loss or Forfeiture of Right.

—S. 83.

See Landlord and Tenant—Nature of Tenancy.

23.—S. 83—Permanent tenant, position of :—

The position of a tenant of a Bhagdari land who is presumed to be a permanent tenant under S. 83 of the Land Revenue Code 1879, is not affected in any way by the Prohibition contained in the Bhagidari Act against alienation.— **Nahanchand v Kekhushru. 9 Bom L R 50=31 Bom 183.**

24.—S. 83—Tenancy—Antiquity—Absence of proof—Presumption.

To claim the benefit of the presumption created by S. 83 of the Land Revenue Code, 1879, it is not sufficient that there should be no satisfactory evidence of the commencement of the tenancy, but the absence of that satisfactory evidence must be by reason of the antiquity of the tenancy. **Vishwanath v. Tatya. 6 Bom L R 645.**

Bombay Acts (Land Revenue Act V of 1879)-S. 83-*Concld.*

24A—S. 83—Saving clause—Tenancy—Rent, fixing of—Eviction.

The saving clause of s 83 of the Land Revenue Code seems to contemplate that though the commencement and duration of the tenancy may be lost in the obscurity still there may be vested in the landlord a right by agreement to enhance rent and evict for its non-payment. **Raje Bahadur Raghunath Savant v Lakshuman Tandel. 2 Bom L R 93.**

24B.—S. 83—Presumption.

In order to create the presumption, contemplated in s. 83. Land Revenue Code, 1879, it is not necessary that the tenancy should have existed for a stated number of years, as it is not possible to lay down any one rule, and each case is to be decided according to the facts found to exist ; the presumption can arise " whenever by reason of the antiquity of a tenancy, no satisfactory evidence of its commencement is forthcoming." **Narayan v Raghavendracharaya. 2 Bom L R 281.**

—S. 84.

See (1) Landlord and Tenant—Ejectment Notice to quit.

(2) Landlord and Tenant—Forfeiture—Denial of Title.

25.—*S.* 84—Annual tenancy—Determination—Notice by landlord.

An annual tenancy to which the Land Revenue Code applies, cannot be determined without a notice in writing by the landlord (or by the tenant). **Ochhavlal v Gopal. 9 Bom L R 1332=32 Bom 78.**

26.—Ss.85, 86—Inamdar, Assignee of—Suit to recover enhanced rent—Assistance of the Collector.

Ss. 86 and 87 of the Land Revenue Code (Bombay Act V of 1879) do not make it com-

Bombay Acts-(Land Revenue Act V of 1879)-S. 85-*Concld.*

pulsory on the inamdar, or his assignee, to ask for the assistance of the Collector to recover enhanced rent from the tenants. If the inamdar, or his assignee, had made a demand on the tenants for the enhanced rent through the hereditary patel, or village accountant, as required by s. 85 of the Code, and they had refused, he would have become at once entitled to his ordinary civil remedy. **Govindrav KrishnaRaibagkar v Balu bin Monapa. 16 Bom 586.**

—S. 86.

See Right of Occupancy—Loss or Forfeiture of Right. **17 Bom 677.**

—S. 87.

See Bombay Revenue Jurisdiction Act (X of 1876.) **9 Bom 462.**

27.—S. 87—Mamlatdar's order.

A Mamlatdar's order under s. 87 of Bombay Act V of 1879 does not preclude the parties from having recourse to the Civil Courts, if dissatisfied with it. **Ganesh Hathi v Mehta Vyankatram Harjivan. 8 Bom 188.**

28.——Land Revenue Code Act V of 1879. Secs. 98 and 113—Civil Procedure Code. Sec. 325.

Where the Collector is unable to execute a decree for partition. the case coming within the scope of Sec. 98 of the Bombay Land Revenue Code, he is justified in selling the land. The order for sale should be passed by the Court under Sec. 113 of that Code, and not under Sec. 325 of the Code of Civil Procedure **Parag alias Lallu v Naran Bawa. P J 1897 p 78.**

—Ss. 102, 106—See Khoti,

—S. 108.

See Khoti settlement Act s. 16

—S. 113.

See Collector.

29.-S. 113-Sale in execution.-Civil Procedure Code. Sec. 317—Bombay Land Revenue Code, Sec. 113 and Chap. XI Sec. 182—Benami—Agent —Trustee.

Bombay Acts (Land Revenue Act V of 1879) S. 113-*Concld.*

Sec. 317 of the Civil Procedure Code applies only to sales in execution of decrees of Civil Courts held under the Civil Procedure Code, 14 Cal 583,concurred in. That Section does not, nor do the provisions of Sec.182 of the Bombay Land Revenue Code which relate only to a sale ordered under the provisions of Chap. XI of that Code, apply to a sale held under the provisions of Sec. 113, of the same Code. Where therefore at a sale held under the provisions of sec. 113 R purchased certain property with A's money and in the interests of A :

Held that R was the Agent and Trustee of A for the property, and that the latter could recover it from him. **Apaji Narhar v Rustuma, P. J. 1897, p 27.**

30.—S. 121—Boundary Dispute.

Sec. 121 of the Bombay Land Revenue Code 1879, must be read along with sections 119 and 120 of the Code. To attract the applicability of S. 121 there must be a boundary dispute between the owners of neighbouring numbers, and when there is such a dispute, the law gives power to the Collector to make a final determination of the dispute with the help of the survey record and other evidence **Lakshman v Antaji 2 Bom L R 1083=25 Bom 312.**

31. –Ss. 119 and 121.—The settlement of a boundary by a Collector under the Bombay Land Revenue Code is conclusive of the right of the landholders on either side of it *interse* whether the boundary of their holdings is in question. **Bai Ujam v Valiji Rasulbhai. P J (1886) 94=10 Bom 456.**

32.—Where A, alleging that it was his property, sued to recover possession of a piece of waste land granted more than a year before by the Collector to B, *held* (Jardine, J dissentiente) that as the Collector's order was made under s. 37 of Bombay Act V of 1879, the claim was barred under s 135 of that Act. **Nagu v Salu. P J (1890) 351=15 Bom 424.**

Notes:—Ap : 21 Cal 626. Dist: 24 Bom 435. Ref : 6 Bom L R 230 ; 32 Cal 1107=2 C L J 107; 33 Cal 693.

—s. 150.

See Sale for Arrears of Revenue—Setting aside sale—Irregularity.

Bombay Acts (Land Revenue Act V of 1879) Ss. 153-159-*Contd.*

—s. 153.

See (1)Right of Occupancy—Loss or Forfeiture of Right.

(2) Sale for Arrears of Revenue—Setting aside Sale—Irregularity.

33.—S. 153—and s. 57—Landlord and tenant —Mulgeni lease—Forfeiture not followed by sale.

A declaration of forfeiture, under s. 153 of the the Land Revenue Code,of the interests of a lessee holding under a permanent lease, not followed by a sale, but by an order transferring possession of the holding to the lessor under s. 57, has not the effect of defeating prior incumbrances created by the lessee in favour of third persons. **Narayan Sheshgiri Pai v Parshotam Sheshgiri. 22 Bom 309.**

34.—Ss. 159 and 162——Attachment for arrears of land revenue—Forfeiture—Applicability of the Land Revenue Code to talukhdari villages—Bombay District Police Act (Bombay Act VII of 1867), s. 16—Cost of Punitive Police post.

The Bombay Land Revenue Code (Bomaby Act V of 1879) applies to talukhdari villages in the Ahmedabad district. Such villages fall within the description of "alienated holdings" as definded by the Code. When a talukhdari village is attached under s. 159 of the Code for arrears of land revenue, so long as the attachment subsists, an order of forfeiture under s. 153 is illegal. The plaintiff was the talukhdar of the village of K. At the end of the revenue year 1878-79, that is, on 31st July 1879, the plaintiff was a defaulter in respect of the assessment payable to Government for that year In November 1879, a punitive police post was established in the village under s. 16 of Bombay Act VII of 1867 on account of the turbulent conduct of the inhabitants. Between April and January 1880 the Collector sold certain property of the talukhdari for arrears of revenue, and realized by the sale a sum of Rs. 608, a sum more than sufficient to cover the arrears due for 1878-79 as well as the assessment payable for 1879, but the Collector, after deducting the arrears due for 1878-79 applied the rest of the sale-proceeds towards the payment of the cost of the punitive post. The assessment for 1879-80 having remained unpaid, the village was attached on the 1st July 1880 under s. 159 of the Bombay Land Revenue Code (Act V of 1879). The attachment was followed on the 6th January 1881 by an order declaring the village to be forfeited under s. 153 of the Code. In 1886 the plaintiff sued Government to recover possession of the village and for a declaration that the order of forfeiture was illegal and *ultra vires*. The defendant contended that it was valid and legal. *Held* that the village having been attached for arrears of land revenue under s. 159 of Bombay Act V of 1879 on the 1st July 1880, the plaintiff had twelve years' time from the date of the attachment within which he could apply for the restoration of the village under s. 162 of the Act. The order of forfeiture of the 6th January 1881 was, therefore, null and void. *Held (per* Birdwood J.) that the Collector had no power, under s. 16 of Bombay Act VII of 1867, to recover the cost of the punitive post from the talukhdar, (1) as he was not an inhabitant of the village, and (2) because the cost could only be defrayed by a local rate imposed on the inhabitants of the district in which the punitive post was established. **Samaldas Bechar Desai v. Secretary of State for India. 16 Bom 455.**

Bombay Acts (Land Revenue Act V of 1879) S. 159-*Contd.*

—S. 162.

See Khoti Tenure

35.—S. 182—Civil Procedure Code (Act XIV of 1882), s. 244—Mortgage with possession—Default by mortgagee in payment of assessment—Sale for arrears of revenue—Certified purchasers —Purchase for mortgagee—Purchasers or mortgagee trustees for mortgagor—Suit by mortgagor for redemption

In 1872 the plaintiffs' father mortgaged three plots of land (Nos. 303, 304, and 305) to the first defendant with possession. In 1880 and 1881, the first defendant having made default in paying the assessment, plots Nos. 303 and 305 were sold by the revenue authorities and were brought respectively by defendants Nos. 2 and 3. In the latter year (881) plot No. 304 was sold in execution of a money decree obtained by the mortgagee (defendant No. 1) against the mortgagor and was purchased by his (the first defen-

Bombay Acts (Land Revenue Act V of 1879) S. 182-*Concld.*

dant's undivided brother without leave of the Court. In 1892 the plaintiffs (heirs of the mortgagor) brought this suit against defendants Nos. 1. 2, and 3 to redeem the said three plots of land from the mortgage of 1872. Defendant No. 1 pleaded that he had inherited plot No. 304 from his brother, who had become the owner of plot No. 304 by his purchase at the execution sale in 1881. He disclaimed all interest in plots Nos. 303 and 305. Defendants Nos. 2 and 3 answered that they had become absolute owners by the purchase at the revenue sales. As to these latter, it was alleged that defendants Nos. 2 and 3 were in possession of the said two plots for the first defendant Defendants Nos 2 and 3 contended that by s. 182 of the Land Revenue Code the plaintiffs were precluded from raising this point. *Held* that, though s. 182 forbade the Court to entertain a suit against defendants Nos. 2 and 3 on the ground that they had bought the land for defendant No. 1, it did not debar it from entertaining a suit against them on the ground that subsequently to the sale they were holding on behalf of defendant No. 1 or against defendant No. 1 on the ground that he was himself really in possession through defendants Nos. 2 and 3 as his agents or tenants. The same principle of equity which would make defendant No. 1 a trustee for the mortgagors if he had bought in his own name would make defendants Nos. 2 and 3 trustees for them if subsequently to the sale they held the land on behalf of defendant No. 1, and would also make defendant No. 1 himself a trustee if subsequently to the sale the property came into his possession as beneficially entitled thereto owing to an agreement between him and the certified purchasers. **Genu v Sakharam. 22 Bom 271.**

Notes :—Fol : 23 All 478.

35A.—S. 182—Bar for suit against certified purchaser.

The provisions of s. 182 of the Bombay Land Revenue Code, and s 317 of the Civ. Pro. Code are to be construed strictly, and they do not bar a suit where the plaintiff, although originally a benamidar, came honestly into possession. **Bagho v. Vishnu. 5 Bom. L. R, 329.**

Bombay Acts (Land Revenue Act V of 1879) Ss. 196--214

—S. 196—See Jurisdiction of Civil Court—Registration of Tenures. **19 Bom 43.**

35B—S. 203—Orders passed by Collector in execution proceedings transferred to him under s. 320, Civ. Pro. Code—Appeal.

Under s. 203 of the Land Revenue Code the Revenue Commissioner or the Government are vested with the appellate power in respect of orders passed by a Collector in execution proceedings transferred to him under s. 320 of the Civ. Pro Code, 1882. **Mancherji v Thakurdas. 7 Bom L R 682.**

--S. 203—Orders and decisions—Provision for appeal from—Ejectment in pursuance of Order—No appeal—Right to sue for possession. See Bombay Act X of 1876 (Land Revenue Jurisdiction.) **5 S L R 46.**

—S. 211.

See Khoti settlement Act S. 17. **21 Bom 244.**

———S. 213—Survey records—Public inspection—Copies. See Adjournment. **5 S L R 49.**

—s. 214.

See Magistrate, Jurisdiction of—Special Acts Bombay Acts V of 1879.
(2) Rules made under Acts.

36—S. 214—Lease- Construction—Reclaim.' meaning of—Khar lands—Bombay Land Revenue Code S. 214, Rules 19 and 21.

The plaintiff obtained on the 16th June 1885 certain lands from Government under a lease whereby the plaintiff acquired occupation right over the lands let to him in perpetuity, subject to the payment of assessment on his promise to reclaim it. The chief condition of the lease was "if half the area is not reclaimed in five years, and the whole in ten years, the concession may be resumed." During the stipulated period the plaintiff succeeded in putting up embankments on the land, which prevented the sea water from washing the land, but he could bring only five acres of the land under cultivation. In October 1895 the Government issued a notice to the plaintiff to the effect that he had broken the terms of the contract which required him to bring

Bombay Acts (Land Revenue Act V of 1879) S. 214-*Concld.*

the whole land. into cultivation in ten years, and on the 16th March 1896 the plaintiff's *khata* was cancelled. The plaintiffs brought a suit for a declaration that the Government had no right to cancel the plaintiff's khata. *Held*, that the work of erecting the embankments (the only work specified in the lease) had been done, and the land had been reclaimed from the sea ; that the work of making it fit for cultivation was evidently not included in the lease ; and that, therefore, Government had no right to cancel the plaintiff's khata. Reclamation means, in the case of submerged or overflowed land, the rescuing of it from being submerged. The rendering it fit for cultivation is not the original meaning in regard to submerged land ; that would be its meaning in regard to the reclamation of unarable land.

Sham Rao Pandurang v Secretary of State
2 Bom L R 499=25 Bom 32.

37—S. 214 Rule 111 (b)—Trees, cutting of—Assessed occupied survey number—Offence.

A person cutting a tree from an assessed occupied survey number cannot be punished under rule 111 (b) under section 214 of the Bombay Land Revenue Code, 1879. **Venkappa.**
4 Bom L R 625.

38 39—S 216—Holder, meaning of Revenue Settlement, extension of.

An application under S. 216, Land Revenue Code, 1879, for the extension of revenue settlement to an alienated village, can be made by a holder who is entrusted with the full powers of the management of the same, even though he does not possess the whole of the lands belonging to the village. **Gopikabai v Lakshman.**
2 Bom L R 235=25 Bom 539.

40—S. 216 Inam village—Suit by an Inamdar against a Khot to recover balance of land revenue

Bombay Acts (Land Revenue Act V of 1879) S 216-*Contd.*

—Assessment—Survey made by the British Government—Collector's certificate—Change in rate of assessment—Pensions Act XXIII of 1871, Sec 4—Jurisdiction of Civil Courts—Revenue—Jurisdiction Act X of 1876, Sec. 4. sub-cl (b)—Land Revenue Code Act V of 1879, Sec. 216, Sub-cls (a), (b) and (c)—Village partially alienated.

In a suit by an Inamdar of a village against a Khot to recover rent in kind (according to the market rate at the time of payment), the defendant (Khot) contended, (1) that he was only liable to pay cash assessment as fixed by the survey made by the British Government, which was at a lower rate than he had previously paid, (2) that the suit was barred for want of Collector's certificate under Sec. 4 of the Pensions Act XXIII of 1871, and (3) that the Civil Court had no jurisdiction to entertain the suit under the Revenue Jurisdiction Act X of 1876, Sec. 4. sub-clause (b) and the Land Revenue Code Act V of 1879, Sec. 216. sub-clause (b).

Held, that as there was no objection taken by either party to the amount or incidence of assessment, of land revenue fixed by Government, and the question being whether the Khot was liable to pay to the Inamdar Mactas or assessment, the suit was not taken away from the cognizance of Civil Courts by the Revenue Jurisdiction Act X of 1876, Sec. 4, sub-clause (b).

Held further, that the Court was not precluded from entertaining the suit for want of Collector's certificate under the Pensions Act XXIII of 1871, Sec. 4, because the original grant passed the lands, and because it is the original grant which determines whether the Pensions Act is applicable, and not the actual rights which the grantee, as a matter of fact, may have enjoyed by it.

Held further, that the payment which the Khot had been making to the Inamdar before the time of the British survey was in the nature of assessment or rating by Government.

Held also, that the plaintiffs were entitled to the old assessment as claimed by them. It was plain that in cases falling within sub-clauses (a) and (c) of Sec. 216 of the Land Revenue Code, Bombay Act V of 1879, the Inamdar's interest in the assessment would not be affected by the

Bombay Acts (Land Revenue Act V of 1879)-*Concld.*-S.216 & 217-*Concld.*

application of Chapters VIII to X of that Act. He would still get the old assessment in the alienated lands in the village in the former case and the same amount of assessment in the latter, and the same must have been the intention in cases contemplated by sub clause (b).

The "holder of the village" in the concluding para of Sec. 216 must be read as meaning the "holder of the assessment or any part thereof of an alienated village." **Gangadhar Hari Karkare v Morbhat Purohit. P J 1893 p 410 =18 Bom 525.**

Notes:—Ref. 29 Bom 480=7 Bom L R 497.

41.—Ss (11), 217—Inamdar-Permanent tenant of the Inamdar—Survey settlement introduced into the village-Inamdar's name entered as Khatedar for lands in tenant's possession-Inamdar's right to enhance rent—Rent, enhancement of.

The plaintiff (an Inamdar) was the grantee of the royal share of revenue of a certain village, in which the defendant was a permanent tenant of certain land. At the desire of the plaintiff, the survey settlement was introduced into the village when the plaintiff's name was entered as Khatedar or registered occupant of the land. The plaintiff next sought to recover enhanced rent from the defendant. The latter, in contesting the claim relied on, among other things, S 217 of the Bombay Land Revenue Code 1870, and contended that he was liable to pay only the Government rate of assessment levied on the land. This contention was disallowed on the ground that the defendant was not a registered occupant of the land.

On appeal, *Held*, that S. 217 of the Bombay Land Revenue Code, 1879, was not restricted in its application to registered occupants only; it invested "the holders of all lands" in alienated villages with the same rights,and imposed upon them the same responsibilities, in respect of the lands in their occupation, that occupants in unalienated villages had. The term "holder" as defined in S 3 cl (11) of the Code, was wide enough to include even a tenant who had entered into possession under an occupant. **Nanabhai Bajibhai Patel v The Collector of Kaira 12 Bom L R 707 =34 Bom 686=7 Ind Cas 949.**

II C C. 57

Bombay Acts (Land Revenue Code Act VII of 1863.)

See Gujarat Talukdars' Act S 31.
12 Bom L R 903.

1.—S. 3-Superior holder—Landlord and tenant-Summary Settlement Act (Bom Act VII of 1863)-Sanad—Payment of assessment and local fund—Tenancy.

It having appeared that defendants were liable to pay the assessment and local fund to the plaintiff who held a sanad under the Summary Settlement Act, 1863, the lower Court came to the conclusion that the relationship of landlord and tenant was not created between the parties: *Held*, that the plaintiff was a superior holder within the meaning of s 3 of the Land Revenue Code, 1879; and that the defendants were in law the tenants of the plaintiff, whatever the nature of their holding might have been. **Surshangji v Narain 2 Bom L R 855**

Bombay legislative Council.

See Governor of Bombay in Council.

Bombay, Limits of Town of-

1.—Land situate in district of Mahim-Jurisdiction—Transfer of Property Act (IV of 1882), s 69-Land situate in the District of Mahim within the island of Bombay and within the local limits of the original jurisdiction of the High Court, is situate within the town of Bombay, in the sense in which that expression is used in s 69 of the Transfer of property Act. **Trimbak Gangadhar Ranade v Bhagawandas Mulchand 23 Bom., 348.**

Bombay Local Boards' Act I of 1884

Notes:—Rep in pt Act XVI of 1895; Bom act III of 1886; Rep in pt and Am Bom Act IV of 1885, SS 1 to 4; Am Bom Act I of 1888.

1.—Chief of Patdi-Right to pay cess to Government and collect it from jiwakdars 'superior holders'—Bombay Act V of 1879:—

The plaintiff's ancestors, as the ruling Chief of Patdi, granted to defendant's ancestors the village of Kamijala as 'jwak giras'. When in 1869 the Act III of 1869 was passed, which empowered Government to levy from all lands the local fund cess, it was decided that as Kamijala was one of the villages of the Patdi State, the cess upon it was fixed on the old Kumal rate. Since that time down to 1884, the revenue officers levied the

Bombay Acts (Local Boards Act I of 1884)-*Concld.*

cess in the first place from the Patdi Chief who, in his turn levied it from the defendants In 1884 the Local Boards Act was passed, and then disputes arose as to whether assistance was to be given to the plaintiff in recovering the local fund cess from the defendants, this resulted in the decision of the Bombay Government that the defendant, and not the plaintiff must be held to be superior holders responsible to Government for the local fund cess This decision was communicated to plaintiff on the 24th April 1888 and was afterwards upheld by the Secretary of State Plaintiff thereupon filed the suit for a declaration that defendants were the superior holders and had no right to pay the local fund cess direct to Government and that he was entitled to pay the same to Government and recover it from the defendants and for recovery of the cess which he paid from 1888 to 1895, *Held*, (1) that the plaintiff was not an 'occupant either generally or under the Bombay Land Revenue Code for he was not in occupation of the land and the term under the Bombay Land Revenue Code is applicable to unalienated land nor was plaintiff superior holder' under the Bombay Land Revenue Code, since the words at the end of the 2nd paragraph of S 8 Bombay Act III of 1869 do not control the preceding portion of the paragraph and the word 'all' before superior holder does not extend the meaning of the latter term

Gordhanlal v Shri Suraj Malji 4 Bom L R 299=26 Bom 504

Bombay Local Funds Act Act III of 1869.

Notes—Rep in pt Act XII of 1873 act XII of 1876, Bom Act III of 1886 (Except as to Aden) Act I of 1884, Am act XVI of 1895 (Except as to Aden) Bom Act I of 1884 S 15

1.—S 8—Local cess-Landlord and tenant - Fraudulent collection of cess

The plaintiffs sued to recover back from the defendant the amount levied by him as local cess on certain wanta lands belonging to the plaintiffs, the defendant claiming to be the superior holder of the village in which the lands were situated The amount was levied by the defendant through the assistance of the mamlatdar under Bombay Act III of 1869, s 8 The defendant contended that, in consequence of a demand from Government, he had paid local cess on the whole of

Bombay Acts (Local Funds Act III of 1869) S. 8-*Contd*

his talukh including the village in which the plaintiffs lands were situated and was therefore entitled, under ss 69 and 70 of the Contract Act (IX of 1872) to recover from them the amount which he had paid to Government as a portion of the cess which rateably fell upon their lands. It was found that the defendant was not the proprietor of the lands held by the plaintiffs and that the relation of landlord and tenant did not exist between them also that defendant paid local cess for the plaintiffs' lands fraudulently and with the intention of thereby making evidence of title to their lands, knowing that he had no lawful or just claim to them *Held*, that the defendant was not the superior holder of the lands within s. 8 of Bombay Act III of 1869, and was therefore not entitled to the assistance of the revenue officers of Government to recover the cess provided by that section for superior holders as against tenants and occupants although he might have paid the local cess due on the land in the plaintiffs possession and that, consequently the aid of the mamlatdar was illegally and improperly given to the defendant for the recovery of the amount from the plaintiffs *Held*, also that the defendant was not a person 'interested in the payment of the money made by him to Government within the meaning of s 69 of the Contract Act assuming that a portion of that sum was demanded by Government in respect of the plaintiffs wanta lands and that they were bound by law to pay it to Government *Held* further that the defendant did not 'lawfully' make the payment within the meaning of s 70 of the Act inasmuch as he did so fraudulently and dishonestly **Desai Himat Singji v Bhovabhai Kavabhai 4 Bom 643**

Notes—Ap 4 Bom 638 Ref 12 Cal 213

2—Act III (Bom) of 1869 Sec 8—Local fund cess- Tenant's liability to pay the cess imposed by an act subsequent to the lease—Landlord and tenant

Under Section 8 of Bombay Act III of 1869 a lessor who is in the position of a superior holder, may recover the local fund cess from his lessee 4 Bom 473, followed **Ram Tukoji v Gopal Dhondi P J 1899 p 108 17 Bom 54.**

Notes—Ref 17 Bom 422 4b Bom 504

3—Local Fund Act III of 1869, Sec 8—Local Fund cess—Inamdar—Superior holder—Liability of Inamdar to pay the cess

Bombay Acts (Local Funds Act III of 1869)-S. 8-*Contd.*

An Inamdar is a superior holder within the definitions of Regulation XVII of 1827 and Bombay Acts I of 1865 and V of 1879 He is therefore, the person primarily liable to pay the Local Fund cess under Sec 8 of the Bombay Local Fund Act III of 1869

There is no provision of law entitling an Inamdar to charge for his expenses in collecting the cess **The Secretary of State for India v Balvant P J 1892 p 252, 17 Bom 422**

Notes —Ref 26 Bom 504, 28 Bom 74

4—S 8—Chief of Patdi—Right to pay cess to Government and collect it from jiwakdars superior holders —Bombay Act V of 1879

The plaintiff's ancestors as the ruling Chief of Patdi, granted to defendant's ancestors the village of Kamijala as jiwak giras When in 1867 the Act III of 1869 was passed which empowered Government to levy from all lands the local fund cess, it was decided that as Kamijala was one of the villages of the Patdi State the cess upon it was fixed on the old Annual rate Since that time down to 1884, the revenue officers levied the cess in the first place from the Patdi Chief who in his turn, levied it from the defendants In 1884, the Local Boards Act was passed and then disputes arose as to whether assistance was to be given to the plaintiff in recovering the local fund cess from the defendants, this resulted in the decision of the Bombay Government that the defendant and not the plaintiff must be held to be superior holders responsible to Government for the local fund cess This decision was communicated to plaintiff on the 24th April 1888 and was afterwards upheld by the Secretary of State Plaintiff, thereupon filed the suit for a declaration that defendants were the superior holders and had no right to pay the local fund cess direct to Government and that he was entitled to pay the same to Government and recover it from the defendants and for recovery of the cess which he paid from 1888 to 1895 *Held*, (1) that the plaintiff was not an 'occupant' either generally or under the Bombay Land Revenue Code for he was not in occupation of the land and the term under the Bombay Land Revenue Code is applicable to unalienated land, nor was plaintiff 'superior holder' under the Bombay Land Revenue Code, since the words at the end of the 2nd paragraph of S. 8, Bombay Act, III

Bombay Acts-(Local Funds Act III of 1869)-*Concld.*-S. 8-*Concld.*

of 1869 do not control the preceding portion of the paragraph and the word 'all' before 'superior holder' does not extend the meaning of the latter term **Gordhanlal v Sri Suraj Malji. 4 Bom L R 299=26 Bom 504**

Bombay Mahomedan Law-Endowment Act IV of 1864.

See Mahomedan Law-Endowment.

Bombay Acts (Mamlatdars' Courts Act III of 1876.)

See Mamlatdars Courts Act.

Bombay Mamlatdar's Courts Act V of 1864.

See Mamlatdar's Courts Act

Bombay Master and Servant Act VI of 1863.

See Master and Servant

Bombay Minors' Act XX of 1864.

Notes —Rep, Act VIII of 1890

Bombay Minors (Act XX of 1864)

See (1) Minor—Bombay Minors' Act, XX of 1864
(2) Bom Civil courts Act
(3) Certificate of Administration.
(4) Costs

1—Minors Act (XX of 1864) S 18—Immoveable property.

The expression 'immoveable property' in S.18 of Act XX of 1864 means immoveable property of any character or kind, whether held by the minor as owner or mortgagee or in any other right The effect of S 18 of Act XX of 1864 is that the moment it is ascertained that a minor has some right to or interest in immoveable property, his administrator cannot sell it so far as that right or interest goes without the previous sanction of the Court **Dattaram v Vinayak. (1903) 5 Bom L R 916=28 Bom 181**

Bombay Municipal Act (II of 1865).

See Service Tenure

1—S 2—Bombay Act IV of 1867—Liability of Railway Company for rates and taxes.

The Great Indian Peninsula Railway Company, which, under an agreement with Government

Bombay Acts (Municipal Act II of 1865)-*Concld.*-S. 2-*Concld.*

hold the land upon which their railway is constructed free of rent for ninety-nine years,are occupiers only, and not owners, of such land within the meaning of s. 2 of Bombay Act II of 1865, and are therefore not liable to be rated as owners of the ground used by them for the purposes of the railway within the city of Bombay. Principles upon which railway companies are liable to be rated considered and laid down. **Justices of the Peace for the City of Bombay v Great Indian Peninsula Railway Company. 9 B H C 217.**

—Ss. 4 and 11.

See Right of Suit—Municipal Officers, Suits Against.

—Ss. 131 and 160.

See Injunction—Special Cases—Public Officers with Statutory Powers.

2—S. 240—Ejectment, Suits for—Suit for mesne profits of land for which plaintiff sues in ejectment.

Bombay Act II of 1865, s. 240, does not apply to suits in the nature of an action of ejectment. *Quære*—Whether a claim to recover the mesne profits of land for which the plaintiff sues in ejectment comes within the provisions of Bombay Act II of 1865, s. 240. 5 B L R Ap 50, and the judgment of Phear, J., in 9 W R 535, approved. **Sarabji Nassarvanji Dandas v Justices of the Peace for the City of Bombay. 12 B H C 250.**

Notes-Ap: 22 Bom 289 F B, Fol: 6 Bom 580 Dist: 18 *Bom* 19;Ref: 16 Mad 317; 8 Bom 421: 22 *Bom* 283; 25 *Bom* 142.

Bombay Municipal Acts III of 1872 & IV of 1878.

1.—Ss. 3 (u) 222 and 504—Drains manholes —Drains above the surface of ground driven through private property—Compensation—Award-Chief Judge of the Bombay Small Cause Court.

A man-hole is included in the expression "any other device for carrying of sewage, etc, and falls within the term 'drain' as defined in S. 3 (u) of the City of Bombay Municipal Act 1888.

The expression "the Commissioner may carry any Municipal drain ..... into, through or under any land whatsoever within the city" covers a drain which is above the surface. of the ground.

Bombay Acts (Municipal Act III of 1872 & IV of 1878) S. 3-*Contd.*

The words "into, through or under". are meant to include drains. passing over the land.

Reading Ss. 222 and 504 of the City of Bombay Muncipal Act, 1888. together, it is plain that the object of the Act, is that, if any damage is done or any portion of a man's property is taken away by the Commissioner's action under S. 222, the amount of compensation should be assessed under section 504 of the Act by Chief Judge of the Small Cause Court, Bombay. **Dattaraya Balwant Chitnis v The Municipal Commissioner of Bombay 9 Bom L R 1321.**

2.—S. 3 cl (w)—Street—Passage kept open having houses on both sides of it.

The owner of a large piece of land divided it into several small building sites which were sold to different persons. These sites were ranged on either side of two proposed roads, which ran through the land and which touched a high road at the one end and a dead wall on the other. Each of the purchasers entered into a covenant with the owner whereby he agreed to prepare and keep free for passage so much of the road as lay in front of his site. Under these circumstances, the question arose whether the proposed road fell within the meaning of the term "street" as used in the City of Bombay Municipal Act, 1888. *Held*, that the proposed road would constitute a "street" within the meaning of the City of Bombay Municipal Act, 1888. **Municipal Commissioner v Mathoorabai. 8 Bom L R 457=4 Cr L J 23=30 Bom 558.**

3.—Ss 33, 34—Indian Specific Relief Act (1 of 1877), Sec 45—Application to High Court to require a public officer to do a specific act—City of Bombay Municipal Act (Bombay Act III of 1888, as amended by Bombay Act V of 1905), Ss 33, 34—Municipal election petition—Jurisdiction of Chief Judge of Small Causes Court of Bombay —Extent of discretion.

At a general election for Municipal Councillorship for a ward in the City of Bombay, eight out of the fifteen candidates were declared duly elected. A petition was then presented to the Chief Judge of the Bombay Court of Small Causes, under S. 33 of the City of Bombay Municipal Act 1888, praying that the election of the eight Councillors or of one or more of them might be set aside and a scrutiny held. The

Bombay Acts (Municipal Act III of 1872 & IV of 1878) S. 33, 34-*Contd.*

inquiry was held and the election of two out of the eight successful candidates was set aside. The Chief Judge then came to the conclusion that under S. 33 he was only empowered to consider the claim of the ninth candidate, who obtained the next highest number of votes to the candidates returned as elected, but, as a valid cause of objection existed to his being declared elected, he declined to direct that candidate should be deemed to be elected. He further held that as there was no other candidate who could be deemed to be elected. proceedings for filling up the two vacancies would have to be taken under S. 34 of the Act. The applicant who stood tenth on the list of candidates applied to the High Court, under S. 45 of the Specific Relief Act, 1877, asking for an order that the Chief Judge to proceed to direct under S, 33 of the Bombay Municipal Act, that the applicant should be deemed to have been duly elected.

Held, that as S. 33 had been held to empower the Chief Judge to set aside the election of any number of Candidates returned as elected, there was nothing repugnant in construing the section as empowering him to fill up any number of vacancies so created from the list of unsuccessful candidates subject to the provisions of the section.

Held, further, that the Chief Judge should therefore, proceed to place the unsuccessful candidates in order of valid votes. The two with the highest number of valid votes against whom no cause of objection can be found should be declared to be elected. If only one is qualified then proceedings for filling up the vacancy or vacacies would have to be taken under s. 34 of the City of Bombay Municipal Act, 1888.

The High Court of Bombay may under S. 45 of the Specific Relief Act of 1877 make an order requiring any specific act to be done or forborne within the local limits of its ordinary original civil jurisdiction, provided that (a) an application, for such order be made by some person whose property, franchise or personal right would be injured by the forbearing or doing (as the case may be) of such specific act; and (b) that such doing or forbearing is. under any law for the time being force, clearly incumbent on such Court in its public character.

Bombay Acts (Municipal Act III of 1372 & IV of 1878) S. 33, 34-*Concld.*

An application under sub-sec I of S. 33 of the City of Bombay Municipal Act 1888, should name the persons whose election is objected to.

Sub-sec. 2 of S 33 enacts what the Chief Judge is to do when an application is made under sub-sec. I. He has to make such enquiry as he may deem necessary and—

(1) If he finds that the election was a valid election and that the person whose election is objected to is not disqualified, he shall confirm the result of the election.

(2) If the Chief Judge finds that the person whose election is objected to is qualified for being a Councillor, he shall declare such person's election null and void.

(3) If the Chief Judge finds that the election is not a valid election, he shall set it aside.

Under S. 33, sub-sec (2), it is not the candidate with the next highest number of votes whom the Chief Judge shall declare to be deemed to be elected, but the candidate with the next highest number of valid votes and against whose election no cause of objection is found. The Chief Judge is entitled to presume that all the votes in favor of a candidate as declared by the Commissioner are valid, but if a vacancy has to be filled, all the unsuccesssul candidates are open to attack, and the last on the list may prove to be the one with the next highest number of valid votes.

The change effected in sub Sec 2 to S 33 by Act of 1905, enables an applicant to apply to the Chief Judge for a declaration that any of the unsuccessful candidates should be deemed to be elected.

Sharafaly Mamooji
12 Bom L R 737=34 Bom 659.

4—S. 163—Compensation—Frontage land —Fifteen per cent. addition to compensation not allowed.—

A certain mosque in Bombay was abutted on the north, west, and east by Public streets. In December 1886, the Municipal Commissioner, pursuant to s. 166 of the Bombay Municipal Acts III of 1872 and IV of 1878, required the trustees of the mosque to set back the building on the said three sides for the purpose of improving the

Bombay Acts-(Municipal Act III of 1872 & IV of 1878) S.163-*Concld.*

public streets. It was contended that the amount of compensation to be paid to the trustees was to be measured by the loss of rent which they would have received for certain rooms which they had proposed to build on the land in question. *Held* that the words of s. 163 of the Municipal Acts III of 1872 and IV of 1878 were intended to ensure compensation to the owner for every sort of damage, and not to restrict it to compensation for such damage as he might by his own arrangement reduce it to. Compensationbecomes due under the section as soon as the Corporation takes possession, which is when the owner begins to build. and there being no words in the section to show a contrary intention. the compensation must be assessed according to the state of things then existing, and not upon the basis of what the owner may have it in his power to do towards diminishing the damage which would otherwise result to him. *Held*, also, that in cases of compensation granted under s. 163 of the Municipal Acts III of 1872 and IV of 1878, the addition of 15 per cent cannot be allowed.

Municipal Commissioner for the City of Bombay v. Patel HajiMahomed Janu. 14 Bom 292.

Notes.—Fol: 18 Bom 184.

5—S. 195—Obstruction—Power given in Act for public benefit—Construction of Act.

—The eaves of certain buildings belonging to the plaintiff projected over the public road. On the 17th May 1886, the Municipal Commissioner of Bombay gave notice to the plaintiff requiring him within thirty days to remove the said eaves as being " a projection, encroachment, or obstruction " within the meaning of s. 195 of Acts III of 1872 and IV of 1878. The plaintiff thereupon filed this suit, praying for an injunction against the Municipal Commissioner. The eaves in question projected to the extent of one foot eight inches. The width of the road in front of the buildings was about forty feet, and the length of the eaves varied from seven feet to nine feet two inches above the roadway. At the time this suit was filed there was an open drain or gutter, one foot three inches wide, running along by the side of the plaintiff's buildings and between them and the road. That gutter, however, subsequently to the filing of this suit, but before the hearing, was covered over. and so much additional width was thereby added to the road. *Held* that the eaves constituted an obstruction within the

Bombay Acts (Municipal Act III of 1872 & IV of 1878)-*Concld*-S.195-*Concld.*

meaning of the above section, and that the Municipal Commissioner was entitled to remove them. Under the above section, the question to be decided is not whether there is a real practical inconvenience to the public traffic in the street. Those are not the words used in the section, and if that was the intention of the Legislature, it would have been expressed Where an Act gives power to a municipality or corporation for the public benefit, a more liberal construction should be given to it than where powers are to be exercised merely for private gain or other advantage. **Ollivant v Rahimtula Nur Mahomed. 12 Bom 474.**

Notes.—Ref: 19 Bom 212; 27 Bom 221.

6—Sch. B.—Spirits.—Toddy juice.—

Toddy juice, whether in a fermented or unfermented state, is not " spirits " within the meaning of Bombay Act III of 1872, and is therefore not liable, on importation into Bombay, to a town duty of annas 4 per gallon imposed on spirits by schedule B of that Act. **Harmasji Karsetji v Pedder 12 Bom 199.**

Bombay Municipal Act III of 1888.

1.—Ss. 143, 144—University buildings—Building occupied for charitable purposes—Charitable purposes—Stat. 43 Eliz., c 4—Municipal taxation, Exemption from.

The following buildings occupied by the University of Bombay, *viz*, the Sir Cowasji Jehangir Hall, the Library and the Rajabai Tower, are not Government property, and are not included in the property for which Government pays a lump sum under s. 144 of the Bombay Municipal Act (III of 1888). The above buildings are exempt from taxation, being "buildings exclusively occupied for charitable purposes," within the meaning of cl. (*a*) of s. 143 of the Bombay Municipal Act (III of 1888). The words "charitable purposes" have acquired a technical meaning in the Presidency of Bombay, and in that sense they include all purposes within the meaning of Stat. 43 Eliz., c. 4. **University of Bombay v Municipal Commissioners of Bombay. 16 Bom 217.**

2.—S. 158 - Tax—Drawback -General conditions prescribed by the Standing Committee limiting right to drawback.

Under s 158 of the City of Bombay Municipal Act (Bombay Act III of 1888), the following general conditions were prescribed by the Standing committee with reference to claims for drawback of the general property tax leviable in Bombay:—" (1) Except with the special sanction of the Commissioner, no claim for drawback shall be entertained unless submitted to the

Bombay Acts-(Municipal Act III of 1888) S. 158-*Concld.*

Commissioner not less than thirty days before the commencement of the half-year to which such claim relates. (2) Drawback of the one-fifth part of the general tax shall be sanctioned by the Commissioner in cases falling within either of the following classes and in no others —(*a*) Chawls or buildings let out for hire in single rooms either as lodging or go lowns for the storage of goods. (*b*) Properties which, in the opinion of the Commissioner, are usually or frequently vacant either wholly or partially. (3) No sanction for drawback shall extend or apply to any floor on which trade or manufacture is carried on, or any goods are sold." The Commissioner having refused to sanction a drawback of the tax leviable on certain properties of the plaintiff on the ground that they did not fall within the terms of the above conditions, the plaintiff filed this suit. It was contended on his behalf that the second and third of the above conditions were bad, and that the standing committee could not by so-called general conditions limit or curtail the right given to tax-payers by s. 158. *Held* that the conditions prescribed by the Standing Committee were not *ultra vires*, and that the Commissioner was justified in refusing the drawback. **Goverdhandas Goculdas Tejpal v Municipal Commissioners of Bombay. 17 Bom 394.**

3.—Ss. 222, 265—Water works—Municipality of Bombay—Right to enter on land of Railway Company to lay pipes, etc.—Railway Act IX of 1890, s 12—Accommodation works.

Under the Bombay Municipal Act (Bombay Act III of 1888), the Corporation of Bombay has the right, for the purpose of supplying the city with water, to enter upon land belonging to other owners, to make connections between the mains, and to lay the pipes forming the connections through or under such lands without the owners' permission, though not without giving them reasonable notice in writing. *Held*, also, that s. 12 of the Railways Act (IX of 1890) does not exclude the above right of the Corporation of Bombay to enter on land belonging to the Great Indian Peninsula Railway Company for the said purposes. **Great Indian Peninsula Railway v Municipal Corporation of Bombay. 23 Mad 358.**

10.—Ss. 231, 234—Municipal Commissioner—

Bombay Acts-(Municipal Act III of 1888) S. 222-*Concld.*

Drainage—Occupied house-New buildings-Right of entry-Discretion vested in the Municipal Commissioner-Powers of Court to interfere in the exercise of such discretion.

The Municipal Commissioner may, if he thinks fit, cause any work described in s. 231 of the City of Bombay Municipal Act, 1888, to be executed and he is authorised by s. 488 of the Act, to enter upon any land to do so. The Court has no power to interfere in the exercise of his discretion, by the Municipal Commissioner, under the Act, unless it is made to appear that the Municipal Commissioner is not acting in good faith, but for some sinister or collateral purpose. The legislature has vested in the Municipal Commissioner a discretion and the Court will not interfere in his exercise merely because the object in view may be carried out in some other way; nor will it lightly impute to him bad faith. S.231 of the Act applies to houses occupied as well as to new buildings. The object of both of the ss. 231 and 234 is "the effectual drainage" of the buildings. S. 231 is meant to apply to existing houses with possibly existing drains; and s. 234 is meant to apply to houses newly erected or re-built. **Gangjibhoy v Municipal Corporation of Bombay. 1 Bom L R 754.**

4.—S. 248—Fazendar—Liability to provide privy accommodation—"Owner"—"Premises" Construction of statutes.

A fazendar is not the person liable, as owner of the premises, to provide privy accommodation under s.248 of the Bombay Municipal Act (Bombay Act III of 1888), the beneficial owner of the house built on the fazendar's land being "the owner" within the meaning of the section. *Per* Ranade, J.—The word "premises" in s. 248 of Municipal Act is used with reference to the building to which the privy belongs.

Municipality of Bombay v Shapurji Dinsha. 20 Bom 617.

5.—S. 249—The words "are employed" appearing in section 249 of the Bombay Municipal Act refer to employment of any kind or for any length of time. **Municipality of Bombay v Ahmedbhai Habibbhoy. 1 Bom L R 12= 23 Bom 728.**

Bombay Acts-(Municipal Act III of 1888) S. 251.

6—S. 251-A (a)—Water closets—Building—Construction—"Directly over, under or directly below."

The words "directly over or directly under," in S.251-A, clause (*a*), mean not only in a direct line vertically above or below, but also in contact with or directly adjacent to.

It is, therefore, permissible to erect a building, wherein a water closet is vertically above or below any residential quarter, provided that a bath-room intervenes between them. **Sir Currimbhoy Ebrahim v The Municipal Commissioner of Bombay. 11 Bom L R 1167=34 Bom 496.**

7.—S. 297—Provision to make public street——Regular line of street——Subsequent alterations.

Under the provisions of S. 297 of the City of Bombay Municipal Act, 1888, a line can only be once prescribed as the regular line of the street and it is not competent to the Municipal Commissioner to alter from time to time the line once prescribed **Essa Jacob v Municipal Commissioner of Bombay. 25 Bom 107= 2 Bom L R 810.**

Notes.—Ref: 27 Bom 231.

—ss. 298, 299 & 301.

See Appeal—Bombay Acts—Bombay Municipal Act, 1888. Case No (3°2). **18 Bom 184.**

8.-Ss. 298,299,& 301-Compulsory acquisition of land—Set back—Compensation paid to owner for land with buildings—Basis of valuation of land.

Where in a case of set back, land with buildings thereon was taken up by the Municipal Commissioner from a private owner under Bombay Act III of 1888, ss 298, 299 and 301:—*Held* that the amount of compensation awarded to the owner should be calculated with regard to the price given within a few years previously for land of a similar character in the immediate neighbourhood of the land in question. *Held*, also, that the addition of 15 per cent, could not be allowed. 14 Bom 292, followed. **Municipal Commissioner for the City of Bombay v Abdul Huk. 18 Bom 184.**

Notes.—Ref: 10 Bom L R 907,

Bombay Acts-(Municipal Act III of 1888) S 342.

9.—Ss. 342, 527—Notice-Suit for injunction—Reconstruction—Repairs—Regular line of the street—Public Officers——Prompt execution of duty.

S. 527 of the City of Bombay Municipal Act does not apply to a suit to restrain a Municipality by injunction from doing an act which is threatened but not done, 25 Bom 143 followed. It is of importance that public officers should not be encouraged to sleep at their posts and postpone the fulfilment of their duties in the expectation that their delay will be condoned and their demands conceded, whatever may have been the lapse of time of the change of circumstances. The word "reconstruction" as used in S. 342, Cl (d) of the City of Bombay Municipal Act, has some other element than that of additions, alteration or repair. If the repair is of an ordinary and casual character, it is not reconstruction of any portion of the building. If, on the other hand, the repairs are of a more or less substantial character, affecting the stability of the building, it is reconstruction whether the repairs are done inside or outside the house. In each case, it is a question of fact whether the partial works done with reference to a building are mere repairs or one of reconstruction of a portion of the building. The difference between repairs and reconstruction is one of degree, and can be made out by finding whether what has been done adds to and was intended to add to the structural capacity of the building. **Dewakabai v The Municipal Commissioner of Bombay. 6 Bom L R 1028.**

10.—Ss. 349-A, 349 B—Interpretation of the sections regarding the height up to which buildings could be constructed—Permission of the Municipal Commissioner when necessary—Powers of the Advocate- General to interfere in cases of public nuisance-Advocate-General has some powers as the Attorney General in England—Civ Pro. Code (Act V of 1908), S, 91—Powers of Advocate General limited under this section—Mandatory injunction will be granted against a private individual if public nuisance persisted in.

Section 349-A of the City of Bombay Municipal Act governs and controls s. 349 B of the Act,

Bombay Acts-(Municipal Act III of 1888)-Ss. 349 A, 349 B.-*Contd.*

The words "except with the written permission of the Commissioner" in s. 349-A not only apply to the special case mentioned in that section but also to each of the cases, provided for in s. 349-B. Both the sections on combining would mean that,

(a) no building shall exceed seventy feet in height.

(b) in streets not exceeding twenty-six feet in width no building shall exceed in height one and a half times the width of the street;

(c) in streets exceeding twenty six feet but not forty feet in width, no building shall exceed forty feet in height, and in all other cases no building shall exceed the width of the street in height, except with written permission of the Commissioner.

If the permission is given to build, any person may, as a matter of right, build, to the prescribed heights relatively to the streets on which the building faces, without having recourse to the Municipal Commissioner at all. In, any case in which permission is granted, it is desired to exceed those prescribed heights or the general maximum height, the Municipal Commissioner's written permission must be obtained.

The opening words of s. 349-B suggest that the rules in that section are intended to be a guide to the Commissioner in the exercise of his discretion, rather than an imperative command.

The intention of the legislature expressed in Ss, 349-A and 349-B was to confer upon the Commissioner a power to grant permission in writing in all exceptional and proper cases for the erection of buildings beyond the prescribed heights.

The Advocate General represents in this Presidency the Attorney-General in England and has all his powers.

In case of constructive public nuisance or public nuisance in law—meaning that which is only wrong because it contravenes the provisions of an Act—the Attorney-General's special power extends in England. No such power can be derived from s, 91 of the Code of Civil Procedure, which is in terms restricted to public nuisances in fact.

Bombay Acts-(Municipal Act III of 1888)-Ss. 349 A, 349 B.-*Concld.*

No mandatory injunction against a private individual for what is a mere nuisace in law will be granted except where it has been created and persisted in defiance of local authority and that local authority has not sufficient power to enforce compliance with law, **The Advocate General of Bombay v. Haji Ismail Hasham.**

12 Bom L R 274=5 Ind Cas 213.

18.—City of Bombay Municipal Act (Bom Act III of 1888), S, 351—Municipal Commissioner-Powai to remove objectionable structures-Exercise of the power—'Appear' interpretation of—Danger, kind of, contemplated by the section-Discretion vested in the Commissioner—Court's interference with the discretion—Commissioner can act through agent—Right of the party to be heard in answer to his notice—Injunction to restrain Commissioner from pulling down a building.

The primary object of s. 351 of the City of Bombay Municipal Act, 1888, is the safety of the public, to secure which the Commissioner must of necessity be given very wide powers. But it does not follow that those powers must be exercised arbitrarily and without due consideration of the provisions of the section and the right of individuals. In the first place, it must appear to the Commissioner that a structure is in a ruinous condition or likely to fall or in any way dangerous to any person occupying, resorting to or passing by such structure. He may next by written notice, require the owner or occupier to pull down, secure, or repair it.

The word "appear" in the section does not involve "appears to the eye." It is sufficient if it appears to the Commissioner on the representations of a competent officer whose duty it is to make such representation. But, the Commissioner's action when "it appears" is judicial,so that he must exercise his discretion in determining what action should be taken. He does not satisfy this test, where he merely signs the notice which is sent to him by the Executive Engineer, because it has previously been signed by that officer. It is only by aid of a fiction that it can be said that a notice signed in this way by the Commissioner complies with the section, which should be considered as a notice to show cause. It is not invalid; at the same time it

Bombay Acts (Municipal Act III of 1888) S. 354-*Contd.*

cannot deprive the person served with it of his right to object, unless the legislature has clearly deprived him of such a right.

Danger means peril, risk, hazard, exposure to injury from pain or other evil, and can vary in degree, according as the apprehended injury is expected to occur at once or at some future time. S. 354 applying to all degrees of danger and prescribing various precautionary measures to be taken to prevent injury resulting therefrom, it follows that first the degree of danger must be ascertained and then the appropriate precautionary measure prescribed.

Discretion must not be arbitrary. The very term itself standing and unsupported by circumstances imports the exercise of judgment, wisdom and skill as contra-distinguished from unthinking folly, heady violence of rash injustice.

The legislature has vested in the Commissioner a discretion in the matter (s. 354) and the Court would not interfere in his exercise of it, merely because the object in view might be carried out in some other way, nor would it lightly impute to him bad faith. But, the Court is, in the first instance, entitled to inquire whether the discretion has been exercised. The discretion has to be exercised, first in coming to a conclusion, as to the state of the structure, and then in fixing upon the remedy.

It is obviously impossible for the Commissioner to inspect all structures that are suspected of being dangerous. Therefore, it is a sufficient exercise of his discretion, in deciding what structures are dangerous, if he appoints a competent person to represent to him what structures are dangerous. But, if a notice is issued based on the representation of such a person, it is open to the owner to prove that that person has not exercised his discretion or has been actuated by improper motives in prescribing the steps to be taken.

If the owner can prove to the satisfaction of the Court that his house was not in such a dangerous condition as to warrant an order to pull it down, that would be *prima facie* evidence, that the person appointed by the Commissioner had not exercised his discretion.

Bombay Acts (Municipal Act III of 1888)-S. 354-*Concld.*

When the Commissioner has *per force* to act on the advice of his expert advisers, it must be proved that they decided judicially what advice they should offer. If they did not, the provisions of the section have not been complied with. In other words, the Commissioner can exercise his discretion through an agent; but it follows that, if the agent has not exercised his discretion, neither has the Commissioner. The Commissioner has the opportunity to remedy this when the owner complaints.

Under certain circumstances, the safety of the public must be considered in priority to the right of private individuals as in the case of imminent danger; but, where there is no suggestion of imminent danger the person affected is entitled to be heard as a matter of common justice. (15 Pa. St. 304 Fol).

Lalbai Tricamlal v The Municipal Commissioner for the City of Bombay. 10 Bom L R 821=33 Bom 334=3 Ind Cas 361.

19—S. 381—Commissioner's power to require the owner to fill up low ground.

Section 381 of the City of Bombay Municipal Act, 1888, empowers the Commissioner to require the owner of low ground to cleanse and fill up the same; but it does not permit him to issue an order that an indefinite quantity of low lying ground shall be filled up much less that it shall be filled to some particular level or filled up with sweet earth or that it shall be sloped in a particular direction.

Municipal Commissioner of Bombay v Hari Dwarkoji 1 Bom L R 518=24 Bom 125.

20—S. 394—Premises—Buildings—Open ground:

The word 'premises' in S. 394 of the City of Bombay Municipal Act, 1888, is not limited to 'buildings' but also includes open ground. **S B. Master v Dharamsi Jetha 3 Bom L R 436.**

21-22-S.461 (d)—Bye-law restricting the height of buildings on a site previously built upon—Validity of such bye-law.

Bombay Acts-(Municipal Act III of 1888)-S. 394-*Concld.*

The Municipality of Bombay has power, under s. 461, cl. (d), of Bombay Act III of 1888, to make a bye-law restricting the height of a new building erected on a site which had been previously built upon. **Municipality of Bombay v Sunderji 22 Bom 980.**

23—Ss. 504, 527 and 301—Land taken by the Municipality for street improvement—Compensation for land taken—Dispute as to amount of compensation—Notice of suit—Limitation.

In 1891 the Municipal authorities of Bombay gave notice to the plaintiffs under s.299 of Bombay Act III of 1888 that they required 23-30 square yards of the plaintiff's land for street improvement. On the 14th December 1891, the plaintiff gave possession of the land to the municipality, and on 27th January 1892 claimed Rs.60 per square yard as compensation. By letter dated 23rd February 1892, the Municipal Commissioner (without prejudice) offered Rs50 per square yard as compensation, and stated that, on the plaintiff producing the title-deeds and papers to establish his title, the necessary documents in connection with the payment would be prepared. Nothing further took place in the matter until the 14th February 1894, on which date the plaintiff wrote a letter to the Municipal Commissioner, in which, without mentioning any sum, he requested the payment of the amount which might be due to him as compensation for his land taken by the Municipality. The Commissioner refused to pay the compensation, contending that the plaintiff's claim was time-barred. The plaintiff thereupon brought this suit claiming Rs1,165 (being at the rate of Rs.50 per square yard) as compensation for the land taken by the defendant or in the alternative for that sum as damages for the breach of contract to pay purchase-money for the land. The defendant pleaded (1) that notice under s. 527 of the Municipal Act (Bombay Act III of 1888) was necessary before suit filed; and (2) that the suit was barred by limitation. The Chief Judge of the Small Cause Court found for the defendant with costs, and dismissed the suit contingent on the opinion of the High Court. On a case stated for the High Court—*Held* (1) that notice under s. 527 of Bombay Act III of 1888 was not necessary, that section not being applicable to suits brought to enforce payment of compensation under s. 301 of the Act; (2) that the suit was not barred by limitation. *Per Farran, J.*—A suit against the Municipality of Bombay for compensation for land acquired by the Municipality under s. 299 of Bombay Act III of 1888 is not an action of tort or quasi-tort, but a simple action for the price of land which the terms of s. 301 of the Act impose upon the Commissioner to pay. The obligation to pay that price is of the same nature, (1) whether the owner assents to the valuation of the land placed upon it by the Commissioner; (2) whether the value is determined by the Chief Judge of the Small Cause Court; or (3) whether it is left undetermined. S. 527 does not apply to any of these three cases. In all of them the obligation to pay is imposed by s. 301, and does not arise from the manner in which the amount of the price to be paid is arrived at. S. 504 prescribes the only mode in which, in case of dispute, the value of the land can be determined. If the owner of land disputes the Commissioner's valuation, he must apply to the Chief Judge of the Small Cause Court within a year. If he does not do so, the result is that he loses the power of effectually disputing the Commissioner's valuation, but does not lose his right to the amount of the valuation. The owner of land has a remedy independent of the provision of s. 504. That section only deals with cases where there is a dispute as to the value of the land, and leaves untouched those cases where there is no such dispute, but where the Commissioner for some reason declines to pay. In such cases the owner is left to his ordinary remedy, no special mode of procedure being prescribed. Cases in which there has been a dispute, but in which the owner abandons his claim to dispute the valuation of the Commissioner, fall within the latter category. **Muneklal Motilal v Municipal Commissioner of Bombay 19 Bom 407.**

Bombay Acts-(Municipal Act III of 1888)-S. 504 *Concld.*

Notes—25 Bom 315. Fol: 20 Bom 697.

24.—S 527—Suit for damages against Municipal Commissioner—Notice of suit—What is sufficient notice.

Bombay Acts-(Municipal Act III of 1888)-S. 527-*Contd.*

The plaintiffs were owners of a house consisting of a ground floor and upper story and measuring 77 feet in length. On the south side of the house was a gully, 3 feet 6 inches wide, separating it from another upper-storied house. The plaintiffs in this suit complained that in January 1891 the defendant by his servants dug a trench 8 feet deep, along the whole length of the gully for the purpose of laying a drain pipe, and that the work was done so negligently that the plaintiffs' house was injured and became in such a dangerous condition that it had to be pulled down. The plaintiffs claimed Rs. 3,996 as damages. The defendant denied the negligence, and alleged that the work was not done by his servants or agents but, by a contractor. For the defendant it was contended that the notice of action given by the plaintiffs under s 527 of the Bombay Municipal Act (III of 1888) was insufficient. The notice stated "that one S L, a contractor under you, and as such being your agent and servant, excavated a trench, etc." It was argued that this was not a good notice, as it only alleged a cause of action arising out of the acts of the defendant's servants and agents, and not out of the acts of a contractor. *Held*, that the notice was sufficient. The section only required the notice to state with reasonable particularity the cause of action, and this was done. The individual by whom the damage was done was specified, and the acts which caused the damage were clearly set forth.

Dhondiba Krishnaji v Municipal Commissioners of Bombay 17 Bom 307.

25.—Breach of statutory duties—Action—Notice—Action on a contract—suit in contract—Distinction between—Procedure City of Bombay Mnnicipal Act (Bom Act III of 1888),—Sec 527—Municipality—Refund of town duty.

A person seeking the protection of an Act cannot claim that his conduct has any relation to the "execution of the Act" if he knowingly and intentionally acts in contravention of its provisions.

It is an established principle of law that notice is not required where the action is brought

Bombay Acts-(Municipal Act III of 1888)-*Contd.*-S. 527-*Concld.*

on a contract. The exemption from this requirement, however, does not apply to all suits in contract as distinct from suits on a contract; since a tort may give rise to a suit in contract.

Runchhordas Morarjee v The Municipal Commissioner for the City of Bombay.

3 Bom L R 158=25 Bom 387.

Bombay Native Law officers Act IV of 1864.

Notes:—Rep Act XII of 1873.

Bombay Port Trust Act I of 1873

Notes:—Rep Bom Act VI of 1879.

Bombay Port Trust Act (I of 1873).

See (1) Injunction-Special-Cases-Public Officers with Statutory Powers **1 Bom 132**
(2) Libel **1 Bom 477.**

Bombay Port Trust Act VI of 1879.

Notes:—Rep in pt Act II of 1901; Bom Act III of 1886 (As Amended by Bom Act I of 1891, S 2 (B)); Rep in pt and Am; Bom Act I of 1899, Am Bom Act I of 1881; Bom Act III of 1883; Act VI of 1883; Bom Act III of 1888 S. 145, Bom Act II of 1901.

Bombay Port Trust Act (VI of 1879).

Ss 43 and 62.

See Sale of Goods

Bombay Promissory Note Act III of 1865.

See Promissory Note.

Bombay Public Demands Recovery Amendment Act I of 1895.

Notes:—Ss 2, 16, 23 (1) Rep in pt Ss 4 (3), 6 (2) 7 to 9, 14, 15, 17 (c) 18 to 22, 23 (3), 26, Sch,

Bombay Acts-(Public Demands Recovery Amendment Act-*Concld.*

27,29 30 32 Am, s 33 and Form 2 in Sch Rep in Pt and am Ben Act 1 of 1897, S 1 (3) Rep Act 1 of 1903, s 7 (1) (D) Rep in pt Act IV of 1907 Applied to recovery of rent due to landlords. In Bengal Act VIII of 1885 S 49 L 158-A (ins E D & A Act I of 1908 S 49) Declared in force tin he Sonthal Parganas Reg III of 1872 S 3 As Amended By Reg III of 1899 S 3.

Bombay Public Demands Recovery Act I of 1897.

Notes:--Ss 1, 3 Rep Act I of 1903.

See Cases under:—Public Demands Recovery Act

Bombay Regulation 1 of 1800.

See Limitation-Bombay Regulation I of 1800

5 W R P C 31; 1 Moore's I A 154 1 Moore's I A 414.

1.--S. 13-Limitation for redemption of mortgage of land made prior to Act XIV of 1859.

No period of limitation was fixed by any Act or Regulation for redemption of a mortgage made prior to the passing of Act XIV of 1859. S. 13 of Bombay Regulation I of 1800 did not apply to redemption or other mortgage suits (1811). 1 Borr 124 and (1882). 2 Borr. 563 foll. **Hiralal Icchalal Majumdar v Narsilal Chaturbhujdas Desai 11 Bom L R 318.**

Regulation—I of 1808 s 4.

See Enhancement of Rent-Right to Enhance

Regulation—IV of 1818 s 52.

See Subordinate Judge, Jurisdiction of.

Regulation—VI of 1823

See Damages-Measure and Assessment of Damages-Breach of Contract.

Regulation—II of 1827.

See (1) Hindu Law-Inheritance-Law Governing Particluar Cases.

(2) Jurisdictiou of Civil Court-Casts.

(3) Pensions Act s 4.

(4) Jurisdiction of Civil Court Caste.

(5) Limitation Act s 26.

Bombay Acts-(Regulation II of 1827)-S. 5.

See Superintendence of High Court-Civil Procedure Code 1882 s 622.

1.—Reg II of 1827 S.5—Disallowing omission under section 11 of Bombay Regulation VIII of 1827—Appeal to High Court.

An Administrator appointed by the District Judge was ordered to be allowed a certain commission. On taking accounts the District Judge disallowed certain items as not coming within the order allowing commission. *Held* that the High Court had no jurisdiction under section 11 of Bombay Regulation VIII of 1827 to modify the order disallowing the items; *held* also that the High Court should not in ordinary cases burden itself with appeals about items disallowed by the Judge below. though it may have jurisdiction to pass directions under Regulation II of 1827, section 5, clause 2. **Chhotalal v Gopilal 1894 P J 477.**

—Reg II of 1827 S. 5, cl. (2).

See High Court, Jurisdiction of — Bombay —Civil.

—Reg II of 1827 S. 21.

See (1) Jurisdiction of Civil Court—Caste.

(2) Right of Suit—Caste Questions.

1—Bombay Regulation II of 1827, S. 21, Cl. (1).—Caste question—Excommunication —Civil Court—Jurisdiction—

A suit for a declaration that his excommunication by his castemen was invalid and that he is still a member of the caste is not cognizable by Civil Courts. Per *Chandavarkar, J.*:—(1) A declaration of continuing membership of caste and consequent right to social privileges is beyond the jurisdiction of Civil Courts. (2) While civil rights hang on the validity of the excommunication, the Court has jurisdiction; but it will not interfere with the decision of the domestic tribunal if it has acted *bona fide* in accordance with natural justice and the rules of the caste. (3) If damages are claimed as for loss of caste or character by libel on him, the Court has jurisdiction, but no damages will be given if the castemen were acting *bona fide* for the protection of their caste interests.—**Natu Velji v. Keshavji, 3 Bom L R 718=26 Bom 174.**

Bombay Acts-(Regulation II of 1827) S. 21-*Conta.*

2—Readmission to caste.

No suit will lie for a decree ordering the members of a caste to re-admit a member to participation in caste communication and privileges. **Narotam v. Mithalal, 1878 P J 235.**

3—Disposal of money paid to Panch.

A claim by a Mahajan, or headman of a caste, to be entitled to the disposal of money paid, according to the custom of the caste, to the Panch on marriages, and brought against a member of the Panch, to recover money paid to him in accordance with that custom, is a purely caste question and not within the jurisdiction of the Civil Courts. **Dodhma v. Khemchand 1882 P J 377.**

4—Not caste question.

A claim by a Khot for damages by reason of the defendant having wrongfully received cocoanuts and betel leaves and a marriage fee from a man of the Bhandari caste, and thereby infringing the customary rights or appurtenances to the plaintiff's office of Khot is not a caste question. **Aba Raghuji v Dewji, 1884 P J 297.**

5—Suit to recover cooking pot belonging to Panch.

Where the defendant borrowed a cooking pot belonging to a certain Mahomedan community and refused to return the same to the Panch, *held* that a suit by the Panch who was in charge of it on behalf of the community to recover it or its price was cognizable by the Civil Court. **Kasam v. Madubhai, 1896 P J 391.**

6—Caste question-Questions of religious rites or ceremonies arising incidentally.

The test of determining that a particular question is a caste question so as to exclude the jurisdiction of the Civil Courts is whether it involves an "interference with the autonomy" of any caste. The circumstance that the right to any property claimed depends on the decision of question relating to religious rites or ceremonies cannot justify the Courts to decline jurisdiction. **Vyankaji v. Janardhan, 1891 P J 65.**

7—Caste question.

Where the plaintiff as the head of a math alleged his exclusive right of performing a certain religious worship and sued the defendant for recovery of the perquisites received by him by wrongfully performing those ceremonies and the defendant contended that he had performed that as deputy of the head of another math who and not the plaintiff was entitled to perform them but neither party alleged that the caste had any voice in the matter. *Held*, that the suit was not barred. **Komarswami v. Gurubasaswami, 1891 P J 334.**

Bombay Acts-(Regulation II of 1827)-S. 21-*Concld.*

—S. 43.

See (1) Public Servant.

(2) Subordinate Judge, Jurisdiction of.

—S. 47.

See Pleader—Appointment and Appearance.

—S 52.

See Pleader—Remuneration.

8—S. 52 cl. 1, Pleader's fee on remand.—

Under S. 52 a pleader is not entitled to a fresh fee when a suit is remanded in appeal for retrial. **Bai Javervahu v. The Sub Collector of Broach, 1874 P J 67.**

9—S. 52—On a question raised as to whether the basis for the calculation of pleader's fees under s. 52 of Regulation I of 1827, should be the actual value of the property or the valuation of the claim for Court-fees purposes:

Held, that the words of the Regulation point to the actual value as the basis of remuneration, while the Court-fee value in suits of this class may bear no relation to the actual value.

The principle and rule of taxation ought as far as possible be such as to secure that the successful party should recover from his opponent such costs as are necessary to enable him to place his case properly before the Court, and this end can best be secured by adopting the actual value as the basis of the taxation.

In view of this conclusion, it will in future be right for the real as well as the Court-fee value to be stated on every plaint and memorandum of appeal, and, in case of dispute, for an issue to be raised as the real value. **Meherbai v. Maganchand, 7 Bom L R 131 =29 Bom 229.**

Bombay Acts-(Regulation II of 1827)-*Concld.*-S. 52-*Concld.*

Bom. Reg. II of 1827—S. 52 — Taxation, principles of:—**See** Taxation, Principles of.

—S. 54.

See Pleader—Appointment and Appearance.

10—S. 56 —Pleader—Misconduct — Disciplinary jurisdiction—High Court.—

Pleaders are a privileged class enrolled for the purpose of rendering assistance to the Courts in the administration of justice. Their position, training and practice, give them influence with the public and it is directly contrary to their duty to use that influence for the purpose of bringing the administration of justice into contempt.

A pleader presiding at a public meeting and procuring the passing thereat of a resolution contemptuously denouncing or protesting against the conduct of a Judge of the High Court in passing sentence at a trial at the Criminal Sessions is guilty of misbehaviour under s. 56 of the Regulation II of 1827. **Government Pleader v. J. M. Samant, 10 Bom L R 1169=33 Bom 252=2 Ind Cas 264.**

—Bom Reg IV. of 1827 S. 26.

See (1) Custom.
(2) English Law.
(3) Parsis.

1—S. 26—Mahomedans — Burying dead in another's lands — Right of persons to perform religious services at the tombs — Regulation IV of 1827, Sec. 26.

It is a custom among the Mahomedans that the ground in which human remains are interred is held as for ever sacred. The members of the families of the dead are in the habit of performing certain religious services at their tombs. The ownership of the soil may be vested in others, but the permission to bury in the land, granted as it must be, subject to the custom of the community, carries with it the right to perform all customary rites. **Ramrao v. Rustumkhan, 3 Bom L R 717=26 Bom 198.**

2—Reg IV of 1827 S. 27, cl. (1)– Family custom or usage—Duty of the Courts.

Cl. 1, s. 27, Regulation IV of 1827 (Bombay), imposes no obligation on the Courts to ascertain where there is family rule or usage, where there is no allegation of such fact in the pleadings or where the parties have waived resort to the course prescribed by the Regulation. **Modee Kaikhoosrow Hormuzjee v Coovebaee. 4 W R P C., 94: 6 Moore's I A 448.**

Bombay Acts (Regulation IV of 1827)-*Concld.*-S. 27-*Concld.*

—Act V of 1827.

See (1) Grant—Resumption or Revocation of Grants.
(2) Limitation—Bombay Regulation V of 1827.
(3) Limitation Act 1877, Art 147.
(4) Mortgage—Possession under Mortgage.
(5) Mortgage—Power of Sale.
(6) Pleader—Appointment and Appearance.
(7) Possession—Evidence of Title.
(8) Right of Suit—Caste Questions.

Bombay Regulation V of (1827).

1—S. 1—Allowance not incident to hereditary office or charge on land.

A prescriptive title to an allowance not incidental to an hereditary office, not a charge on immoveable property, cannot be acquired under s. 1. **Collector of Ahmedabad v Krishnaram. P R 112 of 1872.**

2—S. 1 Prescriptive right—Title by long possession.

The holder of a cocoanut part in Bandora, in the Island of Salsette, in the Thanna district, paying an annual assessment of Rs.39 to Government, built a bungalow upon it without the permission of the Collector, who. under the rule purporting to have been issued by the Government of Bombay on the 1st February 1869 in accordance with the provisions of s. 35 of Bombay Act I of 1865, demanded from him a fine equal to sixty times the assessment, and, on the plaintiff's failure to pay the fine, summarily attached the land under the provisions of s. 48 of that Act. *Held* that, by virtue of uninterrupted enjoyment for more than thirty years, the plaintiff had, under

Bombay Acts (Regulation V of 1827)-*Concld.*-S. 1-*Concld.*

s. 1 of Regulation V of 1827, acquired prescriptive title to the land and had become its absolute proprietor. **Collector of Thana v Dadabhai Bomanji.** **1 Bom 352.**

Notes.—Ap: 19 Bom 391. Ref: 4 Bom 515 F B ; 14 Bom 313.

—Reg V of 1827 s. 7.

See Majority, Age of.

3—Consideration, non-receipt of.

Section 9 places on the party impeaching the consideration alleged in a mortgage bond, the burden of proving that he did not receive it. **Venkaji v Mahadevbhut.** **1874 P J 15.**

—Reg V of 1827 S 9.

See Dakhan Relief Act 1827, Ss 12 13, 3.

—Reg V of 1827 s. 12.

See Limitation Act, 1877, Art 132.

—Reg V of 1827 s. 15, cl, (3).

See Mortgage—Construction.

4—Sale.

Section 15, clause 3, of Regulation V of 1827 does not authorize the sale of a usufructuary mortgage. **Krishnaji v Wasudeo.** **3 Bom L R 156.**

Bom. Reg VII of 1827.

See Arbitration—Arbitration under Special Acts and Regulations—Bombay Regulation VII of 1827. Case No (20) **6 Moor's I A 134.**

Bom. Reg. VIII of 1827.

See (1) Appeal - Certificate of Administration. Case No (354). **18 Bom 748.**

Case No (350). **19 Bom 399.**

(2) Certificate of Administration—Certificates under Bombay Regulation VIII of 1827 etc.

(3) Representative of Deceased Person.

Bombay Regulation VIII of 1827.

1—Though a certificate of heirship may not even be *prima facie* evidence of title when the question is between two rival claimants to the heirship, or persons claiming through them, it is conclusive as against third persons who are in possession of the property of the deceased. **Abaji v Ramchandra.** **1884 P J 149.**

Bombay Acts-(Regulation VIII of 1827)-*Contd.*

2 Certificate of heirship—Minor.

Under the provisions of Regulation VIII of 1827, a certificate of heirship cannot be granted to a minor. **Bai Baiba v Bai Daguba.** **6 Bom 728.**

Notes—Ref: 7 Bom 341 F B.

—s. 2.

See Subordinate Judge, Jurisdiction of. **17 Bom 230.**

3-S.4-A Judge acting under cl.2 of S. 4 of Regulation VIII of 1827, and referring the parties to a regular suit, cannot give the certificate of heirship to any of the rival applicants, but must suspend proceedings in the applications of the parties for the certificate till the decision in the regular suit. **Hargovandas v Bai Jadav.** **1886 P J 20.**

4—An order under S. 4, cl 2, should be made in the terms of that section. **Radhabai v Akrur.** **1896 P J 591.**

5- S 9—No rival claimant in possession.

The second provision of section 9 arises where there are two or more rival claimants between whom the right of succession is disputed, none of whom has taken possession, in which case the Court can appoint an administrator of the property. **Rupsliba v Talukdari Settlement Officer.** **1896 P J 526.**

—s. 10.

See (1) Parties—Substitution of Parties—Appellants.

(2) Representative of deceased person.

6—S. 10 (3)

Property to which S. 10 of Reg. VIII of 1827 applies must be delivered to a person who satisfies the Judge of his right to its possession. Demand of security from him is not warranted, by law. **Srimat Niranjan Murgya Rajendra Swami Savasthan Chitraculdurga.** **1888 P J 15.**

7—S. 11 –

Quere–Whether a Nazir appointed administrator of an estate is a " person interested" within the meaning of S. 11. **Amritlal v Chlidalal.** **1891 P J 215.**

8—Civil Circular, 174—Nazar's appointment is not personal.

Bombay Acts-(Regulation VIII of 1827)-*Concld.*-S. 11-*Concld*

Section 11 of Reg. 8 of 1827 and the Civil Circular Order 174 applies to a Nazar appointed administrator under section 9 and one appointed under Section 10.

A Nazar is considered not to be appointed as a person but as an official and his successor in office carries on the work of his predecessor. When, therefore, a Nazar died and his successor assumed charge of his office, *held* that the entire commission ought to be paid to the successor. **Prabhakar v Wasudev. 1896 P J 489.**

9—No commission due when estate mismanaged.

Where the rightful heir complains of mismanagement by the administrator, *held* that the District Judge ought not to have fixed the rate of commission until he had inquired into the complaints as in case the property was greatly mismanaged, the heir would not be liable to pay commission. **Gangu v Bapuji. 1896 P J 625.**

Bom. Reg. IX of 1827.

See Registration Act 1877, s. 17.

—IX of 1827 s. 6.

See Registration Act, 1877, s. 50.

1-S. 14—Decision of Boundary Commissioners —Finality.

The decision of Boundary Commissioners appointed under Bombay Regulation X of 1827, settling a question of disputed boundaries between two villages in a proceeding to which the Government are not parties, is not final and conclusive as between the Government and the owner of the villages when a dispute arises on a question of assessment. The finality spoken of in S. 14 of Bombay Regulation X of 1827 is a finality for the purposes of the Regulation, amongst which purposes the assessibility or extent of the assessment of land for Government revenue was not in any wise included. **Maharana Shri Jasvantsingji v The Collector of Ahmedabad. 1878 P J 124.**

Bom Reg. XVI of 1827.

See (1) Hereditary Offices Act (Bombay), (2) Service Tenure.

Bom. Reg. XVI of 1827 Ss. 19 and 20.

See Mortgage.

12 Bom L R 143=34 Bom 175.

II C. C. 54

Bombay Acts (Regulation XVI of 1827)-*Concld.*

Bombay Regulation XVI of 1827. s 20.

See Hindu Law—Widow—Power of widow.

—Reg. XVII of 1827.

See (1) Bombay Survey and Settlement Act I of 1865 Case No. (3).
7 Bom H C R A C 82.
Case No 5— **10 Bom H C A C 216.**
(2) Jurisdiction of Civil Court—Rent and Revenue Suits—Bombay.
(3) Land Revenue.
(4) Mamlatdar, Jurisdiction of.

—Reg. XVII of 1827 s. 16.

See (1) Sessions Judge, Jurisdiction of.

—s. 31, cl. (3).

See Jurisdiction of Revenue Court—Bombay Regulations and Acts.

—Reg. XVIII of 1827.

See (1) Appellate Court—Errors Affecting or not, Merits of Case. Case No (240).
11 Bom H C R 129.
(2) Stamp (Bombay Regulation XVIII of 1827).

—s. 10.

See Stamp Act, 1879, s. 34.

—Reg. XIX of 1827 s. 2.

See Jurisdiction of Revenue Court—Bombay Regulations and Acts.

—Reg. XXI of 1827.

See (1) Bombay Revenue Jurisdiction Act (X of 1876). Case No. (1). **9 Bom 462.**
(2) Mahomedan Law—Kazi.
(3) Opium.
(4) Sessions Judge, Jurisdiction of.

—Reg. XXIX of 1827.

See Agent of H H Holkar. Column 575.

—Ss. 4, 6.

See Pensions Act, s. 4.

—Appeal under.

See Service Tenure.

Bombay Regulation III of 1829.

See Cotton Frauds Regulation

Bombay Acts (Regulation XIII of 1830.)

See Agent of H H Holkar. Column (575).

Bombay Regulation Act XVIII of 1831.

See District Judge. Jurisdiction of.

Bombay Regulations and Acts.

See Jurisdiction of Revenue Court.

Bombay Revenue Jurisdiction Act X of 1876.

Notes.—Rep. in pt., Act IV of 1894; Act XVI of 1895; rep in pt., and Am., Act XV of 1880, Act XII of 1891; am., Act XVI of 1877.

—Bombay Revenue Jurisdiction Act (X of 1876).

See (1) Jurisdiction of Civil Court—Offices, Right to.

(2) Jurisdiction of Civil Court—Revenue.

(3) Jurisdiction of Civil Court—Rent and Revenue Suits—Bombay.

1—Ss. 3, 4, 5—Abkari—Land revenue—Toddy spirit—Bombay Abkari Act, V of 1878, ss. *24*, 29, 54, and *67*—Land Revenue Code, Bombay Act V of 1879, s. 87—Reg XXI of 1827, s. 60.

The plaintiff sued to recover from the defendant, a farmer of abkari duties on the manufacture of spirits, under s. 60 of Bombay Regulation XXI of 1827, a sum of money alleged to have been illegally levied by him as tax or rent through the mamlatdar in respect of certain cocoanut trees tapped by the plaintiff in 1877-78 and 1878-79. *Held* that the Civil Courts have jurisdiction to entertain such a suit. If the claim be held to be one in respect of land revenue, it falls within the exception contained in cl. (c) of s. 5 of Act X of 1876. If it is not, s. 4 of the Act has no application. *Per* Birdwood, J.—The expression "land revenue," as used in Act X of 1876, does not include either the duties leviable, under Reg XXI of 1827, on the manufacture of spirits, or the taxes on the tapping of toddy trees, the levy of which in certain districts was legalized by s. 24 of the Bombay Abkari Act, V of 1878. A farmer of duties on the manufacture of spirits is not authorized to levy a duty on any juice in trees, either under Regulation XXI of 1827, or Act X of 1876, or Bombay Act V of 1878. Juice in toddy-producing trees is not spirit, which includes toddy in a fermented state only. **Narayan Venku Kalgutkar v Sakharam Nagu Koregaumkar. 9 Bom 462.**

Notes.—Fol: 20 Bom 764 Ref: 20 Bom 803.

—s. 4.

See (1) Bombay Irrigation Act, s. 48. Case No. (2). **22 Bom 377.**

(2) Hereditary Offices Act, s. 17.

(3) Jurisdiction of Civil Court—Offices, Right to.

(4) Jurisdiction of Civil Court—Revenue Courts, Orders of.

(5) Pensions Act, s. 4.

(6) Right of Suit—Office or Emolument.

(7) Sale for Arrears of Revenue—Right of Sale.

2—S. 4—The plaintiff's claim to be inamdars of a village was rejected by the Inam Commissioner in 1859, after an investigation under Act XI of 1852, and his decision was confirmed by the Governor-in-Council in 1861. Subsequently, upon further petition from plaintiffs, Government passed a resolution in 1882, reversing their previous decision and directing the restoration of the village to plaintiffs. On July 1883, a further resolution was passed to the effect that, for the purposes of s. 4 of Act II of 1863, the village should be held to be restored after formal enquiry. *Held*, that resolution amounted to an adjudication by competent officers under s 4 (k) of Act X of 1876 and that the Civil Courts, therefore, had jurisdiction to entertain a claim for interest on the mesne profits which had been paid to plaintiffs with the restoration of the land Also by Birdwood, J., *Semble* that, as plaintiff's claim was based on Government's decision in their favour s. 4 (f) of Act X of 1876 would not apply. **Janardanrav Ganpatrav v The Secretary of State for India. P J (1888) 388=13 Bom 442.**

3—Limitation—Limititation Act 1877, Art 120—Attachment for arrears of land revenue—Suit for declartion that order of forfeiture was illegal Bombay District Police Act (Bombay Act VII of 1867), s. 4—Punitive Police post.

The plaintiff was the talukhdar of the village of K. At the end of the revenue year 1878-79,

Bombay Acts-(Revenue Jurisdiction Act X of 1876)-S. 4-*Contd.*

on 31st July 1879, the plaintiff was a defaulter in respect of the assesment payable to Government for that year. In November 1879 a punitive police post was established in the village, under s. 16 of Bombay Act VII of 1867 on account of the turbulent conduct of the inhabitants. Between January and April 1880 the Collector sold certain property of the talukhdar for arrears of revenue, and realized by the sale a sum of Rs 608-12-8. This sum was more than sufficient to cover the arrears due for 1878-79 as well as the assessment payable for 1879-80 but the Collector, after deducting the arrears due for 1878-79 applied the rest of the sale-proceeds towards the payment of the cost of the punitive post. The assessment for 1879-80 having remained unpaid, the village was attached on the 1st of July 1880, under s. 159 of the Bombay Land Revenue Code (Act V of 1879). The attachment was followed on the 6th January 1881 by an order declaring the village to be forfeited under s 153 of the Code. In 1886 the plaintiff filed the present suit against Government to recover possession of the village and for a declaration that the order of forfeiture was illegal and *ultra vires*. The defendant pleaded (*inter alia*) that the suit was barred under s. 4 cl. (c), of the Bombay Revenue Jurisdiction Act (X of 1876) that it was also barred by limitation. *Held*, also, that the plaintiff's claim for a declaration that the order of forfeiture was illegal was not barred by s. 4, cl. (c). of Act X of 1876, as the order of forfeiture could not be considered "a proceeding for the realization of land revenue." The proceeding authorized by law for the realization of land revenue *i-e* the attachment of the village having been taken, no other proceeding could legally be taken as against the plaintiff, till the expiration of twelve years from the date of the attachment. *Held* further, that the claim for a declaration that the order of forfeiture was illegal was not time-barred, as it was governed by art. 120 of the Limitation Act. (XV of 1877), **Samaldas Bechar Desai v. Secretary of State For India. 16 Bom; 455.**

4-Service inam land—Suit for a declaration of title to trees thereon and for damages—Jurisdiction of Civil Court—Hereditary Offices Act (Bombay Act III of 1874)—Hereditary officer—Officiator.

Bombay Acts-(Revenue Jurisdiction Act X of 1876) S. 4-*Contd.*

The plaintiff complained that he was prevented from cutting the trees growing on land situate in the village of Tungarli, belonging to certain persons who had sold the trees to him. He claimed damages and an injunction restraining the Collector from interfering with him. The defendant pleaded that the trees did not belong to the plaintiff's vendors, being on service inam land. The lower Court dismissed the plaintiff's claim, holding that the land, on which the trees were growing, was service inam land, and that the plaintiff's vendors had no title to them. On appeal, the High Court, on the evidence, upheld the lower Court's decision that the land was inam service land, but held that it did not necessarily follow that the trees upon it were the property of Government, and not of the vatandars. The latter might be the owners of the trees subject to a condition. The case was, therefore, remanded to the District Court for a finding on an issue as to whether the holders of service inam lands had a title to the trees on the lands, and, if so, whether they had the right to cut down trees without the permission of the Collector. On this finding the District Judge found in the affirmative. The case then came again before the High Court, when a preliminary objection was taken that under s. 4 of Act X of 1876 the Court had no jurisdiction. *Held* that, it having been decided that land in question was service inam land, the Court, under s. 4, cl. (*a*), of Bombay Act X of 1876, ceased to have jurisdiction over the plaintiff's claim against Government in respect of the trees growing thereon, as such claims related to property appertaining to the office of a village officer.
De Souza Devino v. Secretary of State for India 18 Bom 319.

5.—Rev. Jur. Act S. 4—

The Proviso to s. 4 of the Bombay Revenue Jurisdiction Act, 1876, contains no exceptions in respect of holdings unaccompanied by proprietory right in the soil and there is no saving clause which would suggest that such a claim to such holdings might fall within the purview of the Pensions Act. The right of an alienee of the revenue to sue for disturbance of his possession by a stranger or by Government is clearly recognised by the proviso and the only condition required is that the claim should be under an enactment instrument, sanad

Bombay Acts (Revenue Jurisdiction Act X of 1876) S. 4-*Contd.*

written grant or judgment such as is described in the proviso. **Balwant v. Secretary of State. 7 Bom L R 497=29 Bom 480.**

7.—S. 4 (*a*)—Civil Court—Jurisdiction—Suit against Government.

Section 4 (a) of the Bombay Revenue Jurisdiction Act 1874, bars the jurisdiction of the Civil Courts to entertain suits against Government regarding land, of which the plaintiff is put into occupation by Government free from exemption as the reward of his service. The plaintiff cannot escape from the bar by contending that his claim is for the possession of land, while the property that appertains to his office is not the land but the revenue arising from the land.

Appaji v. The Secretary of State For India 6 Bom L R 438=28 Bom 435.

8.—S. 4 (a)—Land held as Saranjam—Suit against Government—Jurisdiction of Civil Court—Act XI of 1852—Decision of the Inam Commissioner—Finality of decision:

The Inam Commissioner decided in 1859, under the provisions of Act XI of 1852, that certain estate was Saranjam and not Sarva Inam. On the death of its holder *P*, in 1899, Government resumed the property on the ground that it was Saranjam and granted it to *V*, one of the grandsons of *P*. The plaintiff, another grandson of *P*, sued the Secretary of State for India and *V*, for a declaration of title to and for possession of the property, alleging that it was Sarva Inam and that it was not competent to Government to resume and re-grant it to any one it liked. *Held*, (1) That the decision of the Inam Commissioner was by virtue of the provisions of Rule 2 of Schedule A of Act II 1852, final as regards the land and interests concerned in the decision. (2) That the title to and continuance of the estate must be determined, under Schedule B, Rule 10, of the Act under such rules as Government might find it necessary to issue from time to time. (3) That in accordance with those rules the estate was on *P*'s death resumed by Government who granted it to *V*. (4) That the suit having been one against Government relating to land held as Saranjam was excluded from the jurisdiction of the Civil Court by the provisions of Sub-S. (*a*) of S. 4 of the Revenue Jurisdiction Act, 1876.—**Ramrao v. Secretary of State. (1909) 11 Bom. L. R. 1333=34 Bom 232.**

Bombay Acts (Revenue Jurisdiction Act X of 1876) S. 4-*Contd.*

9-S 4 (a), (b), (i), (j), (k)-"Any other written grant"—"Treaty."

In the Revenue Jurisdiction Act, 1876, s 4. cl (j), the phrase, "any other written grant" means any written grant other than that which falls within clauses (*h*) and (*i*) of the same section. The clauses (*h*),(*i*),(*j*) (*k*) of the section are independent of one another; the source of title referred to in each stands apart from the rest and each clause is connected only with that portion of the proviso which precedes cl (*h*).

The term "treaty" in s 4 (*a*) of the Act, is to be strictly construed and is to be confined to an agreement between two or more independent Sovereign Powers or States.

The effect of the Amending Act (XVI of 1877) is to restore the jurisdiction of the Civil Courts to the extent mentioned in that Act in the district mentioned in the schedule thereto, and so far to remove the bar created by S 4 of the principal Act X of 1876.

Kalabhai v Secretary of State for India. 6 Bom L R 648=29 Bom 19.

10—S. 4 (b)—Inamdar—Occupancy tenant—Maphi Istawa Kowls—Suit to recover assessment in accordance with survey rates.

An objection to come within either of the two heads 1 and 3 of clause (b) of section 4 of the Bombay Revenue Jurisdiction Act, 1876, must be an objection which reaches them directly, i. e; an objection to them *per se* which admits the liability to pay land revenue on the part of the objector but quarrels with its amount or incidence or the validity and effect of the notification of Survey Settlement as by *themselves* objectionable, not because some other right affects them or makes them inapplicable to his particular case.

Objections in s, 4 (b) of the Act may be raised by a suit or in defence to a suit: but in whichever way they are raised they must be of the particular nature described in clause (b). Where they fall outside that class, they can be raised in defence as well as by a suit.

The effect of the proviso to s. 4 of the Act is that where an occupancy tenant holding under

Bombay Acts (Revenue Jurisdiction Act X of 1876) S. 4-*Concld.*

Government is called upon to pay land revenue accordidg to the survey rates, it is open to him to resist the claim of Government in a Civil Court on the ground that he holds under a written grant or an enactment, etc; which prevents Government from claiming more than can be recovered under the grant or enactment, etc.

Lukshuman v Govind; Govind v Lakshuman. 5 Bom L R 694=28 Bom 26.

11.—Revenue Jurisdiction Act X of 1876, Ss. 11 & 3-Civil Court's Jurisdiction-Forest Act VIII of 1878, Secs 2, 16——Forest officer——Revenue officer—Land Revenue Code Bombay Act V of 1879, Secs. 3 and 203—Forest officer not a revenue officer—Appeal—Right of appeal—Construction.

A Forest officer is not a Revenue officer within the definition in Sec. 2 of the Land Revenue Code Bombay Act V of 1879, and does not become one merely by being placed under a Revenue officer for purposes of control.

Section II of Act X of 1876, only applies to an act or omission of a Revenue officer and only in cases where the law allows an appeal.

Act X of 1876 must be construed strictly. No right of appeal can be given except by express words. **Narayan Ballal v The Secretary of State For India, P J 1895 P 317= 20 Bom 803.**

12.—Practice—Procedure.—

Under s. 11 of the Bombay Revenue Jurisdiction Act (X of 1876), in a suit to which that Act applies, the Court, before taking evidence on the merits, should require the plaintiff to prove first of all that he has, previously to bringing the suit, "presented all such appeals allowed by the law for the time being in force as within the period of limitation allowed for bringing such suit it was possible to present. **Ranchhod Haribhai v Secretary of State for India 22 Bom 173.**

13.—Suit against Government—Practice—Procedure—Appeal from an order of a Revenue Officer—Presentation of such appeal.

All that s. 11 of the Bombay Revenue Jurisdiction Act (X of 1876) requires is that the appeal

Bombay Acts (Revenue Jurisdiction Act X of 1876) S. 11-*Contd.*

referred to therein shall be presented. When, therefore, the only appeal allowed by law against a certain order of the Collector lay to the Commissioner, and such appeal was presented,—*Held* that the plaintiff was not bound to wait for a reply before filing his suit against Government.

Abaji Parashram v. Secretary of State for India 22 Bom 579.

Notes.—Ref: 22 Bom 583.

14.—Section 11 of the Bombay Revenue Jurisdiction Act is not a complex statute of Limitation for the protection of government. Its object is to prevent government from being exposed to law suits arising out of the orders of its subordinate officers before its superior officers have been afforded the opportunity of considering, and it may be, of disallowing the executive orders of its subordinate officials. The words "an appeal allowed by law," used in the section, should therefore not be treated as equivalent to an appeal within the time allowed by law" it rather refers to the appeals which the law prescribes, and has no reference to the limitation in point of time, which the law may impose upon the bringing of such appeals the term "allowed by law" cannot do double duty, and be held to be both descriptive of the nature and number of the appeals which a claimant must present, and also be employed to impose a limit of time within which he must bring such appeals. Statutes imposing restrictions upon the subject's right of suit should be construed strictly. **Ranchhod Haribhai v Secretary of State for India P J (1897) 378=22 Bom 583.**

15.—S. II—All such appeals—Civil Court—Jurisdiction.

The expression "all such appeals" in s. II of Bombay Revenue Jurisdiction Act, 1876, means appeals in respect of the "act or omission." Hence, the bar created by s. 11 does not apply where the fact or omission concerned is not an order or decision in respect of which there is a right of appeal under the Land Revenue Code.

Sakharam v Collector of Ratnagiri 6 Bom L R 124=28 Bom 332.

16.—S. 11—Order of Collector—Dispossession from land—No appeal against order under S.

Bombay Acts (Revenue Jurisdiction Act X of 1876)-*Concld.*-S. 11-*Concld.*

203, Bombay Land Revenue Code—Suit in ejectment—Not barred by S. 11, Bombay Act X of 1876.

A sued the Secretary of State for India in Council for recovery of possession of certain land from which he had been dispossessed by an order of the Collector. A did not prefer an appeal against the order under S. 203, Bombay Land Revenue Code.

Held, that the suit was not barred by S. 11 of the Revenue Jurisdiction Act 1876.

The cause of action is the ejectment and not the order under which the ejectment was carried out. The Land Revenue Code, while providing for appeals against orders and decisions, contains no provision for an appeal from a physical act such as an ejectment; 28 Bom 332; 29 Bom 480 ref. **His Highness Sir Agha Sultan Mahomed Shah wd. Agha Ali Shah v Secretary of State for India in Council. 5 S L R 46.**

—S. 15.

See (1) Mamlatdar, Jurisdiction of,

(2) Special or Second Appeal—Small Cause Court Suits,

(3) Subordinate Judge, Jurisdiction of

Bombay Revenue Jurisdiction. Act Xv of 1880

Notes:—Rep. in Pt; Act XII Of 1884; Act XII of 1891; Virt. Am Bom Act III Of 1895, S. 3.

(1) **See** Guardian—Appointment of Guardian.

(2) Subordinate Judge, Jurisdiction of.

Bombay Revenue Judisdiction Act (XX of 1880).

See Bombay Civil Courts Act, Case No (27) **1882 P J 11; 1890 P J 82.**

Bombay Salt Act, Act VII of 1873.

Notes. Rep; Bom. Act II Of 1890.

Bombay Acts (Salt. Act II of 1890.)

Notes Rep. In Pt; Act XVI of 1895; Am; Bom. Act II of 1892; Bom, Act 1 of 1901; Figure "(1)" In S, 58 Rep; Bom. Act IV of 1905.

1.—Bombay Salt Act (II of 1893) *Ss.* 11, 47. Illegal contract-Money paid under illegal contract cannot be recovered back—License.

Y obtained from Government a lease of certatn salt pans under a certain license, one of the conditions of which was, he was not to sublet them without the written permission of the Collector. Without any such permission, however, Y sub-let them to R, who, as security for the performance of the conditions binding on him under the sub-lease deposited a sum of Rs. 1,000 with Y. The sub-lease was acted upon. At its expiry, R sued to recover Rs 1,000 from Y.

Held, that the money could not be recovered, for the real object and necessary effect of the agreement between the parties was to enable the latter to manufacture salt without a license, in the guise of a sub lease, although that was forbidden by law and by the terms of the license.

Ismailji Yusufali v. Raghunath Lachiram Marwadi, 11 Bom L R 748=33 Bom 636.

Bombay Salt Duties Act XVI of 1844.

Notes.—Rep., Act XII of 1876.

Bombay Service Tenure Act II o 1863.

See Service Tenure.

Bombay Settlement-Effect of Settlement Act II of 1863.

See Settlement—Effect of Settlement.

Bombay Acts (Sindh Courts Act XII of 1866.)

Notes—Rep in pt., Act XII of 1873; Act XVI of 1895; Bom Act III of 1886; Am., Bom. Act III of 1868; "Local Government" Substituted for "Governor in Council," "Government of India" Substituted for "Governor-General of India in Council," Ss. 1, 2, 6, 9, 10, 16, 17, 21 (Prov). Am., Ss. 1-A, 9-A, 9-B, 9-C, 9-D, 9-E, 15-A ins., s. 7 rep., Bom Act I of 1906.

Bom. Sindh Incumbered Estates Act XX of 1881.

Notes.—Rep., Act II of 1906, S. 7.

Bombay Act (XX of 1881) (Sindh Incumbered (Estates)

Notes—Rep., Act II of 1906 S. 7.

Bom. Sindh Incumbered Estates Act XX of 1896.

Notes.—Ss. 2, 5, 9, 10 Am., s. 22 am., and rep. in pt., Act II of 1906.

1—Ss. 8 and 9—"All debts and liabilities" whether includes contingent liability.

In 1895, A sold certain properties to B with a covenant against encumbrances. Unknown to A and B there was mortgage on the properties, at the date of the sale, and in 1905 the mortgagee sued and obtained a decree on his mortgage, in pursuance of which B paid Rs 404, in 1905, and brought the present suit for damages for breach of the covenant. In 1898, A took advantage of the Sind Incumbered Estates Act, 1896, and an order of management had been made, and A's estate was still in management at the date of suit. *Held*, that, under s. 9 of Act XX of 1896, the Court had no jurisdiction. At the date of the order of management A was under a contingent liability to indemnify B in the event of the mortgagee enforcing his claim, and the contingent liability had developed into a claim for ascertained damages. *Held*, also, that "all debts and liabilities to which he is subject" includes a contingent liability arising out of a covenant which has a living force at the time of the order of management. **Sadhuram Tindanmai v Syed Ali Akbar Shah. 3 S. L. R. 95=3 Ind Cas 900.**

2—S. 29—Alienation beyond life-time invalid—No title in such alienation after death.

Bombay Acts (Sindh Incumbered Estates Act XX of 1896) *Concld.*

S. 29-*Concld.*

Under S. 29 of the Act, the share of a person, who is under the protection of the manager, cannot be alienated beyond the term of his natural life. A sale of such is invalid as to any period after his death.

A was entitled to a share in certain survey numbers and was under the protection of the Manager, Encumbered Estates in Sind. After discharge from management, he acquired the rest of the survey numbers and then sold the whole survey numbers to B. B subsequently sold ⅓rd share of survey numbers to C.

Upon the death of A, his heirs sued B and C, to recover the shares which belonged to A, while the property was under management. The claim against C., was given up and the suit as against him dismissed. As against B, plaintiff's claim was decreed. B contended that the share awarded to plaintiff should be reduced by ⅓rd, the share sold to C.

Held, that the contention was untenable. The ⅓rd share sold to C must have been out of the residue of the survey numbers, which A acquired subsequent to discharge from management and to which also B had an absolute title. Therefore, the sale to C, did not operate as an alienation of the share sued for by plaintiffs. **Tekoomal v Din Mahomed 10 Ind Cas 550.**

Bombay Subsistence Money Act IV of 1865.

See:—Subsistence money.

Bombay Summary Settlement Act (VII of 1863).

See (1) Land Revenue.
(2) Service Tenure.
(3) Settlement—Construction of Settlement.

—S. 2.

See Service Tenure.

—ss. 2, 6, 9.

See (1) Contract Act, ss. 69, 70.
(2) Contribution, Suit for—Voluntary Payments.

—S. 7.

See Settlement—Expiration of Settlement.

Bombay Acts (Summary Settlement Act VII of 1863)-*Concld.*

—Ss 27 and 32.

See Duties.

—S. 32.

See Jurisdiction of Civil Court—Revenue.

Bombay Survey and Settlement Act (I of 1865).

Notes.—Rep. in pt, Act XII of 1873; Act X of 1876; Bom. Act IV of 1868, ss. 16, 20; Supplemented, and application declared (Locally), Bom. Act IV of 1868; am, Bom. Act I of 1875; rep. locally (Except ss. 37 and 38), Bom. Act V of 1879; ss. 37 and 38 rep (Locally), Bom. Act I of 1880.

Bombay Survey and Settlement Act I of 1865.

See (1) Bombay Local Funds Act, 1869. case No. (3). **17 Bom 422.**

(2) Khoti Settlement Act, s. 17.

(3) Land Revenue.

1—Revenue survey—Entry of tenants in registers—Landlord and tenant.

The mere entry of the names of the tenants of a khot in the Government registers as occupants under the Revenue Survey Act, I (Bombay) of 1865, does not constitute an injury to the landlord of a tangible kind, of which the Civil Courts can take cognizance. The khot's rights as landlord, if they can be established, cannot be prejudiced by any proceeding under the Survey Act, there being nothing in that Act, or the rules framed under it, which affects the rights of subjects of the Government *inter se*. The utmost benefit which the tenants can derive, as against their landlord, from being entered as occupants under the Act, is a right to claim a deduction of the amount of assessment paid by them direct to the Government. If they deny his title, he can sue them either to establish his title and recover the full rent due to him under his contract with them or to eject them as holding possession of his lands by a title which they themselves repudiate.
Bam v Survey Commissioner and the Collector of Ratnagiri 3 Bom 134.

Notes:—Ref: 10 Bom 112.

2—Boundary dispute.

"Boundary dispute," as used in the Survey Act (Bombay Act I of 1865), means a contention between two neighbouring land-proprietors as to where a boundary line or boundary marks has or have been fixed by the survey officers. After the functions of the latter officers have ceased in a district, the Collector acting under Act III of 1846 is the proper officer to determine such a dispute, and fix the proper position of the boundary marks. But where a landholder claims to recover from a neighbouring holder land alleged to have been usurped or encroached upon by the latter, the person aggrieved must file his plaint in Court (which in the case of a claim for mere possession may be the Court of the Mamlatdar or the ordinary Civil Court), where the detemination of the Collector as to the proper position of the boundary line or marks (although it of itself confers or withdraws no right of possession) affords valuable evidence in adjudicating upon the rights of the parties. **Pitambar Dhari v Sambhajirav 8 B H C A C 185.**

Notes:—Ref: 10 Bom 456.

3—Bom, Reg. XVII of 1827—Building-sites in towns before Bom. Act IV of 1868.—

Semble—That Bombay Regulation XVII of 1827 and Bombay Act I of 1865 were not applicable to building-sites in towns and cities until Bombay Act I of 1865 was expressly made applicable to such sites by Bombay Act IV of 1868. **Dadabhai Narsidas v. Sub-Collector of Broach 7 Bom H C R A C 82.**

Notes:—Diss: 8 Bom 371. Ap: 9 B H C R 53: 5 C L R 278. Dist: 10 C L R 99. Ref: 4 Bom 505; 5 Bom 208; 387; 15 Bom 685; 20 Bom 270, 12 All 46; 1 C L J 104; 10 Bom L R 571.

- S. 11—

See Khoti Tenure. **7 Bom. H C R A C 41.**

4-Entry into private house for survey purposes—*Quære*—Whether s. 11 of Act I of 1865 (Bombay) justifies surveyors in entering private houses for the purpose of measuring them. **Reg v Bhagtidas Bhagvandas 5 B H C 51.**

Notes—Fol: 22 Cal 286. Ref: Rat Un Cr 850.

—S. 14.

See Inspection of documents.

11 Bom H C 231.

Bombay Acts (Survey & Settlement Act I of 1865)-*Contd.*

—S. 25.

See:—Land Revenue. **12 Bom H C ap 1, 225**

Ss. 25, 28 37, 38—**See** Khoti, **14 Bom L R 77.**

5—Power of Government to raise assessment—Bom. Reg. XVII of 1827, s. 4, cls. 2 and 3—

The words in s. 25 of Bombay Act I of 1865 confer upon Government no absolute power in all cases to fix any assessment they may please. But that section, as also s 4, cl. 2 Regulation XVII of 1827, distinctly limit the power of Government to raise the assessment on land held partially exempt by right. Government, however, may set aside such limitations at their discretion by a legislative enactment, as provided by cl. 3 of the above Regulation. But Government can exercise this power only under "specific" rules In Bombay Act I of 1865, s. 25, no such "specific" rules are to be found as would indicate that the Legislature intended to set aside the provisions of cl. 2, s. 4, Regulation XVII of 1827, and to enable the revenue officers to ignore all exemptions except those which they may themselves choose to recognize. Where plaintiff had enjoyed "Savai sut" or a remission of one-fourth for a period of more than thirty years with respect to lands on which assessment became leviable in 1805 A. D., he was held by the High Court to have established a prescriptive right to such a remission.

Collector of Colaba v. Ganesh Mareshvar Mehendale. **10 B H C 216.**

Notes—Ref: 12 B H C R Appx 1; 225.

6—Village cattle—Sanction of Revenue Commissioners to grazing.

The phrase "village cattle" in s. 32 of Bombay Act I of 1865 does not include the cattle of any roving grazier who may choose to squat for a few months on the public ground of a village. That Act does not vest the right of sanctioning such a diversion of the village grazing ground in the villagers themselves, but in the Revenue Commissioner, whose consent must be obtained.

Collector of Thana v. Bai Patel **2 Bom, 110**

Notes—Ref: 21 Bom 684.

II C. C. 55

Bombay Acts (Survey & Settlement Act I of 1865)-*Contd.*

—S. 34.

See Limitation Act, 1877. Art. 144—Adverse Possession. **8 Bom 585.**

7—Ss. 35, 48 — Power of local Legislature—Government land—Suit to set aside attachment on land—Building, Erection of.—

In a suit for setting aside a summary attachment, under Bombay Act I of 1865, placed by the Collector on land held on a settlement for a period not exceeding thirty years, the value was held to be five times the assessment, and the stamp duty calculated upon it, irrespective of the actual market value or the amount for which the land was attached. The holder of a cocoanut part in Bandora, in the island of Salsette, in the Thana District, paying an annual assessment of Rs. 39 to Government, built a bungalow upon it without the permission of the Collector, who, under the rule purporting to have been issued by the Government of Bombay on the 1st February 1869 in accordance with the provisions of s. 35 of Bombay Act I of 1865, demanded from him a fine equal to sixty times the assessment, and, on the plaintiff's failure to pay the fine, summarily attached the land under the provisions of s. 48 of that Act. *Held, first*, that the Government of Bombay had no authority to make the rule of 1st February 1869, and that, s. 35 of the Survey Act providing no penalty for building without the Collector's permission, the attachment was illegal. *Secondly*, that the expressions "Government land" and "Land belonging to Government" in Bombay Act I of 1865 mean land of which Government is the proprietor, and do not apply to land in which the proprietary right in the soil vests in a private individual, whether or not it be subject to the payment of assessment to Government. *Quære*—Whether the amount of the fine contemplated in s. 35 of Bombay Act I of 1865, if not paid, is a charge leviable by summary attachment under s. 48. **Collector of Thana v. Dadabhai Bomanji,** **1 Bom 352.**

Notes:—Ap: 19 Bom 391. Ref: 4 Bom 515 F B; 14 Bom 213.

8—S. 36—Revenue survey—Right of tenant to hold land on paying ordinary assessment—Usage having force of law.—

S. 36 of Bombay Act I of 1865 applies only to lands to which a revenue survey has been extend-

Bombay Acts (Survey & Settlement Act I of 1865)-*Concld.*

ed under that Act. Prior to the passing of the above Act, by usage having the force of law, Government was unable to eject an ordinary tenant of land so long as the latter was willing to pay the reasonable assessment upon the land occupied by him. This usage might be limited or varied by special contract,—*e. g* , by the terms of a lease inconsistent with it. **Dulia Kasham v. Abramji Sale,** 8 Bom H C A C 11.

—S. 36.

See Khoti tenure.

—S. 40.

See Landlord and tenant—Property in trees and woods on land.

9—S. 42—Survey Settlement — Notice of increased assessment.—

S. 42 of Bombay Act I of 1865 (which prohibits an occupant from relinquishing his holding, unless he gives a written notice to the Collector on or before the 31st of March in each year) is not applicable only to the holders of land under a survey settlement, but by implication imposes on the revenue officers the obligation of giving the holder notice when an increased assessment is about to be demanded from him within a reasonable time before the latest date on which he can exercise his right of relinquishing his lands.

Govind Vinayak Gadre v. Collector of Ratnagiri, 6 B H C 101.

Notes:—Con: 12 B H C R Appx 1; 225.

—S. 48.

See Land Revenue.

—S. 49.

See Land Revenue.

Bombay Survey and Settlement Act Amendment Act (IV of 1868).

See (1) Bombay District Municipal Act,1873, S. 33, Case No. (15). **15 Bom 516.**

(2) Bombay Survey and Settlement Act, 1865, Case No. (3)

7 Bom H C R A C 82.

1—Liability to assessment—Possession without payment of land in a town.—

Bombay Acts (Survey & Settlement Act IV of 1868)-*Concld.*

Where land in a town in the Presidency of Bombay was found to have been in plaintiff's possession from 1858 to 1871, without any payment by him of land revenue to Government.—*Held*, that it was not liable to pay assessment under Bombay Act IV of 1868.

Vrijavalabhdass Khushaldas v. Collector of Ahmedabad, 10 B H C R 190.

Bombay Survey and Settlement Act Amendment Act IV of 1868.

See Evidence—Civil cases—Sanad. **1882 P J 227.**

2—By case 2 of Cl. 1 of Section 5 of Bombay Act IV of 1868 the Legislature intended that non-assessment during five years, before the application of Bombay Act I of 1865 or Bombay Act IV of 1868, to the town or city where the land is situate independently of any question of title, should entitle the site-holder to exemption at the hands of the Collector.

The Collector of Ahmedabad v. Balabhai Kevaldas, P J (1880), 88=4 Bom 505.

Notes.—Diss: 7 All 152 F B; Fol: 8 Bom 259.

Bombay Acts (Ahmedabad Taluqdars Act VI of 1862.

Notes:—Rep. in pt, Act XII of 1876; Bom. Act III of 1886; Validated so far as it affects the High Court, Act XIV of 1877, S. 39; Operation Restricted, Bom. Act VI of 1888, S. 34.

Bombay Act VI of 1862 (Talukhdari Act).

See (1) Land Revenue.
(2) Service Tenure.

1—Operation of Act—Right of alienation in Ahmedabad Zillah.—

The Bombay Talukhdari Act (Bombay Act VI of 1862) did not affect talukhdari villages, the right,title, and interest of the talukhdar in which had been sold before that Act came into operation though possession of such villages had not then been obtained by the purchaser. *Quære*—As to the right of talukhdars in the Ahmedabad Zillah to alienate their talukhari villages.

Collector of Ahmedabad v. Samaldas Bechardas, 9 B H C 205.

Notes:—Ref: 4 Bom 611; 8 Bom 105 F B; 26 Bom 757.

Bombay Acts (Ahmedabad Talukdars Act VI of 1862) S 12-*Contd.*

2—S 12—Inability of guardian to contract on behalf of infant ward, so as to bind him personally—Effect of Act VI of 1862 (Bombay), S. 12, in regard to a charge upon a talukhdari estate in the Ahmedabad District during the period of management.—

A guardian cannot contract in the name of a ward, so as to impose on him a personal liability. Act VI of 1862 (Bombay), "for the amelioration of the condition of talukhdars in the Ahmedabad Collectorate and for their relief from debt", was intended to deal with all debts and liabilities which could possibly impose a charge upon the talukhdari estate at the end of the period of management; when the estate was to be restored to the talukhdar free of incumbrance, excepting the Government revenue. If debts amounted to more than the surplus of rents during the management, of which the maximum period was twenty years, they were not to be paid. A widow, as guardian of her infant son, the heir of talukhdari estate in the above district, validly transferred villages, part thereof, and in the deed of transfer to which her ward was, by her as his guardian, nominally a party, contracted to indemnify the purchaser in case the Government should claim and enforce a right to revenue upon the villages which she transferred as being rent-free. The deed purported to make both guardian and ward personally liable in this respect, and also charged the liability upon other parts of the talukhdari estate. The infant attained majority and the estate was then placed under management within Act VI of 1862. During the period of management the Government claimed and enforced payment of revenue upon the villages. *Held*, that there was no personal liability on the part of the talukhdar created by the above; also that, if the charge on the estate had been validily made, it fell, at all events, within the terms of s. 12 of Act VI of 1862, absolving estates from liability for debts incurred, not only before, but during the period of management. **Waghela Rajsanji v. Masludin, 11 Bom 551=L R, 14 I A 89.**

Notes:—Ap: 10 All 498. Fol: 16 Cal 330; 20 Bom 61. Ref: 11 C W N 207; 983 F B; 34 Cal 163 F B; 22 Mad 289; 13 Bom 330; 16 All 53; 17 All 252; 26 Bom 757; 6 C L J 273 F B; 35 Cal 34 F B; 35 Cal 320 =12 C W N 256; 7 C L J 87; 36 Cal 433

Bombay Acts (Ahmedabad Talukdars Act VI of 1862)-*Concld.* Ss 12-31-*Concld.*

=9 C L J 298=13 C W N 458; 13 C W N 1127; 36 Cal 675=9 C L J 523. Dist: 34 Cal 892; 7 C L J 87.

3—S 12 and s.20—Talukhdar's power of disposal over his landed estates after the expiration of the management by the Talukhdari Settlement officer.

Under s 12 of the Ahmedabad Talukhdars Act (VI of 1862), debts or liabilities incurred by a talukhdar during the management of the Talukhdari Settlement Officer are not enforceable against landed estates. His personal liability for the same remains unaffected by the Act. This personal liability furnishes a sufficient consideration for a subsequent obligation, so as to bind the landed estates by a contract made *after* the period of the management by the Talukhdari Officer had expired. From and after the expiration of that period, the talukhdar becomes, under s 20, the absolute proprietor of his estate, and he is *then* at liberty to create a valid charge upon his estate for debts contracted *during* the period of of the management. Acccordingly, where a talukhdar had, after the withdrawal of the management by the Talukhdari Settlement Officer, encumbered his landed estate under several mortgage bonds, passed partly in renewal of old bonds and partly in consideration of old debts contracted during the period of the management,—*Held*, that the mortgage-bonds created valid and binding encumbarances upon the estate.

Boo Jinatboo v Sha Nagar Valab Kanji 11 Bom 78.

Notes:—Ap 16 Mad 311. Fol 17 Bom 755. Ref: 14 Bom 279: 16 Bom 186: 21 Bom 424 F B: 7 Bom L R 836,

4.—S.31—Having regard to the provisions of s 31 (2) of Bombay Act VI of 1888, the estate of a Talukhdar cannot be sold in execution of a decree obtained subsequent to the Act coming into force in respect of an encumbrance created on the estate prior to the date of the Act coming into force without the previous sanction of the governor in Council. In such a case the High Court directed the lower Court to allow plaintiffs, the execution-creditors, reasonable time to produce the sanction, and in case it was produced, to order the property to be sold in execution, otherwise to dismiss the darkhast. **Chudasama Naudhabhai v Naran Tribhovan. P J (1897) 284=22 Bom 884.**

Bombay Acts (Talukhdari Settlement).

See Gujarat Talukhdars' Act.

Bombay Toda Giras Allowance Act VII of 1887.

See Toda Giras Allowance.

Bombay Tolls Act III of 1872.

1—Tolls-Bombay Act III of 1875, Sec 7-Lease to levy tolls—Lessee, right of, to admit partners-Accounts, two sets of-False accounts kept to deceive Government.—

A lessee, from Government of the right to levy tolls, admitted into partnership with him the plaintiff and two others. One of the conditions attached to the lease prohibited sub-letting.

The plaintiff having brought a suit for his share of the profits realized in the transaction, the Judge dismissed the suit on the ground that the partnership was illegal, being of opinion that sub-letting and admitting a partner were identical.

Held, reversing the decree that the partnership was not illegal.

Where in such a partnership two sets of account were kept, one true and the other false, held that such practice, however reprehensible, was not illegal under Sec 7 of the Tolls Bombay Act III of 1875, and did not disentitle the plaintiff to show as between himself and his partners what was the actual profits of the concern.

Ganesh Vithal v Shripad Dattoba
P J 1895 p 184=20 Bom 668.

Bombay Tolls Act (III of 1875).

—S 10.

See Contract Act s 23—Illegal Contracts-Against Public Policy.

Bombay Tolls Act Amendment Act V of 1881.

See Bombay Tolls Act.

Bombay Tramways Act I of 1874.

Notes:—Rep in pt Bom Act III of 1886; Rep in pt and Am Bom Act II of 1895, S 6 Am S 9 rep in pt and Am Bom Act I of 1907.

1.—S 24—Meaning of the words " Regulating the travelling "—Validity of Regulation made under the section for regulating the conduct of the Company's servants.—

The words " regulating the travelling " in s 24 of the Bombay Tramways Act (Bombay Act I of 1874) mean laying down rules, as to how persons shall travel that is to say, rules for the conduct and behaviour of the persons who travel, and cannot be held to include rules for the conduct of the Company's servants, prescribing what they shall do, or what they shall not do, in the matter, for instance, of issuing tickets. S 24 of Bombay Act I of 1874 authorizes the Bombay Tramway Company to make regulations "for regulating the travelling in or upon any carriage belonging to them." Under this section, the Company made the following regulation:—"Any conductor who shall neglect to issue a ticket to a passenger, or shall issue to such passenger a ticket bearing a number other than one of the numbers contained in such books, or shall issue a ticket of a lower denomination than the amount of the fare, or non-consecutive in number or a ticket other than the ticket provided by the Company for the journey to be travelled, shall for every such offence be liable to a penalty not exceeding Rs 25." *Held* that the regulation was *ultra vires*.

Manockji Dadabhai v Bombay Tramway Company 22 Bom 739.

2.—(1 of 1874) Sec 30—Bombay Municipal Corporation—Right of purchase-Notice "Similar," interpretation of—Date of Notice—Purchase, meaning of.—

Section 30 of the Bombay Tramways Act, 1874 provides, " The said Municipal Corporation of the City of Bombay shall have the right of purchasing the said Tramway——after expiration of twenty one years from the 12th day of March 1873, upon declaring its intention so to do within six months after expiration of the said twenty-one years and shall have a renewed right of purchase at the end of every seven years after the expiration of the said twenty-one years upon similar notice being given. " In March 1901 one of the period of seven years expired; and the Corporation gave to the Tramway Company notice of an intention to purchase. The Municipality served for this purpose, three notices, first two of which were served on the 11th and 12th idem respectively: while the third, though dated the 13th

Bombay Acts (Tramways Act I of 1874) S. 30 *Contd.*

was not served till the 14th March. Respecting these notices the Tramway Co. contended that the notices, on the 11th and 12th were premature, because the words " at the end of seven years " related to, not only the right of purchase, but also the time at which notice was to be given: and the notice served on the 14th was too late, because it was not given in as short a time after the end of the year as was possible with exertion on the part of the Corporation.

Held, that, the word " similar, " in s 50 of the Bombay Tramways Act, had reference not only to the terms of the notice, but also prescribed the time within which notice was to be given : thus the Corporation had six months from the expiration of the period of seven years within which to give notice of its intention, and the notice served on the 14th March was served within time.

Per Jenkins C J.—"Though the words ' purchase ' and ' purchaser ' may technically imply an acquisition of property otherwise than by descent, in relation to a sale of land, they are commonly used as appropriate to the stage prior to actual completion by conveyance or transfer."

Bombay Tramways Co v Bombay Municipal Corporation. 4 Bom L R 384.

3.—Municipal Corporation-Right of Purchase —Purchase on behalf of a third person.

The notice contemplated by s. 30 of the Bombay Tramways Act is not invalid solely by the fact that the Corporation in exercising their right of purchase are not acting for themselves but for and on behalf of a third person. There is nothing in the Tramways Act which expressly or impliedly prohibits such a transaction; nothing to show that if the Corporation exercise the power conferred upon them by s. 30 and acquire the tramways, they are bound to keep them in their own hands and to work them themselves.

Bombay Tramway Co. v Mun Cor of Bombbay. 6 Bom L R 739 P C=9 C W N 337 =28 Bom 502=31 I A 169 P C.

4.—Property—Interpretation.

The word "property" in s. 30 of the Bombay Tramways Act, 1874, has not the meaning of the right, title and interest of the Bombay Tramway Company in the subject-matter to which the section refers but means the subject-matter itself.

Indian Arbitration Act 1899 and Bombay Tramways. Act 1874. 4 Bom L R 856.

Bombay Acts (Tramways Act I of 1874)-*Concld* S. 30-*Concld.*

Bombay Acts (University Act XXII of 1857),

Notes:—Rep. In Pt. Act XII of 1876; Act XII of 1891, Supplemented Ss. 2, 3, 8, Rep. In Pt And Ss. 6, 9 to 14, Rep; Act VIII of 1904.

1,—S, 12–Candidate for a degree—Obligation to present certificate of previous examination.

The word " candidate for a degree " in s. 12 of the Act (XVII of 1857) to establish the University of Bombay mean a candidate for the final examination, the passing of which entitles him to a degree. They do not mean a candidate for a degree at any stage of his University career. Students, therefore, presenting themselves for the previous examination prescribed by the Senate of the Bombay University need not present the certificate required by that section.

Darasha Rustomjee. 23 Bom 465.

Bombay Acts (Vatan Act.)

Notes:—See Hereditary Offices Act (Bombay).

Bombay Acts (Village Police Act VIII of 1867,)

Notes:—Rep. In Pt. Act XII of 1873; Act XII of 1876; Bom. Act III of 1886; Rep. In Pt. (Locally And Temporarily), Bom Act 1 of 1889, Am; Bom Act I of 1876; Bom. Act III of 1886 (As Amendended By Bom. Act I Of 1891); *S.* 9 Am. Bom Act IV of 1905; Supplemented, Bom. Act IV Of 1890; S. 58,

Bombay Acts (Wagers Act III of 1865.)

Notes.—Rep. In Pt; Act XVI of 1895 Bom. Act III of 1886.

1,—S. 30—Wagering contract—Intention of the parties to give or take delivery—Intention not to be confounded with capacity to perform—Bombay Act III of 1865—Knowledge of one party that the other is a gambler vitiates the contract.

Where there is no such knowledge, the contract is not wagering though the other party is a gambler. Before a Court can hold a contract, on the face of it genuine or at any rate not clear-

Bombay Acts (Wagers Act III of 1865) S. 30 -*Contd.*

ly wagering, to be a wagering contract, it must be satisfied that the intention of the parties was in no circumstances either to give or to take delivery. This intention is not to be confounded with capacity. A party may be able to fulfil a contract and yet have no intention whatever of doing so.

If A, usually an honest dealer, knows that B is a pure gambler, then any contract which he makes with *B* with that knowledge will be a contract in furtherance of wagering, and will fall within the scope of Bombay Act III of 1865, while it will likewise follow that, waiving that consideration. A cannot strictly be said to have "intended" to give or take delivery to or from B.

Both parties to a contract may intend to wager or one party may intend to wager, and the other party may know that, that is his sole intention and knowing it, enter into the contract. When the facts found warrant the Court in adopting either of those statements of fact, then the contract is a wager under the law of this Presidency. But where only one party intends to wager and the other neither intends himself to wager nor knows that it is the sole intention of the former, then the contract is not a wagering contract from the point of view of the latter and he has a right of action on it. **Mathuradas Gokuldas & Co v. Narbadashankar Harjivan.** 11 Bom L R 997.

2.—S. 30-Bombay Act III of 1865—Wagering contracts—Teji Mandi transactions—Duties of agent.

Teji Mandi transactions are in the nature of gambling transactions. The prohibition contained in S. 30 Contract Act, 1872, applies only to the case of winners. A person, who has won a wager or a bet, cannot sue to recover the amount deposited by the loser with the stakeholder.

Under the general law of wagering administered in England and India (with the exception of the Bombay Presidency), an agent, who has received moneys on behalf of his principal, must pay those moneys, to the principal even though the contracts under which he received them were not only void but actually illegal.

The Bombay Act III of 1865 embraces not only every conceivable form of wagering contracts, but contracts made in furtherance of wagering contracts, and all contracts made by way of security or guarantee of wagering contracts; and it prohibits all suits for moneys paid or payable in respect of wagering contracts. **Ramchandra Shivdar v. Ganga Bison Jaideo.** 12 Bom L R 590

Bona fide Belief.

See Act XVIII of 1850.

—Denial by defendant of plaintiff's title.

See (1) Landlord & Tenant,
(2) Rent Act.

—grant.

See Grant.

—Hiba-bil-ewaz.

See Mahomedan Law.

—holder of value.

See (1) Hundi.
(2) Bill of exchange.
(3) Negotiable Instruments Act.

—information.

See Damages.

—lease without title.

See Lease.

—litigation.

See (1) Maintenance.
(2) Champerty.

—mistake of Law.

See Limitation Act.

—possession.

See (1) Limitation.
(2) Possession.

—proceedings conducted in wrong court.

See Limitation Act.

Bona fide purchase.

See (1) Limitation.
(2) Vendor & purchaser.

Bona fide purchaser.

See (1) Mortgage (Rights and liabilities of Purchaser.
(2) Vendor and Purchaser.

--purchaser for value without notice.

See Cases under:—
(1) T. P. Act.
(2) Vendor & purchaser.

--purchase without notice.

See Vendor and purchaser.

Bona Fides.

See (1) Defamation.
(2) Judicial Officers, Liability of.
(3) Limitation Act, 1877, Art 134 (1859, s. 5 ; 1871, art 134).
(4) Transfer of Property Act, s. 53.
(5) Debtor and Creditor.

Bona fide transaction.

See Contract Act.

--transfer.

See Cases under:—
T P. Act.

--transference without notice.

See Cases under:—
T. P. Act.

Bond.

1 Form of bond 1—2
2 Incomplete bond 3
3 Construction of bond. 4
4 Assignment of bond 5
5 Agreement to sell when becomes a bond 6
6 When promissory note to be deemed a bond 7
7 Necessity of signature of an obligee 8
8 Condition in bond for money lent 9
9 Administration bond 10—11
10 Admission of liability on bond 12
11 Bond payable on demand 13
12 Bond payable within one year 14
13 Bond with collateral agreement to accept rents 15

Bond-*Contd.*

14 Bond executed by guardian for a pre-existing liability 16
15 Guardian's power to bind minor's estate by a bond 17
16 Cause of action 18—21
17 Failure to deliver bond 22
18 Suit for damages for omission to sue 23
19 Right of one of several heirs to sue creditor for share of debt 24
20 Untrue recital of cash payment in bond 25
21 Suit by obligee against some of obligors taking fresh bond from the rest 26
22 Bond used to pay debt of third party 27
23 Suit to have a bond adjudged void 28
24 Suit on bond said to have been passed under pressure 29
25 Sale of interest of obligee in a hypothecation bond 30
26 Material alteration of bond after execution 31
27 Fraudulent alteration of hypothecation clause 32
28 Bond, enforcement of bond by a third party 33
29 Material alteration in bond 34—35
30 Bond fraudulent alteration of endorsement of payments 36
31 Appropriation of payment 37
32 Bond in satisfaction of decree 38
33 Failure of bond 39
34 Presumption of payment 40
35 Bond-stipulation for not transferring property being of no avail to a third party 41
36 Evidences of payment 42–43
37 Acknowledgment in letter of evidence of missing bond 44
38 Novation of bond 45–50
39 Whether novation or no novation 51
40 Bond payable by instalments 52–70
41 Power of Court to alter terms of specially registered bond 71
42 Bond registered under Act XVI of 1864, Ss 51 & 52 72
43 Penalty 73
44 Enforcement of penalty 74
45 Admissibility of evidence to show that the partner signed on behalf of his co-partner 75
46 Mortgage deed whether admissible as money bond 76
47 Property in bond paper 77

Bond-*Contd.*

Bond.

See (1) Interest—Miscellaneous Cases—Bond
(2) Consideration.
(3) Contract.

– creating or not charge on immoveable property.

See Registration Act, 1877, s. 17.

—payable by instalments.

See Limitation Act. 1877, art 75.

—Recitals in.

See (1) Evidence—Civil Cases—Recitals in Documents,
(2) Onus of Proof—Documents relating to Loans, etc.

(1) Form of bond.

1—Bond not to be operative until dishonour of hundi with respect to which bond has been executed.

An instrument which is in the nature of a bond is not the less a bond because it does not come into operation unless and until the hundi with respect to which it is passed has been dishonoured. **Lakshmandas Raghunathdas v Rambhau Mansaram. 20 Bom 791.**

2—Bond—Promissory note.

Where an instrument containing a promise to pay money advanced is attested, is not payable to order or bearer and under which the executant obliges himself to pay the amount to another, is a bond within the meaning of s. 2 (5) (b) of the Stamp Act, 1899. **Venku v Sitaram. 6 Bom L R 841.**

(2) Incomplete bond.

3—Bond, Incomplete.

A bond, the terms of which provide for its being entered into by four separate individuals, is incomplete if executed by three only. **Krishnadas v Balkrishnadas. 11th January 1872.**

(3) Construction of bond.

4—Contract Act, S. 74—Deed—Construction—Felony—Civil Court without criminal prosecution—Penalty—Limitation Act, Arts. 6, 68, 115.

The defendant entered into a contract with the President of the Taluq Board in respect of the collection of fees in a market which provided *inter alia*—"If, I, my agent or servant were to act contrary to the above regulations, I shall be liable to pay a fine not exceeding Rs. 50 imposed by the President * * * or I am not entitled to object if my *gutta* is put up for auction again subject to the loss that may be sustained by the Taluq Board." The President brought this suit for recovery of Rs 50 on the allegation that the defendant's agent collected more than the established fees from the people. *Held*-That the agreement was not an instrument of the same nature as a bail bond or recognizance within the meaning of the exception to S. 73 of the Contract Act. (2) The bond is one given for the performance of a public duty or act in which the public are interested and is not one given "under the provision, of any law," there being no section in the Act which authorizes or requires the giving of such a bond. (3) That the clause authorizing the plaintiff to put the defendant's "gutta" up to auction did not preclude the plaintiff from recovering under the contract. (4) That the penal clause of the Local Boards Act Ss. 162 (*c*) and 162 (*d*), did not preclude the plaintiff from recovering against the defendant under the contract. (5) That the suit for recovery of the penalty mentioned in the clause was governed by either Art, 68 or 115 of the Limitation Act and not by Art. 6. (6) That the amount of Rs. 50 cannot be said, under the circumstances, to be exhorbitant though the amount of damages are for the lower Court to determine. (7) That under S. 74 it is not necessary for plaintiff to prove any actual damage or loss. **Taluk Board of Kundapur v Lakshminarayana. (1906) 17 M L J 537.**

(4) Assignment of bond.

5—Bond—Endorsement on bond 'the balance due should be paid into the hands of my son'—Whether can be treated as assignment of bond—Assignee's right of suit.

An endorsement on a bond that "the balance due should be paid into the hands of my son" operates as an assignment, so as to entitle the assignee to sue thereon. 30 Mad 75, Fol. **Saminatha Pillai v Dorasawmy Naick. 1 Ind Cas 212.**

(5) Agreement to sell when becomes a bond.

6—Bond—Agreement to sell—Stamp Act *S.* 2 (5) c.

Bond-*Contd.*

(5) Agreemant to sell, when becomes a bond—*Concld.*

An ordinary agreement for sale of cotton between two merchants, when attested by a witness becomes a bond within the meaning of the Indian Stamp Act, 1899. **Ralli Brothers. 8 Bom L R 134**

(6) When promissory note to be deemed a bond.

7—Bond—Promissory note—Attestation.

Under the Stamp Act, a promissory note unless it is payable to order or bearer, is to be deemed a bond if attested. **R D Sethna v Mirza Mahomed Shirazi. 9 Bom L R 1034.**

(7) Necessity of signature of an obligee.

8—Signature necessary.

According to native practice, the signature of the obligee of a bond is an essential part of the document, and the mere fact that he was present and assented to the bond being written is not enough to charge him thereon. **Murharrav v Punjaji. 1882 P J 365**

(8) Condition in bond for money lent.

9—Right of suit.

An agreement to put a party in possession of certain lands if default be made in the payment of money lent does not preclude that party from suing for the money lent if he elect to do so. **Annasami v. Naranayen 2 Ind Jur O S 12.**

(9) Administration Bond.

10—Administration Bond.

An administration bond is not invalidated by reason of mutual mistake on the part of the Court and the surety, or misrepresentation by Court. 10 C W N 673=33 Cal 713 Fol: **Sarat Chandra Roy Chowdhury v Rajoni Mohan Roy. 12 C W N 481.**

11——District Judge—Administration bond.

A bond under s. 34 of the Guardians and Wards Act is to be given to the Judge of the Court to enure for the benefit of the Judge for the time being, with or without sureties, as may be prescribed engaging duly to account for what the guardian may receive in respest of the property of the ward. There is nothing in the section (or in the form of the bond given in the schedule to the High Court Civil Circular

II C. C 56

Bond-*Contd.*

(9) Administration bond—*Concld.*

Orders) which suggests that the bond ceases to operate either on the death of the guardian or of the ward or on the Cessor otherwise of the guardianship. **Ganpat v Anna 7 Bom L R 803=30 Bom 164.**

See also—"Administration Bond."

(10) Admission of liability on bond.

12—Remission of condition—Default—Right of suit.

When the full sum specified in a bond was admitted to be due, the fact of the plaintiff having, on condition of the payment of half the amount by a certain day, agreed to remit his claim to the other half, cannot affect his right to recover the entire amount due on the defendant failing to fulfil the condition. **Vengappayan v Rajapayan. 1 M H C R 208.**

(11) Bond payable on demand.

13—Bond payable on demand.

When a bond is payable on demand, limitation runs from the date of demand, and not from the execution of the bond. The first and only demand may be with the suit or suit itself. **Jiwan Singh v. Anwar Khan, 26 P R 1873.**

(12) Bond payable within one year.

14—Bond payable within one year.

Where defendant executed a registered bond on 15th March 1873 by which he agreed to re-pay the loan within one year and plaintiff sued on the bond on the 14th March, 1874, it was held that limitation ran from the end of the year and that the suit was within time. **Sher Jang v. Partab Singh, 79 P R 1875.**

(13) Bond with collateral agreement to accept rents.

15.—Right of suit.

In a suit to recover money (principal and interest) alleged to have been due on a bond, defendant pleaded that subsequent to the execution of the bond plaintiff had taken from the obligor an ijara and a dur-ijara and executed ijara-kabuliats, agreeing to accept payment of the bond by setting off the rents due under the kabuliats. It was found that the kabuliats stipulated that during their term the rent should, year after year and instalment by instalment, be

Bond-*Contd.*

(13) Bond with Collateral agreement to accept rents—*Concld.*

credited in payment of the bond debt. and that at the end of the term of the ijara accounts should be settled and the balance paid, neither party being at liberty to put an end to the lease. *Held* that till the termination of the lease plaintiff could not sue on the bond, his right of suit having been suspended during the continuance of the ijara and dur-ijara, the stipulations in which qualified the stipulation in the bond for absolute payment at the end of a specified period.

Dya Chand Oswal v Mookteeda Dabee.
13 W R 24

(14) Bond executed by guardian for a pre-existing liability.

16.—Existing liability—Guardian's bond—Binding on the minor.

A guardian's bond, containing only a personal covenant by the guardian, without charging the minor's estate, will nevertheless bind the minor, if it is executed for a pre-existing liability which the minor is bound to discharge (26 Mad 330 Fol).

Duraisami Reddi v Muthial Reddi
31 Mad 458

See also:—

(1) **Minor.**
(2) **Guardian & Ward.**

(15) Guardian's power to bind minor's estate by a bond.

17.—Guardian—Bond by guardian—Liability of minor—Necessaries—Bond to keep alive debt due for necessaries, when binds minor's estate—Limitation—Personal liability.

The proposition that a guardian of a minor cannot bind his ward personally by a simple contract debt, by a covenant or by any promise to pay money or damages, is subject to the modification that the promise will not bind the minor, unless it has been made merely to keep alive a debt, for which the ward's property was liable.

Where the promise is to pay money, which has been expended for necessaries, the estate of the minor may be liable, not on the promise, but because the money has been supplied.

It is an established law that a guardian cannot bind his ward's estate, except by a document purporting to bind it

Bond-*Contd.*

(15) Guardian's power to bind minor's estate by a Bond—*Concld.*

When a third person enters into dealings with the guardian of a minor, and advances money for necessaries for the minor or for the benefit of his estate, and takes a bond for the debt from the guardian, the responsibility rests on him to take care that the bond is so drawn as to render the estate of the minor in law liable for the debt. 26 Mad 330, Ref. 17 Mad 306: 20 Bom 61 Ref.

Bhawal Sahu v Baij Nath Pertap Narain Singh. 12 C W N 256=3 M L T 156=35 Cal 320.

(16) Cause of action.

18.—Limitation.

J, after entering into a bond for the payment of a sum of money, adopted one *S*, who took the family estate at *J*'s death. While in the enjoyment of the estate, the bond-holders brought a suit against him to realize the debt, and obtained a decree. Under the decree, the obligees sought to sell the property which by the time of the execution had come into the hands of *R* (a great-nephew of *J*'s), who sued and eventually succeeded in having *J*'s adoption declared void. *R* then sued to set aside so far as it affected him, the decree for the sale of the property, and in this suit also he eventually succeeded. The representative of the original bond-holders then brought a suit against *R* to recover the money due on the bond. *Held* that plaintiff's right of suit first arose, not from the last decree in favour of *R*, but from the time when the debt became due under the terms of the bond. **Rajkristo Singh v Huro Soonduree Chowdrain. 13 W R 313.**

19.—Bond payable within 6 months, on condition of not being paid by another.

Defendant executed a bond to plaintiff on the 29th April 1869, on condition of plaintiffs releasing S from arrest against whom plaintiff had a decree and the bond was payable within 6 months, if S did not pay in the meantime. Plaintiff brought a suit on the bond on the 5th May, 1873, contending that there was litigation between himself and S till 26th October, 1871, in respect of execution of decree and time should run from that date. *Held* that the suit should have been brought within 3 years after the expiry of the six months. **Bhai Sawaya Singh v Hira Nand. 58 P R 1874.**

Bond-*Contd.*

(16) Cause of Action—*Contd.*

20.—Suit to recover share of bond debt.

In a suit by the widow of one of three judgment-creditors to recover the third part of a bond debt which had been decreed in their favour, and of which execution had been taken out,—*Held* that as she had failed in her endeavour to be made a party to the original suit, her only course was to sue for her share of the money received under the decree; though she might have sued to have herself declared a sharer in the decree, her not adopting that form of action held not to bar her suit. As the entire sum due on the bond, with penal interest to date of decree, had been recovered, plaintiff's cause of action had fully accrued, though a balance of interest was still due.

Buzmoonissa v Rowshan Jahan. 10 W R 397.

21.—Suit on bond before due date—Denial of execution.

Held, reversing the decision of the Court below, that the denial of the execution of a bond in the Criminal Court by the defendant does not give the plaintiff any cause of action to recover the amount of the bond before due date.

Sujeewun Singh v Runpal Singh. 10 W R 351.

Notes.—Dist: 21 W R 443.

(17) Failure to deliver bond.

22.—Suit for amount before due date.

If an obligor fraudulently withholds delivery of a bond which has been executed within a reasonable time after the receipt of the money, the obligee has a right to sue for the return of the money before the time fixed for payment.

Pearee Monee Dossee v Thakoor Doss Dutt. 21 W R 443.

Notes.—Ref: 24 W R 190.

(18) Suit for damages for omission to sue.

23.—*Held*, that a suit will not lie for damages against the holder of a bond pledged as security for his omission to sue on that bond within the period of limitation.

Makund Lall v Rughoput Dass. 1 Agra Rep A C 83.

Bond-*Contd.*

(19) Right of one of several heirs to sue creditor for share of debt.

24.—Separate suits by the heirs of an obligee.

Held by the Full Bench (Mahmood J., dissenting) that, when, upon the death of the obligee of a money bond, the right to realize the money has devolved in specific shares upon his heirs, each of such heirs cannot maintain a separate suit for recovery of his share of the money due on the bond.

Kandhiya Lal v Chandar. 7 All 313=5 W N 34.

Notes—Ref: 21 Bom 154; 9 All 486; 12 C W N 84; 6 C L J 383; 558. Fol: 25 Mad 26.

(20) Untrue recital of cash payment in bond.

25-Agreement by plaintiff to advance moneys to defendant to recover defendant's property by litigation-Untrue recital of cash payment in bond—Right to recover money actually advanced—Rate of interest.

Where it was found that the consideration for the bond in question was not paid to the defendant in cash, but that moneys were advanced by plaintiff to various persons on behalf of the defendant to recover the defendant's property by litigation, *held*, that plaintiff was entitled to recover the amounts actually advanced for and on behalf of the defendant; and that, as the recital of cash payment made in the bond was untrue, the plaintiff is not entitled to recover the higher rate of interest provided therein in case of default of payment of principal and interest.

Meenaksi Ayee v Andi Nadan. 10 M L T 18.

(21) Suit by obligee against some obligors taking fresh bond from the rest.

26.—Where an obligee sues some of the persons jointly liable to him under a bond, and takes another bond from the rest for what he considers to be their share of the debt, he does not discharge the latter from their liability to contribute according to the shares in which they are liable among themselves, nor does his transaction with them (they not being sureties) destory the joint liability.

Shushee Mohun Pal Chowdhry v Ram Koomar Koondoo 22 W R 193.

Bond-*Contd.*

(22) Bond used to pay debt of third party.

27—Liability of third party.

The fact that the money raised on a bond is used to pay a debt due by a third party (G) does not make such third party liable to the party executed the bond unless the latter joined in the bond at the request of the third party or of some one acting under his authority.

Gour Kishore Dutt Chowdhry v Ozeer Ali 24 W R 99.

(23) Suit to have a bond adjudged void

28—Specific Relief Act (I of 1877) Sec. 39—Bond—Cancellation—Limitation.

Article 91 of the Limitation Act 1877, applies to a suit brought under the provisions of s. 39 of the Specfic Relief Act, 1877, to have a bond adjudged void and to have it delivered up and cancelled.

Bakatram v Karsetji 5 Bom L R 533 =27 Bom 560.

(24) Suit on bond said to have been passed under pressure.

29—Court of Wards—Disqualified proprietor—Oudh Land Revenue Act (XVII of 1876)—Ch. VIII, Secs 161 to 177—Indian Contract Act (IX of 1872) Sec 16—Act VI of 1899, Sec. 2—Hard bargain—Undue influence—Compound interest.

The group of Sections (161 to 177) in the Oudh Land Revenue Act, 1876 entitled "Ch. VIII, Courts of Wards" was not intended to interfere with the personal status or rights of an adult disqualified proprietor who is neither idiot nor lunatic, except as regards the management of his property or anything expressly prohibited. There is no prohibition of a disqualified proprietor contracting debts or borrowing money, but he is not at liberty to create any charge upon his property without the sanction of the Court.

In 1886, the defendant being then largely involved in debt, was declared a disqualified proprietor under the provisions of the Oudh Land Revenue Act, and his property was placed under the charge of the Court of Wards. In 1889 he borrowed from the plaintiff without the sanction of the Court the sum of Rs, 4,500 and stipulated to pay interest at the rate of 24 per cent. per annum. In 1892 a further sum of Rs, 1,250 was advanced by the plaintiff to the defendant and

Bond-*Contd.*

(24) Suit on bond said to have been passed under pressure.—*Concld.*

the latter executed a bond in favour of the plaintiff for the total sum due to him, but the interest was reduced from 24 per cent. to 18 per cent. per annum. The plaintiff brought the present suit for the recovery of the amount due under the bond. There was no fraud in the matter and no pressure was put upon the defendant by the plaintiff for his agents to induce him to accept the conditions offered to him.

Held, that although the defendant was left free to contract debt, yet he was under a peculiar disability and placed in a position of helplessness by the fact of his estate being under the control of the Court of Wards, and the position of the parties was such that the plaintiff was "in a position to dominate the will" of the defendant within the meaning of the amended Sec. 16 of the Indian Court Act. In this case the lender used his position to demand and obtained from the borrower more onerous terms than were reasonable, and the bond sued on must be set aside.

Held further, that the Subordinate Judge was wrong in deciding the case in accordance with what he supposed to be English equitable doctrine. He ought to have considered only the terms of s. 16 of the Indian Contract Act.

Apart from a recent Statute, an English Court of Equity could not give relief from a transaction or contract merely on the ground that it was a hard bargain, except perhaps where the extortion is so great as to be of itself evidence of fraud. **Dhanipal Das v. Raja Maneshar Bakhsh Singh. 4 C L J 1 (P. C.)= 1 M L T 205=3 A L J 495=9 O C 188= 8 Bom L R 491=10 C W N 849= 16 M L J 292.**

(25) Sale of interest of obligee in a hypothecation-bond.

30.—Civil Procedure Code, 1889, ss, 268, 274.

The interest of the obligee in a bond hypothecating certain land as security for a debt having been attached under s. 274 of the Code of Civil Procedure and sold, a suit was brought by the purchaser upon the said bond. It was objected that the suit was not maintainable because the bond had not been also attached as a debt

Bond-*Contd.*

(25) Sale of interest of obligee in a hypothecation bond—*Concld.*

under s 268. *Held* that the fact of the bond not having been attached as a debt under s. 268 did not affect the right of the purchaser to realize the amount due under it. **Sami Ayyar v Krishnasami 10 Mad 169.**

(26) Material alteration of bond after execution.

31.—Material alteration after execution—Dismissal *in toto*.

In a suit based upon two bonds purporting to be executed by the five defendants, it was found that the name of the fifth defendant (Nabi Bakhsh) had been added by plaintiff after execution without the consent of the defendants.

Held, that the plaintiff was not entitled to recover from any of the defendants, the alteration in a material particular of a deed after execution without the consent of the other party to such deed disentitling the party who has so altered it from seeking afterwards to enforce it. 7 Cal 616; 4 All 62; and 103 P R 1883 followed. **Karam Ali v. Narain Singh 91 P R 1900.**

(27) Fraudulent alteration of hypothecation clause.

32.—Alteration—Fraud.

The obligee of a bond for the payment of money in which a certain share of a village had been hypothecated as collateral security, having fraudulently altered such bond so as to make it appear that a larger share of such village was hypothecated, sued the obligor to recover the money due on such bond by the sale of such large share. The obligor admitted the execution of the bond and that a certain sum was due thereon.

Held, on the question whether under these circumstances the obligee was entitled to relief as regards his claim for money, that he was not so entitled, inasmuch as the bond on which his suit was brought must be discarded, being a forgery and therefore the suit as brought failed. **Gunga Ram v Chandan Singh. 1 W N 118, 4 All 62.**

(28) Bond-enforcement of bond by a third party.

33.—s. 53.—B sued the obligee to enforce a bond hypothecating immoveable property, to the discharge of which he had agreed by means of sale of the property. The contract of sale was never carried into effect, although the vendors were willing and ready to put him in possession of the property, as B failed to pay the price which he covenanted to pay. B was not allowed to enforce the bond **Narain Singh v. Madho Prasad. 7 N W 153.**

(29) Material alteration in bond

34——Suit for recovery of money due on a bond—Forged bond—Material alteration, if, and when, vitiates instrument—Party, addition of, fraudulent—Original debt, effect of, to when recited in bond—Court, power of, to dismiss suit against a party not contesting—Material alteration, law as to—Limitation, if saved by acknowledgment of original debt recited in forged bond.

The test for determining the materiality of an alteration in an instrument is to see whether the addition gave a different legal character to the writing and whether it would completely change the nature of the relation towards each other of the parties to it and their remedies upon it.

If a party to a deed makes an alteration in a covenant after the deed is executed, not only the covenant but the whole deed becomes void.

Any change in an instrument, which causes it to speak a different language in legal effect from that which it originally spoke which changes the legal identity or character of the instrument either in its terms or the relation of the parties to it, is a material change, or technically an alteration and such a change will invalidate the instrument against all parties not consenting to the change.

The question, to what extent the indentity of an instrument must be changed in order that its legal effect will be altered, so as to bring the case within the terms of a material alteration vitiating the instrument, must depend upon the nature of the alteration in each particular case. The test is not, necessarily, whether the pecuniary liability of one of the parties has been increased by the change; it is of no consequence, whether the alteration would be beneficial or detrimental

Bond-*Contd.*

(29) Material alteration in bond—*Contd.*

to the party sought to be charged on the contract. The important question is, whether the integrity and identity of the contract have been changed.

Where a party, by his own act alters a genuine instrument, so that it cannot be the foundation of any legal remedy, he ought not to be permitted to prove the promise contained in it by any other evidence, on the principle that the debt is merged in the instrument and hence the destruction of the latter leaves nothing upon which to sue.

In the absence of fraud, the instrument only, and not the original debt is, in such circumstances, destroyed, but where a party has voluntarily and fraudulently altered a deed and has thus destroyed the evidence of his debt, he should not be allowed to fall back upon the original consideration and establish it by evidence which he himself has destroyed.

As an ordinary rule where the defendant has notice of an alteration in an instrument, which is the foundation of the action, he should raise the issue by his pleading, whether the alteration is material and the instrument has become void If, however, in proving the execution of a note the testimony discovers the fact that it was designedly changed by the payee, the Court is not precluded from giving effect to the well settled rule of law that an instrument is avoided by a material alteration. 7 Cal 616 and 2 P L R 107 Fol: 13 M & W 343; 5 E & B 83; 1 Sm L C 107, 767 (11th Ed). 167 Mass 426, 57 Am St, Rep 466, 6 Walh s. 80, 42 I11 R 375, and 50 Mo. 157, Ref 2 M & Cr 890, 29 L J Ex 115, 1 Ch 451, Dist 3 B & Ad 660 and 1 [illegible]Sm L C 801 (11th Ed), Ref 24 Am St Rep 250, 12 Am St Rep 754, 4 L R A 196, 16 L R A 468, 47 Am St Rep 929, Ref 5 C W N 56; 25 Bom 616; 23 Mad 137; 25 All 580 Dist; **Gour Chandra Das v. Prasanna Kumar Chanda. 3 C L J 363=10 C W N 788=33 Cal 812.**

35—Altearation of deed—Suit for recovery of money due on a bond—Forged bond—Material alteration,if and when vitiates instrument—Party, addition of fraudulent—Original debt, effect of, when recited in bond—Court, power of to dismiss suit against a party and not contesting—Material alteration, law as to limitation,if saved by acknowlegment of original debt recited in forged bond.-

Bond-*Contd.*

(29) Material alteration in bond—*Contd.*

The test for determining the materiality of an alteration in an instrument is to see whether the addition gave a different legal character to the writing and whether it would completely change the nature of the relation towards each other of the parties to it and their remedies upon it.

If a party to deed makes an alteration in a covenant after the deed is executed, not only the covenant but the whole deed becomes void.

Any change in an instrument which causes it to speak a different language in legal effect from that which it originally spoke, which changes the legal identity or character of the instrument, either in its terms or the relation of the parties to it, is a material change or technically an alteration, and such a change will invalidate the instrument against all parties not consenting to the change.

The question, to what extent the identity of an instrument must be changed in order that its legal effect will be altered, so as to bring the case within the terms of a material alteration vitiating the instrument, must depend upon the nature of the alteration in each particular case. The test is not, necessarily, whether the pecuniary liabiliy of one of the parties has been increased by the change; it is of no consequence, whether the alteration would be beneficial or detrimental to the party sought to be charged on the contract. The important question is whether the integrity and identity of the contract have been changed.

Where a party by his own act alters a genuine instrument, so that it cannot be the foundation of any legal remedy, he ought not to be permitted to prove the promise contained in it by any other evidence, on the principle that the debt is merged in the instrument and hence the destruction of the latter leaves nothing upon which to sue.

In the absence of fraud, the instrument only and not the original debt is,in such circumstances, destroyed, but where a party has voluntarily and fraudulently altered a deed and has thus destroyed the evidence of his debt, he should not be allowed to fall back upon the original consideration and establish it by evidence which he himself has destroyed.

As an ordinary rule, where the defendant has notice of an alteration in an instrument which is

Bond-*Contd.*

(29) Material alteration in bond—*Concld.*

the foundation of the action, he should raise the issue by his pleading, whether the alteration is material and the instrument has become void. If, however, in proving the execution of a note, the testimony discovers the fact that it was designedly changed by the payee, the Court is not precluded from giving effect to the well-settled rule of law that an instrument is avoided by a material alteration. **Gour Chandra Das v Prasnna Kumar Chanda 3 C L J 363=10 C W N 788 =33 Cal 812.**

Notes:—Dist: 12 C W N 716.

(30) Bond, fraudulent alteration of endorsement of payment.

36—Alteration of deed.

Held that the ruling in N. W. P., S. D. A. Rep. 1859 P 73 did not apply to a case where the endorsement of payments in satisfaction of the bond, and not the terms of the bond itself, were found to have been fraudulently altered by the obligee In the present case the execution of the bond was admitted by the obligor and the only question in issue was as to the amount that had been paid in satisfaction of the bond. **Kallu Mal v Kallu 1 W N 119.**

(31) Appropriation of payment.

37—Mode of calculating interest—Reg. XV of 1793.

Where payment was made upon a bond, the amount paid being less than the interest due,—*Held* the payment ought to go to reduce the amount of interest due, and the creditor in a suit upon the bond was entitled to a decree for the principal and balance of interest up to date of decree. **Luchmeswar Singh v Luft Ali Khan. 8 B L R P C 110.**

(32) Bond in satisfaction of decree.

38—S. 257-A—Civ. Pro. Code, 1882—Bond in satisfaction decree—Effect.

A bond executed in satisfaction of a decree will be the basis of a fresh suit, though satisfaction of the said decree was not certified. (16 Cal. 504, 15 Bom 419, 17 Mad 382 Fol.) **Sukhu Ram v. Umed. 16 P R 1900=20 P L R 1900.**

Notes.—Ref: 29 P R 1908=71 P W R 1907= 61 P L R 1907; Dis., 88 P R 1904; Overruled, 91 P L R 1907, F B.

Bond-*Contd.*

(32) Bond in satisfaction of decree-*Concld.*

See also cases under:—

(1) C. P. C. (1882) S. 257 A.
(2) Contract Act S. 25.

(33) Failure of bond.

39—Evidence—Non-registration.—

In an action on a bond a mortgage, which was not registered, and the *factum* of which was denied, the Principal Sudder Ameen decided in favour of the plaintiffs; but such judgment being reversed by the High Court, the Judicial Committee, considering that too much weight had been given to the fact of non-registration, reversed that finding, and, after a careful analysis of the evidence, found the bond to be genuine.

Gangaprasad v Mawji Lal. 9 B L R 426; 16 W R P C 30.

(34) Presumption of payment.

40—Presumption as to payment—Obligor's possession of bond—

As between the origiral debtor and the original creditor, the obligor's possession of bond leads to the presumption that its payment is made. But it loses much of its force when it is made between the debtor and the purchaser of the debt at the execution sale. **Debendra Kumar Mandal v Rup Lall Dass. 12 Cal 548.**

Notes—Ap: 18 Mad 437; 26 Bom 305. Fol: 20 Cal 805; 19 Bom 121; 39 Cal 1 F B.

(35) Bond—stipulation for not transferring property being of no avail to a third party

41—Stipulation for not transferring property —Third person not a party to the bond.—

A stipulation in a bond to the effect that the obligor will make no transfer of certain property hypothecated by such bond until the debt thereby secured has been paid up, cannot be used by a third person not a party to the bond to defeat a subsequent charge upon the same property granted in favour of another creditor of the obligor. **Koondun Lall v Wazir Ali. 3 N W P 205.**

(36) Evidence of payment.

42—Error in account—Waiver—Estoppel—Indorsement.

Bond-*Contd.*

(36) Evidence of payment—*Concld.*

Where the defendant executed to the plaintiff a bond for the payment of the balance found to be due from the defendant to the plaintiff upon an adjustment of the account of their mutual dealings, which bond contained the following stipulation. "I shall pay the money after causing the payment to be entered on the back of this bond, or after taking a receipt for the same. I shall not lay and claim to any payment made except in this way,"—*Held* that though the defendant at the time of the adjustment disputed the correctness of the account, yet that, by having executed the bond and made payments under it, he must be held to have waived his objection, and in a suit on the bond could not be permitted to re-open the question of the correctness of the balance, though he might possibly have been allowed to do so had he alleged that he had discovered errors in the account after the execution of the bond, and had he specified some of the alleged errors. *Held*, also, that the stipulation in the bond could not be permitted to control courts of justice as to the evidence which, keeping within the rules of the general law of evidence in this country, they may admit of payment; and the Anglo-Indian law of evidence not excluding oral evidence of payments, it would be against good conscience and the policy of the law to reject it, though the absence of endorsements is a circumstance of some importance, which ought not to be over-looked, but is by no means conclusive. S. D. A., 1855, pp. 19 & 50 impeached 5 Mad., 451; Sp. Ap. 438 of 1872, and 1 N. W., 146, approved. **Narayan Undir Patel v Motilal Ramdas.** **1 Bom. 45.**

Kalee Doss Mittra v Tarachand Roy. **8 W R 316.**

See Girdharee Singh v Lalloo Koonwar. **3 W R Mis., 23**

43—S. 23—Bond Stipulation for endorsement on bond of payment—Evidence of payment—Receipt.

A bond contained a stipulation that the obligors should endorse on the bond such payments of money due under it as were made within the period fixed for re-payment of the principal and should not claim remission of such payments as were not so endorsed. *Held*, that proof of such a payment by a receipt signed by the obligee, and not endorsed on the bond, was not excluded by that stipulation. **Sultan Bibi v Magata Savu.** **3 M L J 9.**

Bond-*Contd.*

(37) Acknowledgment in letter of evidence of missing bond.

44—Acknowledgment in letter of evidence of missing bond—Interest at contract rate—Interest not to exceed principal —

In a suit to recover the amount of principal and interest due upon two separate bonds, one of which alone was forthcoming, the other being referred to and vouched by a note of hand of the obligor, the issues settled and recorded by the Court below for trial were, first, whether the first bond was the deed of the deceased obligor; and, secondly, whether the note of hand was under the seal of the obligor, and if so, whether it was a valid acknowledgment of the debt claimed on the second bond, and up to what time and at what rate interest was due. The Court below, notwithstanding that the first bond actually proved, purported to have been given on an account settled, allowed evidence of the accounts and dealings between the obligor and obligees previous to the execution of both bonds, and, after having referred the same to an accountant, decreed the Plaintiffs entitled to a less sum than sued for, with interest upon the account thus taken. *Held*, on appeal by the Judicial Committee that the Courts below had miscarried, first, in allowing the opening of, and founding the, decrees upon settled accounts, the only question upon the issues recorded for their judgment being the validity of both bonds, of which they were satisfied; and, secondly, that from the frame of the issues neither the obligees nor their representatives were bound to prove the consideration for the bonds, but were entitled to recover the whole principal and interest due thereon, which was decreed, and the decree of the Court below amended to that effect. **Shah Koondun Lall and Phoondun Lall v Rajah Ameer Husain Khan.** **11 M I A 120.**

(38) Novation of bond

45—Surety, Liability of.

B became surety under a bond to Government for the treasurer of a Collectorate. The Collector yearly examined the accounts and struck a balance, which he certified to be correct. B on each such occasion executed a new bond, but the old bonds were not cancelled or given up. On subsequent enquiry, the treasurer was discovered to have

Bond-*Contd.*

(38) Novation of Bond—*Contd.*

embezzled moneys during each year. *Held*, that on such discoveries being made, B was still liable under the old bonds, there having been no novation. **Lala Banshidhar v. Government of Bengal,** 9 B. L. R.. 364= 14 Moore's I. A.. 86=16 W. R P C 11.

Bond—New bond in cancellation of old bonds —Registration refused—Suit on original bonds—Novation—Registration Act, 1908. s 77.

A W N 1881, 98

46—Bond given in renewal of former bonds.

Where a bond is given in renewal of former bonds, such bond constitutes a new security, to take effect from its date. **Hamed Bux v Bindrabun.** 2 N W 37.

Notes —Fol. 24 W R C R 121. Ref. 6 Bom 168 F B.

48—Fraud—Undue influence and threats.

The three childless widows of a zemindar instituted a suit against the rightful heir to their husband's estate, in which they unsuccessfully disputed his legitimacy. Previously thereto they had obtained advances of money from the present plaintiff and executed in his favour an agreement and a bond, whereby they secured to him the payment of large sums in case they recovered their husband's estate, and virtually gave to him the control of their suit. Subsequently they agreed with the rightful heir to compromise the suit, which compromise, however, was never acted upon, partly owing, it was alleged, to the subsequent conduct of the heir. At the date of the compromise, the heir, who had just attained his majority, and was without proper counsel or assistance, and acted under threats from the plaintiff, a powerful and wealthy banker, that he would carry on the litigation against him *per fas aut nefas*, was induced, contrary to his own judgment and sense of right, and without any evidence that the sum claimed was really due to the plaintiff, to execute a bond in his favour, whereby he bound himself to pay a large sum of money claimed by

II C. C. 57

Bond-*Contd.*

(38) Novation of Bond—*Contd.*

the plaintiff as being due from the widows ; the plaintiff on his part agreeing that he would treat such payment as a satisfaction of his claim against the widows, but meanwhile that he would retain the securities which he hold from them. In a suit brought by the plaintiff against the heir to enforce the last mentioned bond—*Held* that the bond was wholly invalid and fraudulent as against the defendant, and that, as there was no privity of contract between the plaintiff and defendant independently of the bond, it could not stand as a security for anything which might be justly due from the widows. *Semble*—The transaction, even if valid, did not amount to a novation, for the plaintiff never abandoned his claim against the widows, but only agreed to abandon his remedy against them in case he obtained satisfaction of his claim from the heir.

Chedambara Chetty v Renja Krishna Muthu Puchanja Naikar: 13 B L R 509: 22 W R 148: L R 1 I A 241.

Affirming decision of High Court. 7 Mad 85.

Notes.—See 22 W R P C 148.

49—Bond for payment of bills of exchange—Collateral security—Presumption.

Where a person who is indebted on certain bills of exchange accepted by him gives a bond for securing payment of the whole amount with interest by instalments, the fact that the bills were not to be given back until all the instalment should be paid raises a presumption that the bond was only intended to be a collateral security, and not a substitution for the obligation arising from the bills of exchange Such a presumption may be impliedly rebutted by other circumstances. 2 Bing N C 693, cited. **Radha Gobind Shaha v Bank of Bengal.** 2 C L R 565.

50.—" Contradicting" etc; its terms—Jamog of interest.

Subsequent to the execution and registration of a bond, a *jamog* was made orally between the creditor and the debtor by which the former agreed to take the rents of certain tenants of the latter in satisfaction of interest, the latter agreed to release the tenants from payment of rent to himself and the tenants (who were parties to the arrangement) agreed to pay their rents to the creditor. No mutation of names

Bond-*Contd.*

(38) Novation of Bond—*Concld.*

in favour of the creditor was effected in the revenue registers. The creditor brought a suit against the debtor to recover the principal and interest agreed to be paid under the bond, alleging that he had never received any rents under the *jamog*. *Held*, that whether or not the plaintiff could maintain a suit on the *jamog* against the tenants for the rent assigned to him in the Revenue Court, he could do so in the Civil Court, and the fact that the *jamog* was not in writing did not affect the question. (7 All 256) referred to. *Held*, also that the *jamog* was not a subsequent oral agreement rescinding or modifying a contract which was registered according to the law for the time being in force within s. 92 proviso (4) of the Evidence Act. **Autu Singh v. Ajudhia Sahu.** 9 All 249, 7 W N 27.

(39) Whether novation or no novation.

51.-The respondents took from the appellants, his obligors under three former bonds, a new bond, by which the amounts due under the old bonds were consolidated and a further advance of Rs. 62 in cash was made. The appellants subsequently refused to register the new bond and denied its execution. The respondents pursued their remedies under the Registration Act up to that provided by s. 73, but without success. Abandoning the new bond, they now sued upon their old bonds and to recover the Rs. 62 advanced in cash. *Held*, that, under these circumstances there had been no "novation" nor, as the suit was not on the new bond had the principle laid down in 3 All 327 any reference. **Mahabir Rai v Debi Dial.** 1 W N 98.

(40) Bond payable by instalments.

52—Limitation—Act XIV of 1859, s. 1—Cause of action.

Where a bond, payable by instalments, provided that upon default in payment of any one of the instalments the whole amount secured by the bond should become payable, *Held* that a suit to recover the money due upon the bond, brought after a lapse of more than three years from the date when the first default was made, though within three years from the date of the last payment, was barred by lapse of time.

Hurronath Roy v Maheroolah Mollah. B L R Sup Vol 618: 7 W R 21.

Bond-*Contd.*

(40) Bond payable by instalments—*Contd.*

53—Bond payable by instalments—Judicial Commissioner's Circular No. 83 of 1859.—

Where a bond was payable by instalments and there was no condition that default in the payment of one instalment should entitle plaintiff to sue for the whole, *held* (*overruling* circular mentioned above) that the plaintiff's cause of action in respect of each instalment arose on the date on which each became due and not from the date of the bond **Ram Dass v. Mohur Singh** 64 P R 1869.

54—Cause of action — Decree payable by monthly instalments.—

When a bond is entered into, to pay off money due under a decree monthly by instalments, each monthly instalment becomes a separate cause of action, and limitation applies to each instalment separately. **Khidu v. Kali Sahu,** 3 B L R. Ap 112=12 W R 71.

55—Default—Cause of action.—

Where a bond was given to secure a debt which was to be repaid by seven annual instalments, and the bond provided that upon failure to pay a single instalment the whole principal sum secured should immediately become due and recoverable with interest.—*Held*, that the cause of action in respect of the principal and interest arose on failure to pay the first instalment.

Karuppana Nayak v. Nallamma Nayak, 1 M H C R 209.

Madho Singh v. Thakoor Pershad, 5 N W 35.

Notes:—Ap: 1 Bom 125 F B. Ref: 2 All 322.

56—Limitation—Waiver.—

Quære—Whether a suit on a bond for payment by instalments, with a clause making the whole amount payable on default in payment of any instalments, must be instituted within three years from the time of the first default. Payments made and accepted afterwards may operate to waive the effect of a default, and to restore the provision for payment by instalments.

Hullodhur Bangal v. Hogg, 1 W R 189.

See **Breen v Balfour,** Bourke 120.

Contra, **Madho Singh v. Thakoor Pershad,** 5 N W 35.

Sumbhoo Chunder Shaha v. Baroda Soonduree Debea, 5 W R 45.

Bond-*Contd.*

(40) Bond payable by instalments—*Contd.*

57—Suit upon a bond executed by the defendants to the plaintiff for the payment of a sum of money by instalments. The bond contained a proviso that, on default being made in the payment of any one instalment, the whole amount should become due. Default was made in the payment of several instalments, but subsequently payments were made by the defendants and accepted by the plaintiff on account of the unpaid instalments. The defendants pleaded the law of limitation. The suit was brought more than three years after the first default in payment of an instalment had been made, but within three years from the time when, taking into account the payments that had been made, the first instalment claimed became due. *Held*, that these payments as regards both parties must be considered as if made at the time fixed; that the defendants could not rely upon the stipulation as making the whole debt due, and fixing the period from which the time of limitation ran; and that, the first of the instalments claimed having become due within three years, the suit was not barred. **Ram Krishna Mahadev v. Bayaji Bin Santaji, 5 Bom H C R A C 35.**

But **see Gumna Dambershet v. Bhiku Hariba, 1 Bom 125.**

Notes:—Over: 1 Bom 125 F B. Not Fol: 3 All 514. Fol: 5 N W P 35. Ref: 7 B H C R 125; Rat. Un Cr 908: 27 Bom 19,1 F B

58—Execution of decree—Failure to keep decree alive—Suit on bond.—

In execution of a decree, seven out of nine judgment-debtors, with the consent of the decree-holder, filed an instalment-bond, agreeing to pay the amount of the decree with interest thereon in two instalments. The decree-holder neglected to take proceedings to keep alive the decree, and his application to execute the decree was disallowed. In a suit brought by the decree-holder against the person who had executed the instalment-bond for the amount of principal and interest due thereon.—*Held*, that the suit was maintainable. **Ashidhari Chowdhry v. Jagessur Kumar, 6 B L R, Ap 32.**

S. C. Ashidharee Chowdhry v. Juggessur Kumar, 14 W R 430.

Bond-*Contd.*

(40) Bond payable by instalments—*Contd.*

59—Waiver of default—Limitation.—

Suit brought on 24th April 1873 for principal and interest due on a bond dated 30th October 1850. The debt was payable by eight annual instalments, on failure of any one of which the whole amount was to be payable on demand. No instalment was paid, and when the suit was brought, defendant pleaded that the suit was barred as three years had elapsed from the date on which the last instalment became due. *Held*, that the usual clause, that on failure to pay one instalment the whole amount shall be payable on demand, gave a mere election to plaintiff of converting the obligation into a different one; that that election was never exercised, and that the document continued to be one securing the payment of a debt by instalments, as to all of which the action had long been barred; and that it was unnecessary, therefore, to consider whether, in the present case "on demand" must not be construed according to its meaning at the period at which the words were written. **Eathamakala Subbammah v. Raghiah, 7 Mad H C R 293.**

Notes.—Ref: 13 All 126.

60—Construction of bond — Payments towards interest and principal.—

Defendants were indebted to the plaintiff in the sum of Rs 1,400. With the object of liquidating this debt with interest at 12 per cent, per annum, the parties executed a bond, whereby it was agreed that the defendants should grant an ijara lease of certain property for the term of fourteen years to the plaintiff's husband; and that the rent reserved on this lease should be paid by the lessee to the plaintiff during the terms in semi-annual payments each of Rs. 83-12. *Held*, that, on the proper construction of this agreement, the semi-annual instalments were to be applied first to the reduction of the principal money due, and not to the payment of the interest. **Shurnomoyee Dossee v. Uma Soondery Chowdhrain. 2 C L R 138.**

61—Cause of action—Waiver of default in payment.—

When a sum of money is payable under a bond by instalments with a condition that, in default of paying one instalment, the whole amount shall then become due, and default is made,

Bond *Contd.*

(40) Bond payable by instalments—*Contd.*

but the obligee subsequently accepts payments of one or more sums as an instalment or instalments due under the bond, such acceptance amounts to a waiver of the condition of forfeiture, and puts an end to the cause of action which had accrued, so that the bond is set up again as a bond payable by instalments, and no cause of action under the condition arises until some fresh default is made in the payment of a subsequent instalment. **Passamma Row Garu v. Toleti Venkiya, 5 Mad H C R 198.**

See on the same principle. **Hur Pershad v. Khowanee, 5 N W 18.**

Notes:—Ap: 12 Mad 192. Ref: 3 Mad 61: 20 Bom 109.

62—Default—Waiver.—

Where, after default in payment of an instalment upon a bond, conditioned that upon such a default the whole amount of the bond should become due, plaintiff accepted payment of such instalment, as also several subsequent ones.—*Held*, that by so doing the parties reverted to the old arrangement for payment by instalments or made a new one to the same effect, and that the penalty occasioned by the first default could not be enforced. **Gyan Chund v. Jawahur, 2 N W 83.**

Notes:—Fol: 5 All 289.

63—Instalment bond—Creditor having an option of suing for the whole amount on first default—Not exercising that option—Limitation.

Under the terms of an instalment bond, the creditor had an option to recover the whole amount but did not avail himself of it. On the contrary, he brought this suit for recovery of an instalment, more than three years after the date of the first default; *held*, that the suit was not barred by limitation. When a bond is not so worded as to compel a creditor to sue for the whole amount at once on the first default, he could not be compelled to sue for the whole. (16 All 371 Appl. (1907) A W N 139 Ref: 31 Cal 297 21 Cal 542 Diss.) **Ajudhia v. Kunjal, 5 A L J 72=A W N (1908) 36=30 All 123.**

64—Waiver of default——Limitation Acts,

Bond-*Contd.*

(40) Bond payable by instalments—*Contd.*

1871 and 1877, art 75—Civil Procedure Code, 1859, s. 194; 1877, s. 210—Power of Court to alter contract between the parties.

Where a bond is payable by instalment, and expressly stipulates for the payment of the whole debt on failure in the payment of any instalment, the law of limitation runs on the whole amount of the bond against the obligee from the day on which the obligor first makes default in the payment of any instalment, unless the obligee waive the default, and afterwards from the day on which any fresh default is made in respect of which there is no waiver. The obligee may waive the default under Acts IX of 1871 and XV of 1877, sch. II, art. 75, but the Courts have no authority to compel him to waive it. Neither Act VIII of 1859, s. 194, nor Act X of 1877, s. 210 confers any authority on the Courts to relieve a contracting party from such an express stipulation in a bond payable by instalments as to the consequence of default in punctual payment of the instalments. A debt being presently due, an agreement to pay it by instalments, with a stipulation that on default the creditor may demand immediate payment of the whole balance due with interest, is not to be relieved against in equity. Such a stipulation is not in the nature of a penalty, inasmuch as its object is only to secure payment in a particular manner. The defendant executed to the plaintiff a bond payable by instalments, and expressly stipulating for the payment of the whole amount on failure to pay any instalment on the day fixed. He paid the first instalment, but made default in paying the second which fell due on the 3rd August 1878. On the 20th August plaintiff sued to recover the whole balance due on the bond. Defendant admitted the bond, but pleaded tender of the amount of the second instalment soon after the due date, and prayed for payment by instalments without any interest. The first Court passed a decree in the plaintiff's favour for the amount claimed with costs, but ordered defendant to pay Rs. 100 and the costs at once, and the balance by yearly instalments of Rs 100 each, with interest at six per cent, till payment. The District Judge, on appeal, affirmed the decree, with a slight variation as to interest, which he directed the defendant to pay on overdue instalments only. *Held* by the High Court, on second appeal, that neither of the lower Courts had jurisdiction, without the consent of the parties, to substitute, for the contract made by

Bond-*Contd.*

(40) Bond payable by instalments—*Contd.*

them, terms which the Court preferred, *Held*, also, that plaintiff was entitled to sue on the day after that on which the default was made,—*viz.*, on the day after that fixed for the payment of the instalment,—and that the Subordinate Judge had no power to rule the contrary. **Ragho Gobind Paranjpe v Dipchand. 4 Bom 96.**

Notes:—Dist: 24 Cal 281.

65—Instalment bond registered—Cause of action—Default—Waiver-Limitation Act (IX of 1908); Sch I, Arts 75, 116.

Where in an instalment bond it was stipulated that in default of payment of one instalment the whole amount of the bond shall fall due—*Held* —That mere omission to sue is not such a waiver as is contemplated by Art 75, 15 Cal 502 foll. 11 C W N 903 dissented from. Such a waiver is not limited to the case of a subsequent acceptance of an overdue instalment but may be effected in a variety of ways and may be inferred from various circumstances, it must however depend on some definite act or forbearance. 4 Cal 297 ref to.

Abinash Chandra Bose v Bama Bawa Chetty, (1909) 13 C W N 1010.

66—Instalment bond—Liberty to sue on default—Option not exercised—Limitation—Acceptance of subsequent instalments—Waiver, implied.

The defendants executed a bond in favour of the plaintiff, promising to pay the money by annual instalments: on failure to pay any instalment the creditor was to be at liberty to recover the whole amount due. The instalment payable for the years 1305 and 1306 were paid, but not on the dates fixed for payment, but thereafter. The creditor brought this suit, to recover instalments for the years 1307-1309 Fasli. The defendants set up a plea of limitation. *Held* that the acceptance of the instalments, after the appointed date amounted to an implied waiver of the creditor's right to recover the whole money. Waiver is implied, when a person entitled to anything does or acquiesces in something else, which is inconsistent with that to which he is entitled. *Held*, further, that the suit was governed by Art 75 of the Limitation Act and the right to sue accrued, when an instalment fell due, in respect to that instalment. (3 A L J 463 Dist) **Maharaja of Benares v Nand Ram. 4 A L J 336=A W N (1907) 139= 29 All 481.**

Notes: -Ref: 30 All 123=(1908) W N 36=5 A L J 72.

67—Waiver of default—Limatation Act, 1871, Art. 75.

Where a bond is payable by instalments, with a provision that upon default of payment of any instalment the whole sum then unpaid shall become due with interest, the creditor, though he can elect but once to enforce this provision, may waive the benefit of it not only on the first, but on any subsequent default. **Satracheria v Setarama. 3 Mad 61.**

Notes:—Ap: 12 Mad 192.

68—Instalment bond, registered—Cause of action—Default—Waiver—Limitation — Limitation Act (XV of 1877) Sch II Arts 75 and 116.

Where in an instalment bond it was provided that, on default in the payment of one kist, the creditor would be able to realise the entire amount due under the bond.

Held—that it was open to the creditor, if default were made to sue at once for the whole amount, or if he so elected, to waive the benefit of the proviso.

Default was made in October 1897, and the present suit was brought in 1906 for the instalments for six years before suit.

Held—that the plaintiff was entitled to a decree, Art 116 of Sch II of the Limitation Act being applicable to the suit which was brought on a registered bond. **Rup Narain Bhattacharya v Gopi Nath Mondol. 11 C W N 903.**

Notes.—Ref: 36 Cal 394=9 C L J 226=13 C W N 1004. Diss 13 C W N 1010.

69—Default in payment—Expiration on time for specific enforcement of contract.

A bond for money provided that on failure on the part of the obligor to pay interest as agreed in the bond, and within a certain period from the

Bond-*Contd.*

(40) Bond payable by instalments—*Concld.*

date of the bond, the obligee might sue for possession of the immoveable property mortgaged in the bond. Default was made in the payment of interest as agreed, but the obligee deferred bringing a suit for possession of the mortgaged property so long that the time mentioned in the bond expired before he could obtain a decree *Held* that under these circumstances a decree for possession of the property could not be granted to him **Balwant Singh v Gumani Ram. 5 All 591.**

Notes:—Ap: 20 Bom 736. Fol: 23 Cal 526; W N (1907) 219; 4 A L J 515; 29 All 638. Ex: 10 All 587. Ref: 23 Cal 325, 9 Bom 452; 5 C L J 380; 34 Cal 216.

70—Suit on bond—Plea of limitation.

Where a defendant sets up the defence of limitation, he must plead it, and show that the claim is barred. If, when the plaintiff has proved his case the facts show that the cause of action accrued at a date earlier than the period of limitation, and the plea of limitation has been set up by the defendant, he will be entitled to take advantage of the plaintiff's evidence that the claim is barred, and to have judgment given in his favour. The obligee of a bond, by which the obligor covenanted to pay the sum of Rs. 3,800 by the annual instalments of Rs. 200, and in which it was also agreed that payments of the instalments should be endorsed on the bond, brought a suit against the obligor alleging default in payment and claiming to recover the amount of the bond. He gave credit for payment of the instalments for seven years, and alleged that his cause of action arose upon default in payment of the eighth instalment. The bond showed on its face endorsements of the payments for which credit was given. The obligor alleged that no instalments were paid after the third year, that therefore the debt became due at an earlier date than that stated by the plaintiff, and that the claim was barred by limitation. *Held* that inasmuch as the defendant adduced no evidence to show that the latter instalments were not paid, and inasmuch as the evidence produced by the plaintiff did not show that the debt accrued at a date earlier than the limitation period, the plea of limitation failed. **Radha Prasad Singh v Bhajan Rai. 7 All 677; 5 W N 202**

Notes.—Dist: 11 All 438

Bond-*Contd.*

(41) Power of Court to alter terms of specially registered bond

71—Act VIII of 1859, s. 194—Order to pay by instalments—Superintendence of High Court.

By bond specially registered under Act XVI of 1864, obligor stipulated to pay the entire amount secured thereby with interest at the rate therein mentioned on a day therein mentioned. There was a further stipulation that, on default of payment, the bond was to be enforced as a decree. On failure of payment, the obligee applied for execution under s. 53, Act XX of 1866, but the Subordinate Judge ordered the payment to be made by instalments. On an application to the High Court under s 15 of the Charter Act,—*Held* that the Subordidate Judge had no jurisdiction to pass a decree on the bond altering or varying its terms. S. 194. Act VIII of 1859, did not apply. **Khettra Mohun Baboo v Rashbehari Baboo. 5 B L R 167: 12 W R 252.**

(42) Bond registered under Act (XVI of 1864) Ss. 51 & 52.

72—Execution in default of payment of interest.

Where a bond was registered under ss. 51 and 52 of Act XVI of 1864, and by its terms a fixed amount of interest was to be paid at the end of every month,—*Held* that, by virtue of special registration, the obligee was entitled to move for execution in respect of each instalment of interest due. **Manthareswara Aiyar v Kamala Naiker. 3 M H C 88.**

(43) Penalty.

73—Stipulation to pay double the amount of debt on default of payment of any instalment.

A stipulation by which, on default of payment of one instalment, double the entire amount of the debt due under an instalment bond was to become at once payable, *held* to be in the nature of a penalty. **Joshi Kalidas v Koli Dada Abhesang 12 Bom 555.**

(44) Enforcement of penalty.

74—Default—Penalty.

Where, after default in payment of an instal-

Bond-*Contd.*

(44) Enforcement of penalty—*Concld.*

ment upon a bond, conditioned that upon such a default the whole amount of the bond should become due, plaintiff accepted payment of such instalment, as also of several subsequent ones. *Held*, that by so doing the parties reverted to the arrangement for payment by instalments or made a new one to the same effect, and that the penalty occasioned by the first default could not be enforced. **Gyna Chund v Jawahur. 2 N W P 83**

Suit on Copy of bond.—See Burden of Proof.

6 All 73, 4 W N 78; 5 W N 202.

(45) Admissibility of evidence to show that the partner signed on behalf of his co-partner.

75—Suit on a bond signed by one of two partners of a firm-Evidence admissibility of, to show that the partner signed the bond on behalf of his co-partner also.

Where the plaint alleged the 1st and 2nd defendants were partners, and that they borrowed from the plaintiff the amount for which the bond (signed by the 1st defendant only) was given. *Held* that (assuming the 1st and 2nd defendants were partners) it was open to the plaintiff to give evidence to show that the 1st defendant signed the bond on his own behalf, and as the agent of the partner, the 2nd defendant (7 Tuant 295 & L R 6 C P C. Ex Ch 486 Fol: 2 H L C 547 Ref:)

C. Venkatasubbiah Chetti v T. Govindarajulu Naidu. 3 M L T 259=18 M L J 1=31 Mad 45.

(46) Mortgage deed whether admissible as money bond.

76—S. 68—"Used as evidence"—Mortgage deed—Attesting witness not called-Whether admissible as a money bond:

The rule that where an attesting witness is necessary to the validity of an instrument, a person who was such witness must be called if alive, capable of giving evidence and subject to the process of the Court, applies, whatever the purpose for which the instrument is produced by. Sec. 68 applies only to cases where an instrument required by law to be attested bears the necessary attestation and not to cases where the instrument itself does not bear the necessary attestation. It is

Bond-*Concld.*

(46) Mortgage deed whether admissible as money bond—*Concld.*

impossible to view the question of execution with reference to a particular covenant in the document as severable from the execution of the document itself as a whole. Where a mortgage deed which was required by law to be attested by two witnesses was put in evidence but no attesting witness though alive and capable of giving evidence was called;—*Held*, that the deed was inadmissible in evidence for the purpose of proving the personal covenant to pay.—**Veerappa Kavundan v. Ramasami Kavundan.**

(1907) 17 M L J 213=30 Mad 251.

(47) Property in bond paper.

77—Bond paper, whether obligor has a right of property in—Obligor entitled to cancellation of the bond,

The obligor of a bond has not a right of property in the bond paper and cannot on payment of the debt recover the document from the obligee. But to prevent fraud the obligor may be entitled to have the bond cancelled.

Mirajdeen v Mahomed Buksh, 8 P R 1869.

Notes.—Fol: 69 P R 1886.

Bond, alterations in.

See Alterations-alterations in bond.

1.—Bonds—Alterations—Onus.

In a family partition an award of bonds of a certain value to plaintiff means of bonds on which that amount was still due and recoverable. *Held*, further, that it lay on the defendant to whom the bonds had been passed and who had always them in his possession to prove the circumstances under which alteration and interlineations in them had been made.

Lakshman v Hari. 1888, P J, 249.

2.—S. 25 (3) Account Balance—Promise to pay interest—Bond—Limitation.

Held, that a balance of account struck by a debtor in his creditor's books, which contains a distinct promise to pay interest, therefore, is more than a mere acknowledgment of pre-existing debt and amounts to a bond, and consequently is a good contract under S. 25 (III) even if it consists of time-barred items. **Nanak Chand v Diwan Chand. 135 P W R 1910.**

Bond, attachment of.

See Attachment—Subjects of attachment.

--by guardian

See Minor.

Bond-by Manager

See Hindu Law-Joint family.

Bond chargeable with stamp duty

See Stamp Act.

1.—Agreement not to obstruct realization of security—Attachment by third person.

Where the defendant executed an instalment bond assigning certain Mokasa Amals as security, and agreed not to raise any obstruction as to the amount of the security, and that should there be any obstruction on his part to the payment of the Mokasa Amals to the plaintiff, the whole amount should be recoverable on demand.—

Held, that the defendent's allowing the Amals to be attached by another creditor was such an obstruction as was contemplated by the bond.

Tuljaji v Yashvantrav. 1882 P J 392.

2—The appellants sued the respondent on two bonds. In the first it was provided (i) that the respondent should pay the principal amount within two years with interest at Rs 2 per cent per mensem; (ii) that such interest should be paid every six months; (iii) and that in case of default in payment of the same, the appellant might at once claim the amount of the bond. The second bond differed from the first only in this respect that in the third clause it contained a further provision that in case of default compound interest should be payable. The question was to what amount of interest the appellants were entitled. *Held*, that the appellants were entitled to interest for the periods after the bonds become due at the rate payable before that date (*Viz* Rs 2) and such rate should not be reduced because they had not availed themselves of their right of suing when default occurred ; and that they were entitled to recover, in respect of the second bond, compound interest at the rate agreed upon. 1 All, 603) followed. **Chammi Lal v Ganesh Kuar.** 3 W N 35.

—Construction of

See (1) Bond,
(2) Deed-construction.

—enforcement of, as decree

See Registration.

—executed by lessor

See Landlord & Tenant.

Bond, executed by mother.

See minor.

Bond, executed by widow

See (1) Hindu Law—Widow.
(2) Hindu Law—Reversioners.

—executed in name of one party but in favour of third party

See Benami transaction.

—for breach of contract

See Stamp Act.

—hypothecating immoveable property

See Registration.

—in the hands of obligor

See Evidence—Secondary evidence.

—payable by instalment

See Bond.

—registered

See Registration.

—registered, executed by minor for necessaries

See Minor.

Bonds Suits on

See (1) Jurisdiction.
(2) Parties.

Bond stamped after death of grantor

See Stamp Act.

—Stamped with adhesive stamps

See Stamp Act.

—stipulating higher rate of interest

See Interest.

Bond to secure due performance of duties.

See Stamp Act Principal & Surety.

—under Rs 100.

See Registration Act.

—with native date.

See Limitation.

—written and signed by husband.

See Husband & wife.

—written on two papers.

See Stamp Act.

written upon plain paper in time of need.

See Stamp Act.

Books.

See (1) Evidence —Civil Cases-Miscellaneous documents—Books.
(2) Merchandise Marks Act s. 2.

Books of account.

See (1) Attachment.
(2) Corporation.
(3) Evidence.

Borah Mahomedans.

See Mahomedan Law.

Bot Khata.

See Khoti Settlement Act, 1880, Sections 17, 33

Bottomry—bond.

(1) Advance for repair of ship (1)
(2) Supply of necessaries to foreign ship (2)
(3) Master's lien for wages. (3)
(4) Master's lien for disbursements and wages. (4).
(5) Right of suit (5).
(6) Owner's covenant to pay. (6).

H C C 58

Bottomry Bond-*Contd.*

(1) Advance for repair of ship.

1.—Master's lien for wages—Priorty.

A, the agent for a ship in port at Bombay, lent the master money on a bond in the nature of a bottomry-bond, which he obtained from the master under pressure of necessity. It appeared that A,at the time of the making of the bond,had funds of his principal's in hand. *Held*, that the master's lien for wages has priority over the bond-holder. "Good Success." **Macqueen** v. **Fuzzul Mahomed**

I Ind Jur N S 303.

(2) Supply of necessaries to foreign Ship.

2.—Ship—Statute 7 Geo. 1 c. 21, s. 2.

The Statute 7 Geo 1, c. 21, s. 2 (which declared void all contracts by way of bottomry made by any subject of His Majesty on any ship in the service of foreigners bound or designed to trade to the East, and all contracts for loading or supplying such ships with goods, etc, or with any provisions, stores, or necessaries, etc.), is repealed by implication. When a suit is brought by material men for necessaries supplied to a foreign ship against the surplus proceeds of such ship lying in the registry of the Court, and there is no opposition, on the part of the owners of these proceeds, the Court has a discretionary power to allow the claim of the material men to be paid out of such unclaimed proceeds.

The Proceeds of The "Asia." Exparte Hormsji. **5 Bom O C 64.**

Notes:—Ref I0 B H C R 110.

(3) Master's lien for wages.

3.—Sale of ship—Charterer—Priority.

The charterer of a ship advanced money to enable her to complete the voyage, and obtained as security a "bottomry-bond," signed by both the master and owner. On the completion of the voyage, the charterer got the ship arrested and sold, and the money was brought into Court. Before any order had been made for the payment of the proceeds out of Court, the master also had got the ship arrested at his suit for wages due,but no decree had been obtained. Subsequently, the charterer, without notice to the master, obtained an order of Court for the payment of the proceeds of sale to satisfy his bottomry-bond. Thereup-

Bottomry Bond-*Contd.*

(3) Master's lien for wages *Concld*

on the master applied to restrain the charterer from taking the money out of Court until the claim for wages had been first satisfied *Held* that the master had a lien on the proceeds for wages due to him at the time of the sale of the ship, prior to that of the bottomry bond holder, and that he was entitled to have the proceeds retained in Court until the hearing of his claim **The Ship 'Porgtugal 5 B L R 958**

(4) Master s lien for disbursements and wages

4—Towage—Priority of lien

A ship was chartered for a voyage from Calcutta to Jedda and back While at Jedda the master found it necessary to borrow money for the wages of the crew and other purposes and with the consent of the owner tenders were invited by advertisement for a sum for which a bottomry bond was to be given Several tenders were made, and one by the charterer of the ship was accepted A bottomry bond was executed by the master, with the consent of the owner in which was included the expense of certain repairs which had been found necessary at an intermediate port on the voyage from Calcutta and for which the master had made himself liable By the bond the master bound himself his heirs executors and administrators, for the payment of the sum named therein, and part of the consideration was expressed to be the payment of the debt which the master had incurred at the intermediate port On arriving in the Hooghly the ship was taken in charge by a pilot under whose advice the master engaged a steamer to tow her to Calcutta He was sued in Calcutta for the hire of the steamer and had to pay the claim When the ship arrived in Calcutta the bond holder obtained a decree on his bond and had the ship arrested and sold but on the application of the master who had put in a claim for wages the Court ordered that the proceeds should remain in Court pending the consideration of the master's claim In a suit by the master to recover the balance of wages due to him as master of the ship and for the expense of the steamer which towed the ship up the river to Calcutta—*Held* the towage was a disbursement fairly made, and of which the bond holder had the benefit the master therefore had a lien on the ship for such disbursement *Semble*-The master also had a lien for wages down to the time when he was duly discharged, and not merely down to the time of the arrival in port and arrest of the ship The master however, having bound himself by the terms of the bond, was precluded thereby from setting up his lien against that of the bond holder, to whom on the face of the bond, he had constituted himself a debtor **The Ship Portugal 6 B L R 323.**

Notes—Ref 10 B H C R 110

Bottomry Bond-*Concld.*

(4) Master's lien for disbursements and wages—*Concld*

(5) Right of Suit

5—A suit will not lie in an ordinary bottomry-bond given by the master of a vessel against the owner to recover the amount thereof

Gladstone Wyllie & Co v Harrison 24 W R 50.

(6) Owner s covenant to pay.

6 Hypothecation of ship—Uncertainty of contract—Yogyam adamanam

A bottomry bond given by the owner of a ship must to be valid, be given at a place where he has no personal credit or security other than the bond

A bond hypothecating a ship after reciting the consideration and the security imposed a personal liability on the hypothecators for re-payment of the amount within a fixed time and stated that if the money is not paid within the stipulated time we (the hypothecators) shall add vattam at Rs 20 per cent per annum on the amount of principal and interest accruing on that date adding vattam once in twelve months until date of payment after the stipulated time, on the *adamanayogyam* of the said ship and get back this mortgage bond.'

Held, that the bond was not valid as a bottomry bond, and that as a mere hypothecation the provision therein contained for vattam on yogyam of the ship was void for uncertainty, the word *yogyam* being indefinite in its signification.

Asan Koothoo Sahib Mercoyar v Mothoo Kana Ana Ramathan Chetty 22 Mad 26=8 M L J 159.

Notes:—Ref 25 Mad 561.

Bought and sold Notes

See (1) Contract—Bought and Sold Notes
(2) Evidence—Civil Cases—Secondary Evidence—Unstamped or Unregistered Documents
(3) Evidence—Parol Evidence—Varying or Contradicting Written Instruments
(4) Stamp Act, 1897 sch I art 46.

Boundaries.

See Decree—Form of Decree—General Cases

—Alteration of

See Zamindar—Power of Zamindar

—Dispute as to

See (1) Bengal Tenancy Act s 109
(2) Evidence—Civil Cases—Maps
(3) Onus of Proof—Limitation and Adverse Possession
(4) Right of suit
(5) Special or Second Appeal Order subject or not to appeal
(6) Special or Second Appeal—Other Errors of Law or Procedure—Local investigation
(7) Superintendence of High Court—Civil Procedure Code s 622

—Proof of.

See Res Judicata—Matters in issue

—Specification of

See (1) Grant—Construction of Grant
(2) Plaint—Form and Contents of Plaint—Boundaries

1—Confusion of.

Equity will relieve when the confusion of boundaries has been occasioned by the fraud of one of the parties and grant the relief not only against a party guilty of neglect or fraud but also against those who claim under them The Court in cases relating to confusion of boundaries proceeds upon the same principle as it does when an agent or bailiff or any other person who is under an obligation express or implied to keep his own property separate from the property of another mixes them together, for under such circumstances he will have the onus thrown upon him of distinguishing his own property and if he is unable to do so the other person will be entitled to the whole property **Sheshi v Venkatramna 1891 P J 232.**

Boundaries-*contd.*

2—Mokurari pattak construction of-Conflict between area and boundaries

Held upon a construction of the pattah in the case that the dimensions specified were an essential part of the description of the land conveyed and not a cumulative description of it which was to be governed by the boundaries

Held further that in the circumstances of the case the intention should be inferred to have been to pass the specified quantity of land only (I P C A 46=2 Ch 164 Ref) **Kumar Rameshar Malia v Ram Tarak Hazra 14 C W N 268. =1 Ind Cas 650.**

3—Onus of proof Disputed boundary-Waste and jungle land

Where the lands in question are waste and jungl lands and are situated on the borders of the taluks of the plaintiff and the defendant, and no party has been exercising any act of possession for more than twelve years before the suit

Held that the ordinary rule regarding the *onus* incumbent on the plaintiff has no application that the parties are in the position of counter-claimants that it is the duty of the defenddant,as much as of the plaintiff to aid the Court in ascertainting the true boundary,and that it is necessary for the Court to take into consideration the evidence adduced by both sides (21 Cal 504 (P. C) 21 I A 39 rel upon) **Radha Kanta Basak v Akhoy Chunder Dey 7 Ind Cas 165.**

4—Boundaries—Thak or Survey map—Presumption—Dried up bed of river—Isolation from river—Fishery right—Civ Pro Code (Act XIV of 1882) S 13 Changed state.

It cannot be presumed as a matter of law that the boundaries of an estate as shown on the thak or survey map are identical with the boundaries, as they stood at the time of the Permanent Settlement but it is open to the Court to presume, in the circumstances of a particular case, that the condition of the locality has not changed materially between the date of the Permanent Settlement and the time of the Revenue Survey.

The dried up bed of a public navigable river if not originally part of public domain, becomes private property so as to entitle the owner of the soil to all beds left therein completely isolated from the new course of the river.

Boundaries-*Concld.*

As the right of fishery, in ordinary course follows the title to the soil, a stranger cannot claim a right of fishery in an inland sheet of water, the bed whereof is in private ownership.

The authorities on the subject of how far a right of fishery is affected by a change in the course of a river reviewed. (1902) 30 Cal 291; 30 I A 44, Ref:) **Sarat Chandra Singh v Kshitis Chandra Roy. 12 C L J 216=7 Ind Cas 140.**

5—Suit relating to—of land,—Doubt as to identity of land,—Duty of judge—Procedure to be followed—Inspection of land—Issuing commission under C. P. C., 1882, S. 392—Witnesses to be called by Court under S. 171, C. P. C. 1882.

In case of a boundary dispute, or when there is any doubt about the identity of the land in suit the Judge should first insist on a good plan, then proceed to the land and require the parties and all witnesses, who will speak about the land, to attend on the spot, or, in some cases, he might issue a commission under S. 392, C. P. C., for the local investigation. Proper procedure to be followed in such cases explained. **Po Gyi v Maung Paw. 5 L B R I=2 Ind Cas 347.**

6—Suits to determine boundaries—Practice—Equity superinduced by act of parties between two independent estates.

If the plaintiff is able to indicate the boundaries, it may be treated as a suit for recovery of possession of lands; but where he is not, mere confusion of boundaries between estates of two independent proprietors is *per se* no ground to support a bill for fixing the boundaries, unless some equity is superinduced by act of the parties, i. e, unless some confusion has arisen from misconduct on the part of the defendant or those under whom he claims. I W and T L C (7th Edition) 170 at p 172 F I J and W 484, 492 and 2 Merivale 410 at p 417 refd to. **Kawasji v Hormusji 6 Bom L R 782=29 Bom 73.**

Boundary.

1 Demarcation of boundary line 1
2 Disputed boundary 2
3 Question of boundary 3—4
4 Ascertaining and defining boundaries 5
5 Suit for removal of boundary marks. 6

Boundary-*Contd.*

(1) Demarcation of boundary line

1—Beng Reg X of 1882, ss. 2, 3, and 8—Suit for declaration of boundary contrary to survey award—Proprietary rights, Exercise of-Presumption of ownership.—Beng. Reg. XI of 1825, s. 5, cl. 12.

At the time of the Permanent Settlement the northern boundary of the pergunnah Shoosung (situated in Mymensingh, at the foot of the Garrow hills) was not defined by Government. From before that time, and certainly for more than sixty years, the zamindars of the pergunnah have always, but in an irregular and uncertain manner, exercised certain rights in the Garrow hills and over the inhabitants, who are half savages, such as hunting elephants, cutting wood, levying cesses on the inhabitants, when possible (including in some parts of the hills a tribute of one rupee per hut), and exacting occasional services from them. Government held a survey, and declared the northern boundary of pergunnah Shoosung to be a line running along the base of the Garrow hills. The zamindar thereupon sued to set aside the survey, and for a declaration that the northern boundary lay many miles further north, and that the intermediate hill country belonged to him as forming part of pergunnah Shoosung. *Held* (by Seton-Karr, J) that the acts of possession proved by the zamindar were sufficient under the circumstances to prove his proprietary right in the disputed tract, and for the passing of a decree in his favour. *Held* (by Macpherson, J) that they were not sufficient to entitle him to a decree being acts of mere easement independent of possession. *Held* (by Peacock, C J, Jackson and Phear, JJ,) on appeal under the Letters Patent. The rules laid down by Regulation X of 1802 were intended to take effect only within the tract of country described in s. 2, within which the administration of civil and criminal justice, etc, was by s, 3 declared to be vested in an officer to be denominated the Civil Commissioner of the north-eastern parts of Rungpore. The proviso in s. 8 was not intended to give substantive powers to the Governor General in Council in respect of other tracts of the country, and cl. 2 of the same section did not intend to take away the pewer of any Civil Court except within that tract. The proviso contained in s. 8 does not authorize Government to separate any part of the Garrow country beyond that described in s. 2 from the district and from the general Regula-

Boundary-*Contd.*

(1) Demarcation of boundary line—*Concld.*

tions, but merely directs the separation of such tracts from the estates of the neighbouring zamindars, and the discontinuance of the collection of cesses by the zamindars from the Garrows. By cl 2, s. 8, the jurisdiction of the Civil Courts is taken away only in respect of acts of the above description, done under the authority of the Government ; but that does not take away the right of a zamindar to contest a survey award drawing a line which deprives him of part of his zamindari and his permanently-settled estate. Where a Rajah had exercised rights and collected dues on certain hills and in forests north of an alleged line, and it was the unanimous opinion of all the revenue authorities that the forests were within his permanently-settled estate, the assumption by them and Government of such line as the boundary of the Rajah's estate, throwing upon him the onus of proving his claim to any portion north of that line, was held to be arbitrary and anomalous. If such proceedings were adopted under cl. 12, s. 5, Regulation IX of 1825, they were wholly irregular, and the irregularity can be no ground for excluding the Court from examining them. When a man is found exercising, on both sides of a boundary line, without objection, rights of ownership or incorporeal rights, and when it is not shown that there is any other owner of the soil, or that any objection to the exercise of such rights was made during a long course of years, his acts cannot be treated as the encroachments of a wrong doer. *Per Phear J.*—Where acts of user illustrate all the modes of enjoyment of which a disputed property can reasonably be expected to be capable, it can be rightly attributed to proprietorship of the tract upon which they were exercised. **Government v Rajkishen Singh. 8 W R 343 ; and on appeal, 9 W R 426.**

(2) Disputed boundary.

2—Survey—Suit for land from lessee of adjoining mouzah.

In a suit by the lessee of a mouzah to recover possession of a piece of land from a lessee of an adjoining mouzah, both making title under one zamindar, where a survey had taken place at a time when both mouzahs to which respectively the land was claimed as belonging were in his

Boundary-*Contd.*

(2) Disputed boundary—*Concld.*

possession, and when neither of the leases were in existence,—*Held* that suit involved simply a question of boundary, and what was to be ascertained was to which mouzah the land in dispute was found to belong at the time of survey.

Ameeree Begum v Gobind Pandey. 15 W R 35.

(3) Question of boundary.

3—— Evidence as to disputed boundaries -Burden of proof.

The rule as to the burden of proving the affirmative has no application in cases of boundary when the disputed dividing line runs through waste lands which are not the subject of definite possession. The litigants being in the position of counter-claimants, both are bound to aid the court in ascertaining the true line.

Lukhinarain Jagadeb v Jadu Nath Deo. 21 Cal 504, 21 I A 39.

Notes:—Ref: 26 Cal 53 ; 18 All 290 ; 4 C L J 198 ; 11 C W N 230; 9 C L J 451.

4.—Privy Council, Practice of—Reports of Deputy Collectors at local investigations.

Unless there be very good grounds for dissenting and differing from the reports made by the Deputy Collectors upon local investigations, the Courts even in India, and *a fortiori* the Courts in England, in dealing with boundary questions ought to give great weight to them and to be guided by them. The Privy Council will never interfere with the finding of an Indian Court upon a question of boundary, unless they are clearly satisfied that there has been some plain miscarriage in the conduct or decision of the case upon which they can put their hands, and make it the ground for an order reversing or varying the decree. **Ram Gopal Roy v. Gordon, Stuart & Co. 17 W R., 285= 14 Moore's I. A., 453.**

(4) Ascertaining and defining boundaries.

5.—The appellant having obtained a decree in 1854 declaring him entitled to erect boundary pillars according to a certain khusrah,—*Held* that it was now a work of great difficulty to as-

Boundary-*Contd.*

(4) Ascertaining and defining boundaries— *Concld.*

certain and define the boundaries, and that the Court in executing that decree was not precluded from taking into consideration other decrees between the same parties, not as contradicting or altering that khusrah, but as explaining and supporting the views taken by the Court of what the boundaries really were according to the khusrah.

Rajendro Kishore Singh v Hyabul Singh.
17 W R 379.

(5) Suit for removal of boundary marks.

6.—No claim for declaration of title or for possession—Maintainability of suit—Suit for removal of boundary marks.

This was a suit for the removal of certain boundary marks whereby the plaintiff alleged "hundreds of *bighas* of land owned and possessed by him and included in his zamindari land passed into the village of the defendant." *Held* that the suit as brought was unsustainable, seeing that the plaintiff cannot sue for the removal of the pillars without asking for a declaration of right and for maintenance of possession.

Thakuri Rai v Muhammad Sayyid.
A W N 1884, 4.

See (1) Evidence—Civil Cases—Maps.
(2) Juridiction of Civil Court—Revenue Courts—Orders of Revenue Courts.
(3) Sunderbuns Boundary.

Boundary Disputed.

See (1) Bengal Survey Act V of 1875.
(2) Bombay Land Revenue Act. 1879, ss. 119, 121 Case No (31).
10 Bom 456.

—Fluctuating.

See Accretion—New Formation of Alluvial Land—Rivers or Change in Course of Rivers. Case No (57) **11 B L R 265 : 18 W R 160; L R I A Sup Vol 34.**

Boundry Marks.

See (1) Bombay Land Revenue Act, 1879, s. 56. Case No (17) **15 Bom 67.**
(2) Madras Boundary Marks Act.
(3) Onus of proof.
(4) Rules Made under Acts.

Boundary-*Concld.*

Boundary Question of.

See Bengal Tenancy Act, s. 158. Case No (494) **17 Cal 277.**

Boundary—Erroneous boundary—Acquiescense—Estoppel—Adoption of boundary in settlement of dispute-Effect—**See** Deed--Construction of deeds, **6 Ind Cas 467=12 C L J 378.**

Boundary Dispute Cases—Appeal—Practice-Procedure. **See** Privy Council-Practice.
12 M L J 83=29 Cal 187 (P C).

Boundary Marks Act.

See (1) Madras Boundary Marks Act.
(2) Foreign Court jurisdiction of.

Brahman bride given in marriage by her mother without her father's consent.

See Hindu Law—Marriage.

Brahmins, Feeding of.

1.—Feeding and paying Brahmins.

A direction in a Will for feeding and paying the Brahmins on the day following the night of the *Sivaratri* is a valid bequest. 4 Cal 443 (1873); 6 Bom 24 (1881); 17 Bom 351 (1892), followed.

Kedar Nath Dutt v Atul Krishna Ghose.
12 C W N 1083.

Brahmo.

1.—Hindu—Sikh—Lapse from orthodox practice, effect of.

A Sikh or a Hindu by becoming a Brahmo does not necessarily cease to belong to the community in which he is born. Certain lapse from orthodox practice in matters of diet and cermonial observance held not to have the effect of excluding from the term Hindu in the Probate and Administration Act one who was born within it and who never became othrwise separated from the religious communion in which he was born.

Rani Bhagwan Kaur v Bose.
31 Cal 11=13 M L J 381=7 C W N 895=30 I A 249; P C.

Brahmo-*Concld.*

2.-Brahmo—Two wives not allowed.

A person having already a wife living is not competent, according to the tenants of the Progressive Brahmo Faith, to contract a valid marriage with another woman.

Sonaluxmi v Vishnuprasad. 6 Bom L R 58=28 Bom 597.

3.—Adoption-Capacity to give Brahmo's son —Adopted by Hindu widow—Incapacity-Burden of proof.

Where an opportunity was given to plaintiff to amend her plaint by raising a definite issue both as regards the factum and validity of an adoption, which she sought to impugn, but she did not raise any issue regarding the factum:—*Held* —That she was not entitled to raise the issue of the factum of the adoption at the hearing and that the question being merely one of law, the onus lay on her to prove that the adoption was invalid. A Hindu becoming a Brahmo can validly give his son born while a Brahmo, in adoption to a Hindu.27 Bom 551 foll. **Kusum Kumari Roy v Satyaranjan Das. 7 C W N 784=30 Cal 999.**

Brahmo Samaj.

See Brahmo. Case No. (3)

7 C W N 784=30 Cal 999.

Branches,

1.—Maxim—*Cejnsest solum ejust usqus ad coelum*—Question whether common law rights of owner can be limited by religious prejudices of neighbours.

Plaintiffs sued for an injunction restraining defendants from obstructing them in cutting certain branches of a pipal tree overhanging their property. The pipal tree grew in the enclosure of a temple and the resistance was based on the ground that the tree was an object of veneration to Hindus and that the lopping of its branches would be offensive to the religious feelings of the Hindu community. *Held*, that the plaintiffs were entitled to the injunction prayed for and that the fact that the plaintiff's action might cause annoyance to a large number of Hindus was not a sufficient ground of cutting down the well-recognised common law rights of an owner of property. **Behari Lal v Ghusa. 1902 A W N 169=24 All 499.**

Breach of condition.

See (1) Landlord and Tenant —Alteration of Conditions of Tenancy.
(2) Landlord and Tenant—Forefeiture—Breach of Conditions.
(3) Will—Construction.

Breach of contract,

See Cases under—
(1) Act XIII of 1859.
(2) Betrothal.
(3) Contract—Breach of contract.
(4) Damages—Measure and assessment of Damages-Breach of Contract.
(5) Damages-Suit for Damages—Breach of Contract.
(6) Ferry Rights.
(7) Hindu Law Contract.
(8) Jurisdiction—Causes of Jurisdiction—Cause of Action—Breach of Contract.
(9) Limitation Act, 1877, Arts. 115, 116 (1859, s. 1, cls. 9 and 10).
(10) Pleader and Client.

1.—Construction.

In a suit on a mortgage for Rs. 49,855 and odd, a consent decree was made whereby the Defendants consented to judgment for the entire amount but subject to the proviso that, if on a certain date the Defendants should pay to the Plaintiff the sum of Rs 35,000, the decree should be considered as satisfied. The decree further provided that if for the payment of the aforesaid sum it should be necessary for the Defendants to sell any portion of the mortgaged properties they should give the particulars of the properties to be sold to the Plaintiff who should then appraise the same within 30 days and after crediting the proper price against the Defendants' debt should execute a deed of release or deed for consent. The Plaintiff, however, refused to appraise any properties when asked to do so, and by reason of such refusal the Defendants were unable to pay up the amount within the date fixed. The Plaintiff thereupon applied for execution for the whole amount of the decree. *Held*,—That by reason of the breach of contract by the plaintiff, he was only entitled to a decree for Rs. 35,000. That the sum must be regarded as having been tendered and refused on the date fixed for payment thereof and would not therefore carry any interest. **Harendra Lal Roy Chowdhury v Maharani 5 C W N 536=28 Cal 557.**

Breach of contract-*Concld.*

2.—Suit for damages for breach of contract against Secretary of State for India-Government Officer, suit in consequence of some act done by one in capacity of—Small Cause Court suit, suit in nature of—Second appeal—Civil Procedure Code s 586.

The Station Staff Officer of Sitapur as an officer of Government, leased 1, 132 *bighas* 4 *biswas* of land to the plaintiff for grazing purposees for five years. In the 9th clause of the lease it was provided that the whole or any protion of it might be resumed for the whole term of the lease or for a lesser period on payment of a proprotionate compensation. In June 1898,451 *bighas* 4 *biswas* were taken from the plaintiff for the purpose of establishing Government grass farm compound,and compensation was paid to the plaintiff under the terms of cl 9 of the lease. In January 1899 the land which had been taken from the plaintiff was let to others for grazing purposes. The plaintiff sued the Secretary of State to recover Rs 450 as damages for the loss the plaintiff sustained by the land, which was taken from him being let to others and used for grazing purposes. The first Court dismissed the suit, the District Judge decreed it. In second appeal before the Judicial Commissioner a preliminary objection was taken to the effect that the appeal was barred by the provisions of s 586, Civil Procedure Code, inasmuch as the suit was of the nature of a Small Cause Court suit, and its value was under Rs 500. *Held*, that the suit fell within Art 3 Sch II of the Provincial Small Cause Court Act, and the appeal was not barred by s 586 of the Code of Civil Procedure. **Secretary of State for India in Council v Munshi Niaz Ahmad** **5 O C 403.**

Breach of contract of marriage.

Breach of contract of marriage—Suit for damages when contract was by father as guardian.—**See** Minor **10 P L R 97.**

Breach of custom.

See (1) Custom.
(2) Hindu Law Custom,
(3) Mahomedan Law Custom,

Breach of promise of marriage

See Contract-Breach of Contract.

Breach of trust

See (1) Partnership property
(2) Trust.
(3) Vendor and purchaser
(4) Public Charity
(5) Specific Performance Decree for
(6) Breach of trust

1.—Civ. Pro Code O 23 r. 3 (1882 S 375)—Trustee—breach of trust—Religious Practice—Beneficiaries C. P. C. S 437—Hindu Temple.

Where the hereditary trustee of the temple, after a decree had been made in his favour as representing the worshippers at the temple and pending an appeal by the Shanars, sought to enter into a compromise with them by admitting their right to worship in the temple contrary to the decision of the Court, and it was alleged and not disproved that he did so from a corrupt motive

Held, that the appellate Court very properly reinforced the cause of the worshippers of the temple by joining certain new plaintiffs.

The principles applicable to the case of a trustee who betrays his trust by surrendering customary usage of the institution, and if he fails to do so he is guilty of a breach of trust and still more so, if he deliberately attempts to effect a vital change of usage and to make it binding on the worshippers by obtaining a decree of the Court to establish it. 3 Merivale 353=17 Revised Reports 101 Fol, **Sankaralinga Nadan v Raja Rajeswar Dorai 12 C W N 946. (P C).**

2.—C P C O 23 r 3 (1882 S 375)—Trustee—Worshippers—Persons for whose benefit institution founded—Inquiry—Decree of first Court—Compromise by trustee—Giving up right under first decree—Lawful agreement.

Where the Raja of Ramnad, as trustee of the Kamuthi temple, brought a suit for a declaration against the Shanars that they were not entitled to worship, and for injunction and damages and obtained a decree, and from that decree, the Shanars appealed, and, pending such appeal,the trustee and Sha-

Breach of trust-*Contd.*

ners compromised, by which compromise the trustee gave up all rights under the decree and some of the worshippers and persons admittedly interested were on their application made parties to oppose the compromise. *Held*, (1) that the compromise by the trustee was not *bona fide* and not lawful within the meaning of S 375 I P C,, (2) that the decree of the lower court did not cease to be binding upon the parties by the mere fact of appeal, though the pendency of the appeal should open the whole question for the appellate Court, (3) that a trustee giving up the right under the decree under appeal would be guilty of breach of trust. **Rajah M Bhaskara Sethupati v Narayanasamy Gurukkal**

12 M L J 360.

3.—Ss 14, 7, 18, 3,—Endowments affected by regulation XIX of 1810, management of—— Removal of trustee for misconduct—Act XX of 1863, Ss 3, 7, 14 and 18.

The object of Act XX of 1863 was to relieve the Boards of Revenue and Local Agents from the duties imposed on them by Reg XIX of 1810, and, in order that any action may be taken under this Act S 3 of the act requires that the provisions of the Regulations specified in the preamble to that Act should be applicable to the endowment which is the subject of the suit, and that the nomination of trustees etc, should either be vested in or be exercisable by the Government at the time of the passing of the Act When the question was about the management of a certain religious endowment in Cuttack a list was admitted that in 1864, the Local Government appointed a Committee of three members under S, 7 of the Act, *held* that such appointment was a clear indication of the fact that that endowment was under the management of the Board of Revenue before the passing of the Act of 1863, and that the fact that an endowment had come under the management of the Board of Revenue was sufficient to characterise it as a public endowment and as one falling within the operations of this Act It was also held that all endowments which were effected by Reg XIX of 1810 whether they come under the Board of Revenue or not, fall within the purview of Act XX of 1863.

For the operation of this Act it is immaterial whether the office of the trustee or manager is

Breach of trust-*Concld.*

hereditary or not, and, in either case, a trustee or manager who misconducts himself and acts contrary to the object of the endowment, can be dealt with under the provisions of this Act.

Where the Court finds that a trustee was guilty of misconduct in the management of the endowment, an order by the Court directing him to execute a bond with sureties, in order to ensure better management for the future, is legal. (8 W R 313 fol, 18 All 227, 5 B L R App 55, 7 Cal 767, Ref 26 Mad 166, 2 Mad 197, 14 Mad 103, Fol.)

Mahomed Athar v Ramjan Khan

34 Cal 587.

Breach of warranty.

See (1) Vendor and purchaser

(2) Warranty.

Bribe.

1.—Limitation Act (XV of 1877), schedule II article 95- Knowledge Suspicion—Bribe—Secret commission—Effect of bribe on mind of receiver-Suit for rescission of lease—Estoppel—Fraud, contract induced by, voidable only—Remedy by rescission, when obtainable-Remedy by damages-Mere suspicion is not knowledge within the meaning of art 95, Limitation Act 1877.

Payments in the nature of a bribe or secret commission are open to the gravest reprehension, and when a bribe has been given it is immaterial to enquire what, if any, effect the bribe had on the mind of its receiver.

In a suit for rescission of a lease by the lessor on the ground that the lessee had bribed the lessor's servant to bring about the transaction, it appeared that, after the institution of the suit, the plaintiff had prosecuted an appeal and defended another on the footing that the lease was a valid one.

Held, that the plaintiff's action in the two appeals was only inadvertent, the suits having been instituted and the appeals preferred before the present suit was instituted, and that the plaintiff was not thereby precluded from seeking to rescind the lease.

A contract induced by fraud is only voidable and not void, and the remedy by rescission is open only so long as the parties can be restored

Bribe-*Concld.*

to the relative positions which they originally occupied.

Where it is impossible to put the defendant back in his original position, the plaintiff should ask for damages and not for rescission. L R 3 Q B D 549, (1899) 1 Q B 3 9; 68 L J Q B 360; 80 L T 11, Ref; L R 3 App Cas 831 Fol. Indra Nath Banerjee v E G Rooke
3 Ind Cas 316=14 C W N 101=37 Cal 81.

2.—Legal Practitioners Act (XVIII of 1879) as amended by (Act XI of 1896), Secs 13, 14—— Professional misconduct-Grossly improper conduct —Legal Practitioner advising payment of money to witness to speak the truth or to prevent giving false evidence-False Statements by legal practitioner in letter to induce speedy remittance for such purpose.

A legal practitioner by paying or offering to pay money to a witness to induce him to speak the truth or to prevent him from giving evidence may not be guilty of any offence criminally punishable but is guilty of unprofessional conduct. A legal practitioner in pressing his client for the payment of money to a witness to induce him to keep back unfavourable evidence is guilty of grossly improper conduct in the discharge of his professional duties within the meaning of Sec 14 of the Legal Practitioners Act. Nrityo Gopal Sen a Pleader 5 C W N 45

Bribe

—Suit to recover money paid as See Small Cause Court, Moffussil, Jurisdiction of (General
9 Ind Cas 82.3

Bridge

Re-building of—Bridge connecting houses situated on opposite sides of a lane—See Easement. 9 P L R 1911—9 Ind Cas 10?=51 P W R 10 1.

British India

—Tributary [illegible] Mayorbunj.

The tributary mehals of Orissa, of which Mayoorbunj is one do not form part of British India. Ratan Mahanti v Khatoo Sahoo
29 Cal 400=6 C W N 573

British India-*Contd.*

1—Kathiawar States whether British territory —Relation of British India with Native States, how ascertained—Sovereign powers of the Governor of Bombay in Council—Exercise in Native States through Political Agent—Courts of Political Agent and Assistant Political Agents, if King's Courts—Function of Governor in Council on appeal, whether judicial—Appeal to Privy Council.

The rights and powers of contract possessed and exercised over the Native States in India by the British Indian Government, with the corresponding restrictions upon the independent action of those States, are to some extent, the necessary consequences of the suzerainty vested in the predominant power. But apart from this general source, rights of very varying kinds have been acquired in connection with the several States, from other sources Such rights differ not only in origin but in kind and in degree in the cases of different states, so that in each instance in which the nature or extent of such rights becomes the subject of consideration, enquiry has to be made into the circumstances of the particular case. On a review of the relation of the Kathiawar States and their people to British India, and the character of the control exercised by the British Indian Government over those States and particularly with relation to the administration of justice, *Held*—That the Kathiawar States are not includad within the King's dominions. Large as has been the political control exercised over them, any assertion of territorial sovereignty has been avoided. No legislative power over them has ever been claimed The intervention in their affairs has never been carried further than was judged necessary, in the emergency, for the maintenance of peace, good order, and security. The position of the Chiefs has always been respected; and at least, in the case of the more important among them, many of the functions commonly regarded as attributes of sovereignty have been preserved to them. The form adopted in establishing and regulating tribunals in the province has been that which was regular and appropriate if it was not British territory, but quite irregular and inapplicable if it was. I A C 332 (1876), explained. If a Court, administering justice on the King's behalf, makes an order, judicial in its nature, by which some

British India-*Concld.*

one is injuriously affected, the person aggrieved is not precluded from applying to the King in Council to redress his wrong merely by the fact that he is not the King's subject. The jurisdiction exercised by the Courts of the Assistant Political Agents and the Political Agent in Kathiawar, and by the Governor of Bombay in Council on appeal is political and not judicial. No appeal lies to His Majesty in Council from the Courts in Kathiawar or from the decision of the Governor of Bombay in Council on appeal. **Hemchand Devchand v Azam Sakarlal Chhotamlal and The Taluka of Kotda Sangini v The State of Gondal (P C)**

10 C W N 361=8 Bom L R 120=3 A L J 259=3 C L J 395=16 M L J 115=33 Cal 219=33 I A 1 (P C).

Brit Jajamani bahis.

1—Suit to set aside sale of *brit jajmani bahis* —Ancestral moveable property—Suit not time-barred.

A suit to set aside a sale of *brit jajmani bahis* purchased with ancestral funds, if otherwise maintainable, would be governed by Art. 126, Limitation Act, 1877, and not by Art 49. Art 126 refers to both moveable and immoveable property belonging to a joint family

Kishen Lal v Shib Narain. 6 A L J 614=3 Ind Cas 505.

Broach and Kaira Encumbered Estates Act (XXI of 1881.)

See Public Officer.

1—Under the Broach and Kaira Encumbered Estates Act where the Thakur, whose indebtedness rendered necessary the application of the Act to his estate, dies during the management, there is nothing in the Acts which bars a suit against the successor during the management in respect of his own debts, though a decree in such suit could not be executed against the family estate.

Bhikha v Sidha Thakur Ganpatsingji. 1886 P J 107.

Broach and Kaira Encumbered Estates Act XXI of 1881 *Concld.*

2—Ss. 20, 9, 27, 37.—Suit in Civil Courts for partition not barred by liquidation scheme—'Unius expressio alterius exclusio, when applicable Plaint determines jurisdiction—No fixed rule as to impartibility of jagirs and saranjams—Each case depends on its circumstances—Alva is partible—Suit for its partition does not require certificate under Pensions Act, 1871.—

In respect of the debts and liabilities of a Thakur, Act XXI of 1881 ousts the jurisdiction of the Civil Courts as soon as a liquidation scheme under section 20 is sanctioned; but this ouster does not apply to a suit for partition among the debtor Thakurs themselves. Sections 9, 20 and 27 show that conclusively; but, as sec. 37 mentions succession only, it is argued that a suit for partition being not a suit relating to succession, on the principle of *unius expressio alterus exclusio*, the jurisdiction of the Civil Courts is excluded. The argument is not universally conclusive. It loses all force where one class of suits only are removed from the cognizance of the Civil Courts and no reason exists in the nature or purpose of the Act for extending the class.

Section 37 requires the manager to be made a party. His not being so is a matter for amendment and it does not take away the jurisdiction of the Court as it is the plaint which determines it.

Though large and important *jagirs* and *saranjams* are usually impartible, there is no general rule applicable to all estates held upon political tenure, but that each case must be considered separately according to circumstances.

From a consideration of the evidence it is found that the village of Alva is partible.

A Suit for its partition does not require a certificate under the Pensions Act of 1871 since the Maleks are the owners of the soil of the village and not merely assignees of its revenues.

Malek Jamiat Raju v Karimkhan Mubarajkhan. 1896 P J 721.

Broach Encumbered Estates Act (XIV of 1877)

1—In section 19 of Act XIV of 1877, the term "suits" includes application for execution of decrees and the section thereby excludes the

Broach Encumbered Estates Act XIV of 1877-*Concld.*

time during which the management has continued in computing the period of limitation in respect to such applications. **Bhulji Becher v Bawaji Daji. P J (1881) 62=5 Bom 448**

Broach Talukhdars' Relief Act XV of 1871.

1—S. 23—Manager of Thakoor's estate—Liability for damages for attachment in execution.—

The Broach Talukhdars' Relief Act, XV of 1871, does not bar the cognizance, by the Civil Court, of a suit to recover the amount improperly levied as rent of rent-free land, and to obtain a declaration that such land is not subject to the payment of rent, albeit that under s 23 of the Act the manager of a Thakoor's estate is exempt from personal liability for anything done by him *bona fide* pursuant to the Act, and is not subject to an action for damages on account of the attachment of the plaintiff's property.

Asmal Saleman v Collector of Broach 5 Bom 135.

Broach Thakur's Relief Act.

See Jurisdiction of Civil Court.

Brocage of office

1—Consideration unlawful—Brocage of—Consideration for creating facilities for confirmation in office. A promise to pay money in order to procure resignation of an office by the promisee with a view to the promisor securing the appointment is not an enforceable promise, the consideration being unlawful. **Saminatha Aiyar v Muthuswami Pillai 17 M L J 252=30 Mad 530.**

Broker.

See Contract—Wagering Contracts.

1—Position and rights of broker — Agent—Right to commission—Claim of brokerage from both vendor and vendee-Vendor and purchaser.-

A broker is entitled to his commission if the relation of buyer and seller is really brought about by him, although the actual sale has not been effected by him. A broker is entitled to his commission where he has induced in the vendor the contracting mind, the willingness to open

Broker-*Contd.*

negotiations upon a reasonable basis, even though a change or modification of the terms of the contract is made by the buyer and seller without his intervention. A broker sued the Municipality of Bombay for brokerage in respect of lands purchased by them. *Held*, that, if during the time that the broker was negotiating with the vendor the latter was induced to consent to the sale, the broker was entitled to his brokerage. It was not material to inquire what operated upon the mind of the vendor, and whether it was the advice of friends, or the knowledge that his land could be acquired compulsorily, or the persuasions of the broker. It was sufficient to support the broker's claim if the vendor's acceptance of the terms was brought about during his intervention; and the fact that the Municipal Commissioner stepped in at the last moment, and himself actually struck the bargain, did not deprive the broker of his brokerage. Primarily a broker is merely the agent of the party by whom he is originally employed. To make the other side liable to pay him brokerage it must be shown that he has been employed by such party to act for him, or that in the contract he has agreed to pay brokerage.

Municipal Corporation of Bombay v. Cuverji Hirji. Motlibai v. Cuverji Hirji, 20 Bom 124.

Notes:—Dist: 22 Bom 540. Ref: 9 Bom L R 1232.

2—Suit for brokerage—Contract effected by broker not carried out by purchaser—Quantum meruit.—

The plaintiff was employed by the defendants as broker to sell certain property. The defendants' letter, dated 3rd January 1895, engaging him as broker stated as follows:—"It is understood that the brokerage will be paid on receipt by us of the money, and that this transaction is to be completed within a fortnight from date". The plaintiff negotiated with one Pestonji Patel and his brother, who eventually agreed to become purchasers, but stipulated for four or five months within which to pay the purchase-money. On the 1st February 1895, the defendants through the plaintiff finally closed the contract with the purchasers, one of the terms of which provided that Rs. 10,000 should be paid immediately as earnest and the balance (Rs. 27,000) of the purchase-money to be paid within four months. The pur-

Broker *Contd.*

chasers were, however, unable to pay the Rs. 10,000 earnest-money, and they handed to the defendants three Bank of Bombay shares as security for the performance of the contract. One of the purchasers shortly afterwards died, the defendants apparently abandoned the idea of enforcing the contract, and at the end of the year they returned to the purchaser's family two of the Bank of Bombay shares, having (as they alleged) sold the third to defray the expenses which they had incurred in connection with the transaction. The plaintiff sued to recover Rs. 1,500 as brokerage from the defendants. *Held*, that under the circumstances the plaintiff was not entitled to recover the Rs. 1,500, but only to a *quantum meruit*, there being no previous agreement as to the time when the brokerage was to be paid and that he was only entitled to a percentage (5 per cent) on the value of the shares which had been actually received by the defendants. Part of the business for which the plaintiff was employed was to find a solvent purchaser.
Stokes v. Soondernath Khote, 22 Bom 540.

3—Right to sue—S. 236—Broker purporting to act as such but really acting as principal, if may recover.

Plaintiff's suit to recover Rs. 2,500 in respect of breach of three contracts for the purchase on sale of jute. The Court found as a fact that in the transaction in suit the Plaintiff purported to act as broker to the Defendant but really acted as principal and that this was without the knowledge and consent of the Defendant. *Held*-That sec. 236 of the Contract Act was a bar to Plaintiff's action. 2 Dow & C 188, 192, 5 Bli N S 165, 30 R R 147, H L (1831), 7 H L 802: s c 44 L J C P 302 (1874),followed **Sewdut Roy Maskara v. Mesrope Martyrose Nahapiet, 11 C W N 609=34 Cal 587.**

4—Liability for agent's fraud—Scope of authority discussed.

An undertaking by a broker to refund advances made by third parties to his constituents and giving a guarantee for the repayment of advances with profits is altogether outside the scope of his ordinary business and would not bind his partner unless the latter assented to it or subsequently ratified it. The duties and responsibilities of a broker discussed. A principal is liable for the wrongs of his agent committed within the scope of his authority and purporting to be for the benefit of the principal, though no express order of the principal can be shown, but where the fraud is committed by the agent when he was acting not in the interest of his employers but entirely in his own interests, the principal cannot be held responsible for the consequences of his fraudulent conduct. There is no duty incumbent upon mercantile men any more than upon other people to anticipate and to take precautions against the possibility of a theft of letters or of forgery being committed The rule that "whenever one or two of innocent parties must suffer by the act of a third person, he who has enabled such person to occasion the loss must sustain it", must be restricted to this that the neglect must be in the transaction itself and be the proximate and direct cause that led to the loss complained of. Even if there is negligence on the part of one of the parties in the conduct of their business it would not be sufficient to fix him with liability unless the loss was the ordinary or likely result of that negligence. 4 Bing 253, discussed and distinguished. The signing by a broker of a bought note in which he guarantees the fulfilment of a contract on the part of the seller raises no presumption of law in transactions between the same parties which cannot be contradicted, that subsequent bought notes, to which the signature of the broker is forged, containing similar guarantees were signed with the authority of the broker. **D. Mc Laren Morrison v. S Verschoyle 6 C W N 429.**

5 - Broker engaged to negotiate loan on mortgage—Implied guarantee by principal—Failure of principal to satisfy intending lender as to title—Broker's claim to remuneration:—

Defendant engaged plaintiff as broker to negotiate a loan of Rs. 18,000 on the first mortgage of certain properties, and agreed to pay plaintiff brokerage at 4 p c. Plaintiff procured a person who was prepared to lend the amount, and who actually placed the sum in the hands of the common attorney of himself and defendant. The attorney was not satisfied that the mortgage was to be the first mortgage of the property, and advised the intending lender to withdraw; and the transaction fell through. It was conceded for defendant that the circumstances were such as to justify the attorney in advising the lender's withdrawal. On plaintiff suing his principal for

Broker-*Concld.*

commission. *Held*—That plaintiff had duly performed his part of the contract and was therefore entitled to his remuneration under it, the failure of the negotiations being due to defendant's liability to satisfy the intending lender on a point in respect of which there was a guarantee by him in the contract, viz, the mortgage was to be a first mortgage. 33 L T 584, foll.

Gobind Chandra Khatick v. Elices,
7 C W N 297=30 Cal 202

6—Broker, liability of—Want of authority.—In order to make a broker liable on the ground of want of authority, the onus is upon the plaintiff to affirmatively prove such want of authority.

Bissessur Dass v. Johann Smidt,
10 C W N 14.

Brokerage.

Brokerage—On wagering contract — Contract Act, 1872. **1 L B R 128.**

Brokerage.

See (1) Broker.
(2) Pirncipal & Agent-Commission Agents.

Brokerage Contract.

1.—Principal and agent—Agent for raising a loan—Capitalist not ready and willing to advance on terms offered by principal—Remuneration of agents—Time, the essence of contract—Contract Act, s 55.

Quantum meruit—Where the remuneration of an agent is payable upon the performance by him of a definite undertaking he is entitled to be paid that remuneration as soon as he has substantially done all that he undertook to do, even if the principal acquires no benefit for his services, and, except where there is an express agreement or special custom to the contrary, even if the transaction in respect of which the remuneration is claimed falls through, provided that it does not fall through in consequence of any act or default of the agent. Where the agency is in respect of raising a loan, it is essential that the agent procures a person ready and willing to make the loan on the terms proposed; it is not sufficient that he procures a person willing to negotiate about the matter. The defendants granted a letter of authority to the plaintiffs to raise a loan of eleven lakhs on a mortgage of their entire estate. The capitalists with whom the plaintiffs entered into negotiations were not ready and willing to advance the money on the terms offered by the borrowers. They imposed a condition as to the margin of security never proposed or accepted by the borrowers. The transaction ultimately fell through: *Held*, that the plaintiffs never earned the remuneration claimed by them. The rule of equity, which is formulated in s 55 of the Contract Act, is to look at the whole scope of the transaction to see whether the parties really meant the time named to be of the essence of the contract. Where the plaintiffs claimed remuneration according to the contract which failed completely, they are not entitled to remuneration on the basis of *quantum meruit* for their services, which was not the foundation of their claim,

Kisl en Prashad Sinha v Purnendu Narain Sinha 15 C L J 40,

Brokerage fees.

1.— In estimating allowance of, in estimating compensation of land compulsorily acquired one set of brokerage fees that is to say, those payable on purchase, should be deducted, when the price is estimated by capitalising returns and deducting inevitable outgoings. But this is not necessary when the market price is known for the market has presumably already considered such items.

When the estimate is on the rental basis, the purchaser looks to annual returns minus outgoings as the value he gets for his money. If he does not look to those annual returns but only wants to sell again, then the value he expects to get is not estimated on the rental basis but upon the future market price which he speculates on obtaining from some third person and in determining how far that future price will pay him, he must reckon on re-couping himself from it, for all expenses which that transaction would involve and therefore will not buy unless he thinks that on re sale he can realise a price which will pay him back more than the market price at date of purchase. **Merwanji Muncherji Cama 9 Bom L R 1232.**

Brother.

See (1) Hindu Law—Inheritance——Special Heirs—Males—Nephew.
(2) Hindu Law-Inheritance-Special Heirs—Females-Sister.

Brother-*Concld.*

1.—Hindu Law–Impartible estate–Succession of Mitakshara-Brother Widow-Custom-Migration of family—Impartible zemindary-Savings by the holder—Property purchased from savings self-acquired property.

In families governed by the Mitakshara, the brother and not the widow of a childless man takes an ancestral estate. The tenancity of custom regulating succession even under the strain of migration is repeatedly recognized by the law. Where a holder of an ancestral Zamindari and the savings purchases land &c, the property so purchased becomes the self-acquired property of the holder. **Shrimati Rani Parbati Kumari Debi v Jagdis Chunder 4 Bom L R 365=6 C W N 490=29 Cal 433=29 I A 82 P C.**

Brother, alienation by.

See (1) Hindu Law—Alienation.
(2) Hindu Law –Joint family,

Brothers Of The Half Blood.

See Cases under Hindu Law—Inheritance—Special Heirs—Males- –Half Blood Relations.

Buddhist Law.

See Burmese Law

Building.

See Attachment—Subjects of Attachment—Building and house Materials Case No. (30). **21 Bom 588.**

—Occupied for charitable purposes.

See Bomboy Municipal Act 1888, ss 143, 144 Case No (7). **16 Bom 217.**

—Without sanction.—See Bengal Acts-Calcutta Municipal Act **7 C W N 374.**

Building and House Materials.

See Attachment

Building And Improving On Another's Land.

See Acquiescence,

Building beyond area for which permission is granted.

See Municipalities Act.

Building erected by adjoining owners.

1 —Liability of adjoining owners for costs of party wall—Agreements for building—Decision of Government surveyor made final in case of dispute—Right of suit—Right of one owner over portion of party wall not used or built on by the other.—

Under separate agreements made by them respectively with Government, the plaintiff and defendant held adjoining plots of land for building. The agreements contained the same terms and stipulations, among which were the following. (a) The buildings to be continuous, with party walls common to both adjoining houses. (b) All disputes regarding the cost and maintenance of party walls to be decided by the Government surveyor, whose decision shall be binding on both parties" The plaintiff employed a contractor to erect a house upon his plot of land. The house was completed in 1870, the north wall of which was built as a party wall in pursuance of the condition contained in the agreement with Government. Disputes subsequently arose between the plaintiff and his contractor, which were not settled until the 26th August 1878, on which date the plaintiff paid the contractor a sum of Rs 20513-4-11 which included the cost of the party wall. After the plaintiff's house had been completed, the defendant built his house upon the adjoining land, and in so doing he used a large portion of the party wall as the southern wall of his house. He paid the plaintiff half the cost of the protion so used by him. The rear portion of the said wall was not used by the defendant, as his house did not extend so far to the rear as the house of the plaintiff. The plaintiff demanded payment of half the cost of that part of the wall not used by the defendants, but the defendants refused to pay. The plaintiff then claimed that part of the wall as his own property, and proceeded to open windows in it. The defendants objected. The plaintiff subsequently filed the present suit, claiming from the defendants payment of half the costs of the said portion of the wall not used by the defendants, and, in the event of such payment not

Building erected by adjoining owners-*Contd.*

being awarded he prayed for a declaration that he was the sole owner of the said portion of the wall and for an injunction restraining the defendants from disturbing him in the sole enjoyment thereof The brother (Khatav Luddha) of the first defendant was originally made the second defendant of the suit He however disclaimed all interest in the premises and it appeared that in 1876 the first defendant had sold the property to him (Khatav Luddha), who in 1879 sold it to Kesserbai, the first defendant's wife Kesserbai accordingly was made the second defendant in the place of Khatav Luddha Both the defendants pleaded limitation and denied their liability to pay any part of the cost of that part of the wall which they did not use The first defendant further alleged that he had paid the whole cost of the foundation and other parts of the said wall and claimed to set off this payment against the claim of the plaintiff. At the original hearing, Scott J, held (1) that that part of the wall in dispute although not used by the defendants, was a party wall having regard to the terms of the agreement under which the said wall was erected (2) that Kesserbai was liable equally with the first defendant to pay for its part of the wall having purchased the property subject to the terms of the prior agreement of which she presumably had notice (3) that the suit was not barred but that there was no right of action for the cost of the party wall independently of the award of the Government surveyor in whose decision by all disputes as to such cost and that, until his decision was given there was no completed cause of action So it Accordingly on 11th December 1882 decreed that the defendants were severally liable to pay the half of whatever sum the Government surveyor might certify to be due for the cost of the disputed part of the said wall and that the defendants were entitled to set off, in the calculation of what was due from them the cost of any work or materials which the Government surveyor might find had been contributed by the first defendant The case was thereupon adjourned in order that the certificate of the Government surveyor might be obtained The Government surveyor subsequently gave his certificate as to the cost of the unused portion of the said wall but stated that on the evidence before him he was unable to decide as to the ownership of the foundations, etc, of the

Building erected by adjoining owners-*Concld.*

wall The case came on again before Scott, J, who decided to take evidence on the points left undetermined by the Government surveyor Witnesses were accordingly examined, and on 11th December 1883 the Court disallowed the defendant's claim of set off and gave judgment for the plaintiff for half the amount certified by the Government surveyor as the cost of the disputed part of the wall The defendants appealed *Held*, that, having regard to the terms of the agreements under which the plaintiff and defendants respectively held their property the Court was not competent to determine the question of the defendant's set off or the other points raised by the pleadings These were matters to be decided by the Government surveyor whose certificate was a condition precedent to the plaintiff's right to sue and upon which the Court might give judgment *Held*, also that the plaintiff was not entitled to use the portion of the wall not occupied by the defendants in any way except as a party wall It was erected under the agreement as a party wall and that it should be used for a purpose inconsistent with the idea of being a party wall would be opposed to the true intention of the parties to the agreement whether Government or the lessees. The plaintiff was not entitled to the full right of ownership over it as if it had been built on his own ground the declaration and injunction asked for, therefore were refused

Coverji Luddha v Morarji Punja

9 Bom 183

See Cooverji Luddha v Bhimji Girdhar

6 Bom 528

Notes.—Dub 13 C W N 1102 Not Fol 36 Cal 493

Building Lease

1—Party Wall Liability for cost of—Agreement to refer disputes to a third person Effect of such agreement on the right to sue—Award of such third person essential to right of action—Surveyor's certificate—Limitation—Covenant—Right to sue—Stranger to consideration—Landlord and tenant

The plaintiff sued to recover from the defendant half the Cost of a party wall The plaintiff and defendant were lessees of adjoining pieces of land under agreements made between them respectively and the Secretary of State for India in Council as

Building lease-*Contd.*

lessor The terms and conditions to the two agreements were the same. By these agreements the plaintiff and defendant respectively agreed to build houses upon the said pieces of land in the manner therein specified, and the agreements contained the two follwing clauses —(1) "The buildings to be continuous with party walls common to both adjoining houses ' (2) ' All disputes regarding the cost and maintenance of party walls to be decided by the Government surveyor, whose decision shall be binding on both parties In pursuance of the said agreements, the plaintiff and defendants respectively erected buildings on the said pieces of land The plaintiff caused the northern wall of his building to be built as a party wall, and it was used by the defendants as the southern wall of the building, erected by them The defendants paid the builder, who was employed by the plaintiff s sum of Rs. 700 on account of the cost of erecting the party wall but the rest of the cost was defrayed by the plaintiff The party wall was completed in November 1871 but, in consequence of disputes which arose between the plaintiff and the building contractor the sum payable to the latter was not ascertained for some years In March 1879 the plaintiff caused the party wall to be measured by a surveyor and on the 7th June 1879 demanded from the defendants payment of half the cost The defendants, however, failing to pay the sum demanded, the plaintiff after notice to the defendants, caused the cost of the said party wall to be ascertained by the Government surveyor, who by a certificate, dated the 25th February 1882, certified that the share of the cost to be borne by the defendants for the said party wall was Rs 226 The plaintiff in this action sought to recover his sum from the defendants minus the Rs 700, which, as abovestated, the defendants had already paid and for which the plaintiff gave them credit The defendants in their written statement alleged that the party wall had been partly built with materials supplied by them, and that in the year 1870 they had adjusted accounts with the plaintiff in respect of the said materials and the said party wall and it was then agreed that the sum of Rs700 paid by the defendants should be treated as a final settlement They also alleged that the plaintiff had settled disputes with the building contractors, and had only paid them three annas in the rupee on the amount of their claim in full satisfaction , the defendants pleaded that they ought not to be charged with more than

11 C. C. 60

Building lease-*Contd.*

their due proportion of such reduced amount It was further contended for the defendants that their obligation to pay half the cost of the party wall existed independently of the arrangement between them and the plaintiff to refer the matter to the Government surveyor that this latter covenant was only collateral, and did not interfere with the plaintiff s right to sue the defendants for their half share of the cost , that the plaintiff's cause of action in this respect arose on the 15th October 1878, when the contractor's claim was finally settled and that this suit not having been brought for more than three years after that date, it was barred by limitation *Held* that the suit was not barred There was no right of action independently of the valuation and award of the Government surveyor There was no separate covenant to pay compensation to which the covenant for reference to the Government surveyor could be collateral The rights of the parties were defined by the contracts, and under these, each lessee might have the benefit of a party wall on such terms and no others as he on his part submitted to Payment of a share of the cost was not one of those terms except in so far as each lessee, if a dispute arose, was bound by the decision of a Government surveyor That decision was not ancillary, serving to give greater explicitness to a right already fully subsisting It was essential to the right itself, and until it was made, no cause of action for the moiety of the cost arose Where, in leases granted by one lessor to several lessees taking sites for buildings intended to be contiguous and to form one block or group in mutual relation, there is a common covenant which is an inducement to the lessee to take the lease, and which he must know is equally an inducement to his neighbour to take his lease, neither can be called a stranger to the consideration Each may be regarded as an equitable assignee of the covenants which lessor made for his benefit as lessee Each, consequently, has an equitable right to enforce against the other, the obligation stipulated for in his interest, and serving as a part of his inducement (as the other knew) to the contract **Cooverji Luddha v Bhimji Girdhar 6 Bom 523.**

See Cooverji Luddha v Morarji Punja 9 Bom 183.

2—Lease for building purposes—Presumption of permanency

Where a lease is given for building

Building lease-*Concld.*

purposes the Court may well presume that it was intended to be a perpetual grant 23 W. R. 399 (1875) 4 C. W. N 210 : s. c. 27 Cal 570 (1900), relied on. 3 C. W. N. 502 : s c. L R 26 I A. 58 (1899), distinguished. **Raja Promoda Nath Roy v Sri Govindo Chowdhury 9 C W N 463=32 Cal 648.**

3—Contractor given additional indivisible work—Variation of original contract—Extension of time fixed for completion of original contract—Building owner not to claim penalties for non-completion within time stipulated—Extension of time on account of extra work—Extension not objected to—Acquiescence by contractor—See Contract—Miscellaneous. **13 M L J 488.**

Building materials.

See Attachment subjects of attachment

Building on another's Land.

See Cases under :—

(1) Building on land without title.
(2) Acquiescence.
(3) Estoppel.

—Special cases

(4) Injunction.

Building on another's Land—Upon Land of another—Estoppel—Limitation Act, 1908, art. 149. **13 Bom L R 92=9 Ind Cas 765.**

Building on another's Land—Suit for possession of grove—Permanent on grove.

See Valuation of suits.

A W N 1886, 106.

Building on another's Land—Acquiescence—On the land of another—Mere non-interference not sufficient to constitute an.

See Estoppel Estoppel by Conduct.

A W N 1899, 191.

Building on another's Land—Jurisdiction—Suit to recover land after removing buildings thereon—Not subject-matter of suit.

See Jurisdiction-General. 7 M L J 49.

Building on another's Land—Contract for sale-Rights of vendee. **See Specific Performance 1 A L J 688.**

Building on another's Land—Building Erection of-by one Right of another sharer to sue for demolition—Common land, **54 P R 1892.**

Building on land without title.

1—Right of person building to compensation—Bona fide belief of title.

Where a man builds on land belonging to another, he will not, when ejected, be allowed any compensation for the buildings, unless the circumstances show that he built in good faith, believing the land to be his own. 1 B L R A C 213, 3 B L R A C 18, 17 W R 467, and 7 B L R 152 : 12 W R 495 **Furzand Ali Khan v Aka Ali Mahomed. 3 C L R 194.**

See Wahdoollah v Golam Akbur. 25 W R 205.

2—Building on another person's land by other than a mere trespasser—Notice of adverse claim—Equitable right of removing buildings—Custom of country.

The law in India is that buildings may be removed if there has been good faith on the part of the builder. Maxim of English law *quad haerot in solo* is not necessarily applicable in this country. (6 W R 228, 4 All 55, 2 Cal 152, 233, 6 B H C 80, 15 W R P C 47, W R 1864, 20 Ref:)

Maung Hoya v Ma E Mya. U B R 1892 1896, Vol II, 214.

3—Erection of a building on another's land—Owner standing by, not preventing—Owner estopped.

Where the owner of a plot of land standing by does not interfere to prevent others building a house thereon, *held* that he is estopped from demanding that the house be pulled down.

Bhecka Singh v Hurjus. 7 P R 1866.

4—Proprietor ousting the occupier at pleasure—Usage.

According to the general usage in rural village the proprietor cannot oust the occupier of a house at pleasure on payment to the latter of the value of the materials of the building.

Buksha v Feeda. 20 P R 1868.

5—Erection of building on land with the consent of proprietors owing half share—Suit to eject by the owner of a fourth share—Defendants entitled to compensation.

Where plaintiff, the owner of a fourth share in a piece of building ground, sued to eject the defendants, who had built on the land with the

Building on land without title-*Contd.*

consent of the proprietors owning a half share, *held* that plaintiff was entitled to possession of her fourth share on her paying compensation to the defendants **Mussummat Zuhooran v Bumsee. 21 P R 1867.**

6—Execution of building by one on another's land—Compensation.

Where a man builds on the land of another, the builder may be allowed to remove his materials or the owner of the soil may take it over at a valuation or content himself with a ground rent according to the circumstances of the case and the conduct of the parties themselves.
Ramdhan v Kura Mal. 38 P R 1889.

Notes.—Ref. 91 P R 1892.

7—Erection of building on another's property—Compensation.

A party in possession erecting buildings upon or making improvements to property, *bona fide* is entitled for compensation for such building and improvements from the rightful owner. If such a person has been induced by the owner of the land to build, there may be an equitable transfer of property from the latter to the former **Kunhya Lal v Kishen Chund. 42 P R 1866.**

Notes.—Cited 2 P R 1885.

8—Occupation by persons without title—Erection of buildings—Delay of owner in bringing suits—Relief to which occupier without title is entitled.

Mere delay on the part of an owner of land in suing a person in possession without title, who erects buildings on the land he has illegally occupied, does not entitle the possessor to be maintained in possession. The particular relief to which a possessor so situated is entitled must depend upon the circumstances of the case.
Gouhar v Fazla, 53 P R 1878.

Notes—Cited. 121 P R 1885.

9—Land suit—Effect of not objecting to the valuation of a suit before the lower Court—Building upon another's land—Compensation.

Held, that, to determine whether a suit is a land suit, the true principle is to have regard to the character and use of the land at the time immediately before the cause of action arose: the use, to which the defendant may have devolved the land after the cause of action has arisen, is immaterial, and a land suit does not cease to be one, merely because something else is claimed along with it.

Held: also, that objection as to the valuation of a suit or to the admissibility of a document cannot be raised for the first time in appeal to Chief Court.

Held, further, that, except where the owner stands by and makes no protest when the building is being erected, a person knowingly building upon another's land is not entitled to claim compensation in the ejectment suit, but he can be allowed to remove the materials. (C 37 P R 1901 Fol; C 20 P R 1894, dissented from. 20 All 345; 21 All 496; 11 Cal 189; 29 Mad 497 Dist.)
H. H The Maharaja of Jaipur through Baij Nath v Mathra Das. 78 P W R 1910.

10—Building—Mandatory—Estoppel—Removal of building—Acquiescence—Discretion.

Held, that the Court rightly exercised its discretion in refusing a mandatory injunction to remove a new building erected with the permission of the Municipality under a *bona fide* belief that the plot belonged to the Municipality, especially when the owners living a few yards off never asserted their rights during the whole erection of building and brought the suit within 7 days of the year taken up for the completion of the building. 1890 A W N 191; 21 All 426, I E & I A 129 referred to. **Shama Charan v Babu Lal Misr. 1904 A W N 70.**

11—Non-proprietor.—House built by non-proprietor—House falling into ruins—Zemindar giving the site to others—Suit by first non-proprietor after 12 years—Custom—Burden of proof.

Where a house built by a non proprietor had fallen into ruins more than 12 years before the institution of the suit it is for the non-proprietor plaintiff to prove that the site still belongs to him under the terms of the *wajib-ul-arz* or some village custom **Aman Ali Khan v Musammat Nazimannissa. 3 Ind Cas 19.**

12—Building—Sanction——Limitation—Damages:

The special limitation provided for by s. 427 of Act II of (B C) 1888 does not apply to a withdrawal of a sanction to build once given, for such withdrawal cannot be considered as an act done or purporting to be done, within the meaning of that section.

Building on land without title-*Concld*

On the Corporation's failing to pass orders within a fortnight on an application for sanction to build, the right of the applicant to build under s. 250 of the above Act becomes an absolute one.

The Corporation is bound by the acts of its officers. **Tullaram v The Corporation of Calcatta. 7 C W N 329=30 Cal 317.**

13.—Standing by.

If a stranger builds upon the land of another, although believing it to be his own, the owner is entitled to recover the land with the buildings on it, unless there are special circumstances amounting to a standing by on the part of the real owner such as to induce the belief that he intended to forego his right. **Vinayakrao v Vidyashankar 9 Bom L R 404.**

See also cases under :—

(1) Acquiescence.
(2) Estoppel.
(3) Equitable Relief.
(4) Improvements.
(5) Landlord and Tenant.
(6) Mortgage.

Building on Land right to revenue and Compensation for improvement.

See Landlord and Tenant.

Building on thorough fare.

See (1) Injunction.
(2) Damages.

Buildings.

—Erection of.

See (1) Acquiescence.
(2) Bombay District Municipal Act, 1873, s. 33, Case Nos. (16-17-18). **18 Bom 547; 19 Bom 27; 21 Bom 187.**
(3) Bombay Survey and Settlement Act, 1865, ss. 35, 48—Enjoyment of Joint Property. Case No. (7). **1 Bom 352.**
(4) Co-sharers—Enjoyment of Joint Property—Erection of Buildings.
(5) Improvements.
(6) Landlord and Tenant—Alteration of Conditions of Tenancy—Erection of Buildings.
(7) Landlord and Tenant—Buildings on Land—Right to remove, and Compensation for, Improvements.

Buildings-*Concld.*

—Repair of.

See Madras District Municipalities Act, S. 179.

Buildings, Right to removal of

See (1) Co-sharers—Erection of Buildings—Enjoyment of Joint Property.
(2) Landlord and Tenant—Buildings on Land, Right to remove, and Compensation for, Improvements.
(3) Prescription—Easements—Light and Air.

Building sites.

See (1) Municipal Act.
(2) Abadi. Case No. (4), **12 C P L R 146.**
(3) Landlord and tenant.

Building, suit to Restrain.

See Right of suit.

Bulahar, office of.

1—Nature of office—Power of zamindar to dismiss officer.

The office of a bulahar is an office held only during the zamindar's pleasure, and the person holding such an office is removeable by the zamindar. **Sunoo Khan v Oodea. 2 Agra 140.**

Bundee Transaction.

See (1) Contract-Wagering contracts.
(2) Right of suit

Bundelkhand Encumbered Estates Act.

1—Local S. 12—Joint decree-Some judgment-debtors taking the benefit of the Act, discharged—Liability of the remaining judgment-debtors.

Judgment-debt is a private debt within the meaning of S. 12 of the Bundelkhand Encumbered Estates Act. Where the holder of a decree against six judgment-debtors, five of whom took the benefit of the Act, failed to put forward his claim before a special judge during the time allowed by law, the judgment-debt must be deemed to have been discharged to the extent of the joint liability of the persons taking the benefit of the Act. The judgment-debtor, who did not take the benefit of the Act, is only liable for his share. **Makund Rao v Janki Bai. 5 A L J 132= (1908) A W N 43=30 All 441.**

Bundelkhand Encumbered Estates Act-*Concld.*

2—Encumbered Estates Bundelkhand Act I of (1903) S. 10 (b)—Mortgage-debt—Decision of special Judge—Fresh suit, maintainability of—Civil Court—Jurisdiction.

A mortgage-debt which has been the subject of enquiry and adjudication by the special Judge under the Bundelkhand Encumbered Estates Act I of 1903, cannot be a subject of fresh suit in a Civil Court. **Sheoram Apadeo v Seth Phul Chand. 6 Ind Cas 164**

Bundelkhand Land Alienation Act (II of 1903).

1—Local—Section 9—matter referred to a Collector—Conditional sale clause struck off—Jurisdiction of Civil Court—Money decree.

The jurisdiction of a civil court does not cease when the question is referred to a Collector under s. 9 clause 3 of the Bundelkhand land alienation act. Where the collector acting under sub section 3 of section 9 strikes off the conditional sale clause with the concurrence of the mortgagee from the deed, and the mortgagee does not take a mortgage in the form prescribed by s. 6, the mortgage is not satisfied, but the civil court should pass a decree in favour of the mortgagees for their money demand, **Baldeo Prasad v Sheo Nandan. 3 A L J 740=(1906) A W N 14**

Bunds.

See Right to use of water.

Bunkur, Right of.

1—Proprietorship on the soil.

The right of bunkur (a right of cutting wood) is a right indicative of a certain dominion over the soil. **Seelanund Sing v Moheshur Singh. 3 W R P C 19: 10 Moore's I A 81.**

Burden of proof.

See Onus Probandi.

Burgadar.

1—Burgadar, if tenant—Suit for burga rent, if maintainable in Small Cause Court—Small Cause Courts Act (IX of 1887), Sch II, cl (8).

Settlement with a burgadar, under which he undertakes to cultivate the land for a half share of the produce, the remaining half going to the owner, does not by itself create the relation of landlord and tenant between the parties. A suit for recovery of the price of his share of the produce by the owner is maintainable in the Small Cause Court. **Kade Mandal v Ahadali Mola. 14 C W N 639=6 Ind Cas 594.**

Burial-ground

See Right of Suit—Charities and Trusts.

—**Prohibiting use of.**

See Calcutta Municipal Consolidation Act, S. 381.

1——Acquisition by Government——Compensation——Respective claims of Municipality and owner of the soil—Dedication of user—Extinction of use—Reverter to owner—Market-value of burning ground—Bengal Municipal Act (III, B. C. of 1884), sec. 30—Construction—" And" —" Ghat " —Meaning.

An owner of lands may appropriate land to public use and yet retain in himself all such rights in the soil as are compatible with the full exercise and enjoyment of the public use to which the property has been devoted, and it is not essential to constitute a valid dedication that lagal title should pass from the owner. Nor is it inconsistent with an effectual dedication that the owner should continue to make any and all uses of the land which do not interfere with the uses for which it is dedicated. *Held*, in respect of land which had not been expressly dedicated but was used by the public as a burning ground, that the circumstances of the case showed that the owner made a dedication of user of the property for the purpose of a burning ground, such dedication to remain in force only so long as the property continued to be used as a burning ground. When the sole use to which property had been dedicated becomes impossible of execution by reason of statutory acquisition and compulsory use for purpose inconsistent with the original dedication it reverts to the dedicator or his representative. Although it is an essential element of a good dedication that it should be irrevocable, nevertheless when after a valid dedication has been made the use for which the property is dedicated becomes impossible of execution or the object of the use wholly fails, there is an abandonment in consequence of which the rights of the public the-

Burial-ground-*Contd.*

rein fail and a reversion takes place,the dedication being taken to have spent its force when the use ceased. 1 C W N 698: s c L R 24 I A 177; 25 Cal. 194 (1897), distinguished. Unlike the road-land which was acquired by the Collector in the above case, the burning ground in this case, treated as such, had a market value which had been actually assessed. Therefore the person who was proved to be the owner of the soil was entitled to the compensation assessed. The word *ghat* in sec. 30 of the *B*engal Municipal Act does not include a tract of land used as a burning ground. That sub soil under a *ghat* does not vest in the Municipality under sec. 30 of the Bengal Municipal Act; but the *ghat* itself does. The Legislature by enacting sec. 30 intended that such roads, etc., as are private property, or are maintained by Government or at the public expense should not vest in the Municipality. **The Chairman, Howrah Municipality v Khettra Kristo Mitter.** **10 C W N 1044= 4 C L J 343.**

2.—S. 9 (1882—S, 11)—Jurisdiction—Suit-Right of burial—Claim to recite prayers in the mosque—Jurisdiction of Civil Courts.—

Held,-that though in suits relating to ritual or religious observance only, the Civil Courts in this country have no jurisdicion,when the matter is of a mixed spiritual and temporal character,the question will depend upon the nature of the connection between the facts, and if the spiritual question is no intrinsically connected with the temporal as to be inseparable from it, it would be the duty of the Courts in trying the civil disputes to enquire into the spiritual matter thus intimately related.

Where the plaintiffs alleged that they had a right to bury their deceased relations in a certain mosque, and in the course of the burial to recite prayers at a particular spot in the mosque that the recitation of the prayers was a necessary part of the burial and that they were hindered from exercising their right in accordance with the law and usage of the community to which they belonged, by the defendant who asserted an exlusive right to recite the prayers in himself. 7 Bom 328; 26 Bom 198 Ref.

Held, that though the defendant's objections were limited to that part of the ceremony which consisted in the recital of prayers the dispute did not relate to a matter ot ritual only and that the plaintiffs were entitled to go into the question whether. according to the law and customs governing their community, their right of burial was in the way alleged by them. **Tharagan v. K M M Sahib Tharagan.**

1 M L T 423=16 M L J 471=30 Mad 15

3.—Nuisance—Opening of burning and burial ground not actionable—Even if so, Municipality protected—Limitation Continuing nuisance:

The Municipality of Madras opened a burning and burial ground close to the plaintiff's factory with the result that the ground was a source of nuisance, and led to the depreciation in value of the premises. S.392 of the City of Madras Municipal Act says that the Municipal Commissioners "shall provide a sufficient number of convenient and fitting places for burial and burning grounds" and S. 458 gives a right of action to any one aggrieved by the failure of the Commissioners to perform a duty imposed on them by the Act. The plaintiff sued for an injunction restraining the defendents from using the land as a burial and burning ground and for damages. No negligence was proved by him in the use of the land as burial and burning ground. There was some evidence that it was a source of nuisance to any one who occupied plaintiff's premises, and that their market value had been depreciated by the opening of the burial ground *Held*, (1) No actionable nuisance had been proved. It cannot be laid down as a legal proposition or doctrine, that any thing which under any circumstance, lessens the comfort or endangers the health or safety of a neighbour,must necessarily be an actionable nuisance. The use of a place dedicated for the communal purpose of cremation in a way not calculated to aggravate the inconveniences necessarily incident to such an act, as it is generally performed in this country, is not a public nuisance. (2)*Sir Arnold White*, C J (a) Even if an actionable nuisance had been proved, the defendants were protected, as the defendants acted under statutory powers, and were even under statutory obligation to open burning grounds. 11 A C 45 foll; 6 A C 193 distinguished (*b*) The mere fact that a neighbouring land owner has sustained damage from the establishment of a burning and burial ground does not show that the site selected is not

Burial-ground-*Concld.*.

convenient and fitting. (c) The words "within or without the limits of the city" must be read *secundum subjectammeria* and with reference to the requirements of the community in connection with the disposal of corpses and the general necessities of the case. (*d*) By S. 433 of the Act, the period of limitation for the commencement of suits against the Commissioners in respect of any thing done in pursuance of the powers given by the Act is fixed at six months. *Semble*:—That plaintiff's cause of action if any. arose when the site began to be used as a burial ground, namely, in 1896, and that the claim was barred by limitation, both under S. 433 and the general law. **Muhommad Mohidin Sait v. The Municipal Commissioners for the City of Madras.** **25 Mad 118.**

Burma Act XXI of 1863 (Recorders' Courts, Burma).

Notes:—Rep; Act VII Of 1872.

Burma Boundaries Act V of 1880.

1—Public right of way—In Burma there appears to be no statute defining the mode of acquiring rights of way over Government land. From long continued user of way by the public over land belonging to the crown, dedication, in the absence of anything to rebut the presumption, ought to be presumed. VI App. C 636 Fol: 14 Bom 215 Ref: When an order under the Boundaries Act is alleged, the fact of its existence and of its having been made by a competent officer after demarcation had been ordered by Government must be proved. **Angus Sutherland v Azim Nulla Mahomed.** **L B R 1872—1892, 550.**

2—Ss. 5, 6, 11 and 12—Decision of Boundary Officer determines the boundaries finally—Bar to subsequent claim.

Where it was contended that the proceedings of the Boundary Officer determining the boundaries between two plots had the effect of determining the boundaries of Government only.

Held, that the decision of the Boundary Officer defined all the boundaries of both the plots including the common boundary between them. 5 L B R 7: 2 Ind. Cas 351 Fol.
B Dey v Halima Bee. **11 Ind Cas 916.**

Burma Bouudaries Act V of 1880-*Concld.*

3—S. 17—Boundary dispute—Decision of a Boundary Officer—Jurisdiction of Civil Courts to entertain suit as to boundaries or as to title.—

Under S. 17 of the Boundaries Act, the order of a Boundary Officer in respect to a boundary is conclusive, subject to the provisions, relating to appeals from such an order, and so no further suit, with respect to the boundary,can be brought in the Civil Courts.

As matters of title must be gone into in the settlement of a boundary dispute in order to arrive at correct boundaries, the decision under the Act bars a Civil suit as to title also.
Ma on Bwin v The San. **5 L B R 7= 2 Ind Cas 351.**

Burma Courts Act (Act XVII of 1875)

1—Ss. 2 (b), 30—Suit for rent of land-"Land suit"—Right of—

In this second appeal, it was contended, on behalf of the respondent, that a suit for rent is not a land-suit as defined in s. 2 (b) of the Act and that, therefore, in the present suit, which was one for recovery of rent of land under a lease, there was no second appeal on questions of fact.

Held, that a right to rent of land is a right or interest in immoveable property (2 L R B 124 F.), and a suit for such rent is a land-suit; and a second appeal on facts is, therefore, allowed by s. 30 of the Act. **Kaung Hla Pru v San Paw** **3 L B R 90.**

2—Buddist-law of marriage—wife's claim for maintenance.

According to the Buddist law in British Burma husband must maintain his wife. He is liable to pay debts contracted by her for necessaries if he fails to maintain her. But this law has no application if the wife had sufficient means of her own. Therefore she cannot maintain a suit against her husband for her expenses of necessaries, living for a past period during which she had maintained herself. **Moung Hmoon Htaw v Mah Hpwah.** **10 Cal 777. 11 I A 109.**

S 25—Jurisdiction of Court—Suit of which is not possible to estimate the value—Guardians and Wards Act VIII of 1890—Civil Pro. Code s. 11—See Jurisdiction—Question of Jurisdiction. **2 L B R 140.**

Burma Courts Act (Act XVII of 1875—*Concl'd.*

3—4—Limitation for second appeals.—

Limitation of time prescribed for an appeal to a High Court under the Limitation Act of 1877 has no application to a second appeal under s. 27 of the Burma Courts Act.
Mahomed Hossein v Inodeen. 10 Cal 946.

Notes:—Dist: 13 Cal 221.

—S. 49.

See Appeal to Privy Council—Cases in which appeal lies or not—Valuation of appeal.
Case No. (101) 24 Cal 30.

5—Restitution of conjugal rights—Appeal from the decree of the Recorder of Rangoon.

The proviso in s. 49 of the Burma Courts Act is an express declaration, that it is a condition precedent to an appeal from the Recorder of Rangoon's Court that the value of the suit must be one as can be calculated in money and the value must be within certain specified limits. Therefore no appeal will lie from the decree for the restitution of conjugal rights under the Burma Courts Act. **Golam Rahman v Fatima Bibi. 13 Cal 232.**

Notes:—Fol: 18 Cal 378; 31 Cal 849. Dist: 28 All 545, F B=3 A L J 266=(1906), W N 99; 34 Cal 352. Ref: 31 Cal 849; 8 C W N 705; 11 C W N 458; 5 C L J 400.

6—Certificate of administration—S 28 of Act (XL of 1858.)

Appeal under s. 28 of Act (XL of 1858) is governed by the ordinary law of appeals laid down in the Burma Courts Act. Therefore no appeal will lie from an order refusing an application for the issue of a certificate for administration under act XL of 1858, the application being incapable of a money value.
Mulla Adjim. 14 Cal 351.

7—Art 156 of the Limitation Act-Burma Law s. 97.—

An appeal from the Recorder of Rangoon to the High Court is an appeal under C. P. Code and therefore must be made within the time prescribed by art. 154 of the Limitation Act, 1877.
Aga Mahomed Hamadani v Cohen. 13 Cal 221.

Burma Courts Act (XI of 1889)

1—Transfer of Property Act s. 76.

The fact that s,4 of the Lower Burma Courts Act 1889 requires that accounts between mortgagor and mortgagee in possession should be taken in accordance with the provisions of s. 76 of T P Act is in accordance with justice,equity and good conscience.
Kadir Moidin v Nepean. 26 Cal 1.

—s. 40.

See Appeal to Privy Council—Cases in which Appeal lies or not—Valuation of Appeal.
Case No. (101). **24 Cal 30.**

—s. 42.

See Recorder of Rangoon.

—Ss. 50 and 69.

See Insolvent Act, s. 50.

Burma Fisheries Act (Act VII of 1875)

1-Fishery rules—Lessee, rights of,to the fish in adjacent waters.

The lessee of a fishery is bound by the plan thereof delivered to him under r. 20 of the Rules under the Fisheries Act, and is debarred by s. 91 of the Evidence Act from proving that he is entitled to the fish of any waters not entered in such plan. He cannot recover damages until after clear proof of an appreciable diminution in the stock of fish in his fishery caused by poaching in adjacent waters. **Maung San Nyein v Maung Te L B R 1872—1892, 604.**

2—Rules under—Fishery, plan of.

When a plan of fishery is given to lessee under rr. 6 and 20 of the Rules under the Burma Fisheries Act, such plan showing the nature of the contract between him and the Government, no right is reserved to the Commissioner or any other authority subsequently to reduce the extent of the fishery shown therein. **Maung Tha Yauk v Maung Aung Pyo. L B R 1872—1892, 602.**

Burma Forest Act (IV of 1902)

1—S. 10, not ultra vires of legislation.

The Indian legislatures have the power to limit the liability of the Government for loss or damage caused by its servants, and the provisions

Burma Land and Revenue Act II of 1876-*Contd.*

of S. 80 of the Burma Forests Act are not *ultra vires* of the legislature. **Maung Po Kyi v Secretary of State for India** 8 Ind Cas 994.

Burma Land and Revenue Act II of 1876.

Notes.—Rep in pt.. Act 11 of 1880; Act XII of 1882; Act XIII of 1898; s 18; Am act XIII of 1898, s 16; Bur Act I of 1901; Application of certain provisions ext. Bur Act III of 1905, s 30; "Local Government" substituted for "Chief Commissioner," s 8 (B) and Heading over s 39 am., ss 22-A, 38-A, 54-A, 54-B ins.. Bur Act 1 of 1907, ss 2 to 6.

1.—Title of sub-tenant of a Government tenant to land adjoining the tenant's holding cleared and cultivated by the sub-tenant—Landlord and tenant—Estoppel.

Where the plaintiff held certain land under Government, which he sublet to defendant who afterwards extended his cultivation by entering upon and clearing waste land (the land in suit) adjoining the plaintiff's holding, and got his own name entered in the thugyi's books as the Government tenant of the same, and afterwards regularly paid the Government revenue thereon and sued to have his title declared as the Government tenant of the land in suit, on the ground that defendant held it only as his (plaintiff's) sub tenant, held that as there was no evidence to show that defendant had ever attorned to plaintiff in respect of the land in suit, or that the plaintiff had ever been recognized by Government as the Government tenant, the plaintiff had no title. **Maung Kyauk Lon v Naung Shwe Kyauk** L B R 1872—1892, 489.

2.—S. 7 of Rules of 1879, issued under—Grants of ownership—Title to hold land —

Where the plaintiff obtained a grant of ownership of certain land from the Deputy Commissioner and defendant, on the ground that he was the occupant of the land adjoining and that he had received no notice as required by s. 7 of the Rules of 1879 issued under the provisions of the Burma Land and Revenue Act, and also claiming to be the Government tenant of a portion of the land granted to plaintiff, ousted the plaintiff from the portion so claimed and plaintiff sued to recover possession, *held* that the fact that

Burma Land and Revenue Act II of 1876-*Contd.*

notice had not been duly served on the defendant did not render the grant to plaintiff invalid, and that as the grant gave the plaintiff a clear title, the defendant was bound to show a superior title. It is doubtful whether the Civil Court has any jurisdiction in a suit of this nature, having regard to s. 55 cl. (f) Act 11 of 1879. **Maung Thun v. Mapao** L B R 1872—1892, 273.

Notes.—Cons., L B R 1893—1900, 473.

3.—S. 7—Adverse title to land—Mortgagor—Mortgagee.

A mortgagee by being in possession of land for 12 years does not acquire the title to the land adversely to the mortgagor under the provisions of s 7 of Act II of 1876. The provisions of that section have no application as between a mortgagor and a mortgagee, or between any permissive occupant of land and the person other than Government by whose permission the land is occupied. **Maung Kwe IU v. Maung San Ya** L B R 1893—1900, 3.

4.—Ss. 7 and 17—Title to land in possession by prescription—Status of land-holder—Patta grant—Suit for recovery of possession of land granted under patta—Reference to Revenue authorities.

S. 7 of the Land and Revenue Act allows a person in possession of land to acquire a title against Government by prescription, and the grant of the patta by the Government will not put the grantee in a better position than that of the grantor. The grantee will take the patta, subject to the rights of any person in possession, and the claim of the grantee to the land will be liable to be defeated if he does not get possession before anyone else has acquired the status of land-holder. In a suit to recover possession of certain land alleged to have been granted under a patta to plaintiff, where the defendant contends that at the time of institution of such suit he, the defendant, had acquired the status of land-holder in respect to such land, the point should be referred to the revenue authorities for decision under s. 17 of the Land and Revenue Act. **Maung Shwe Byi v. Maung Kyaw Sho,** L B R 1893—1900, 24.

5.—S. 10—Suit for possession of land.

S. 10 of the Act does not say that a plaintiff

Burma Land and Revenue Act II of 1876-*Contd.*

suing under that section to be put in possession is bound to make Government a party to the suit. **Maung Pan Ngon v Maung Sein Da.** L B R 1893—1900. 635.

6.—Ss. 13, 56—Jurisdiction.

Reading together s. 12 of the Land and Revenue Act and s. 84 of the rules under that Act, applications by landholders for permission to resign land temporarily must be by written petition. Where in a suit to recover possession of a piece of land which the thugyi had settled with defendant, it was admitted that the plaintiff had once acquired the rights of a landholder with respect to the land in suit and had relinquished it, but his allegation that he relinquished the land only temporarily, was not proved, *held* that the plaintiff's suit was practically one to set aside a settlement made by the thugyi, and the jurisdiction of the Civil Court was barred by s. 6 of the Land and Revenue Act. The defendant having obtained a settlement of the land from the thugyi was entitled to hold it until plaintiff could establish his right to a settlement before the Revenue authorities under s. 13. **Nga Shwe Eik v. Nga Tha Aung.** L B R 1872—1892. 531

7.—S. 19, 56-Jurisdiction of Civil or Revenue-Courts—Claims by temporary occupiers—Revenue authorities to decide questions under S. 19.

Where the occupier of land applied for a lease, but the Sub-Divisional officer, instead of granting a lease, merely ordered that, as the applicant had made his garden before the issue of a Government Circular prohibiting further leases in the locality, he should not be disturbed in his possession.

Held, that such an order could not be taken as the equivalent of formal grant, and bestowed no higher status than that of temporary occupier under S. 19 of the Burma Land and Revenue Act.

In the absence of a grant made by or on behalf of Government, an occupier who has not acquired the status of a landholder must come under S. 19. Under S. 56 of the Act, the Revenue Authorities alone can decide questions as to who are to occupy lands under S. 19, and no Civil Court can therefore, grant a declaration of title sought by an occupier. **Maung Po Chit v Periacurupen Chetty,** 12 Ind Cas 22.

Burma Land and Revenue Act II of 1876-*Contd.*

8.—Ss. 19, 55, 56-Jurisdiction of Civil Court.

The Civil Court has jurisdiction in all matters not expressly exempted from its jurisdiction by s. 56 of the Land and Revenue Act, 1876 The plaintiff held paddy-land all round a village tank to which all the villagers had a right of access across his land and the villagers enclosed with a fence a piece of land all round, and immediately adjoining, the tank in order to prevent plaintiff encroaching and interfering, with their use and enjoyment of the tank, and the plaintiff then sued defendants to declare his title to a portion of the land so enclosed; *held* that the Civil Court had jurisdiction to entertain the suit, there being nothing to show that the dispute between the parties arose out of any claim to hold land temporarily under Rules framed by the Local Government under s 19 of the Land and Revenue Act. **Maung San Ya v. Maung Ok** L B R 1872-1892, 506.

9.—Ss. 19, 56, 55, Proviso 1 (b), 17—Sale—Mortgage-Defective title—Jurisdiction of Civil Court, objection to.

Where plaintiffs sued to redeem certain agricultural land alleged to have been mortgaged to defendants who pleaded that plaintiffs sold the lands to them outright, and it appeared in evidence that part of the land was cleared about 13 years before the institution of the suit and part less than 12 years before that date, *held* that as it appeared at the hearing that the plaintiffs had neither a grant nor the status of a landholder their claim fell under s. 19, Lower Burma Land and Revenue Act, and that the jurisdiction of the Civil Court was ousted by s. 56 read with s 55, proviso 1 (b) of that Act. When an issue arises on such question it should be referred to the Revenue Officer under s. 17 of that Act. An objection may be taken at any time and cannot be met by s. 578 C P C 1882. 11 Mad 26 Fol. **Maung San Paing v Shwe Hlaing.** 1 L B R 277.

10.—Ss. 37 51, rules under—Land in possession of cultivator without grant or lease—Unauthorised permission by thugyi to another to work salt thereon—Eviction.

Grants or leases for salt manufacture are given under Revenue Rule 87 and can only be given

Burma Land and Revenue Act II of 1876 - *contd.*

by Sub divisional Officers and Deputy Commissioners There is no authority for holding that a thugyi can give verbal permission to salt boilers to occupy land for this purpose. Under r. 51 cultivators are able to enter upon waste or uncleared lands without express permission, but they are liable to pay full revenue rates, and are also liable to eviction. Under s. 23 of the Act all culturable land, with certain exceptions, which do not apply to this case, is liable to land revenue. The unauthorized action of a thugyi in giving one person permission to work salt on the land in the occupation of another person does not amount to an ejectment of that other person. **Maung Kya Pyu v Tha Nga Aung. L B R 1893—1900, 634.**

11.—Ss 47, 55, 56—Sale of land by Revenue Officer for arrears of revenue—Irregularities in procedure—Jurisdiction of Civil Courts.

A sale of land held for the recovery of arrears of revenue by a duly authorized officer, though there was no notification of the sale and no enquiry as to the defaulting holder's interest in the land, is a sale under s. 47 of the Burma Land and Revenue Act, 1876, and under ss. 55 and 56 of the Land and Revenue Act, the validity of the sale can only be questioned by the Revenue authorities. **Pallaneappa Chetty v Maung Po Thein. L B R 1893—1900, 370.**

12.—S. 55, cl, (b) explained.—

S. 55 (b) refers to "claims to occupy or resort to lands under ss.19,20, & 21 & disputes as to the use or enjoyment of such lands between persons permitted to occupy or resort to the same." By the first part of the clause, the legislature means claims against Government. If this part of the clause refers to claims between private individuals, it would lead to conflict of jurisdictions and be highly inconvenient. Suppose A, upon a possessory title under s.19 sues B, who relies upon a grant or lease. The case would have to be decided by the Revenue Court which would alone have jurisdiction. The Revenue Court may decide in favour of A. Then B. upon the strength of his grant or lease sues A in the Civil Court, which would certainly have jurisdiction. The Civil Court may decide in favour of B, and there would then be a conflict of decisions. This cannot have been the intention of the legislature.

Burma Land and Revenue Act II of 1876- *contd.*

Persons could not be permitted to occupy the same land adversely to one another. The clause refers to disputes arising between persons jointly permitted to occupy the same land. Such disputes must be decided by the Revenue Court,

Saya Hlaing v. Maung Lu Gyi. L B R 1893—1900, 436.

13.—Ss.55 (b),56—Jurisdiction—Civil Court's power to grant a mortgage decree in respect of land over which no person has a right created by Government grant or a landholder's right.

A suit by a mortgagee for a decree for the sale of land over which no right has been created by a Government grant or a land holder's certificate, is barred by s. 56 of the Lower Burma Land and Revenue Act read with s. 55; proviso, if a mortgagee of land, held under s. 19 of the Land and Revenue Act and ch. IX of the Revenue Rules, wishes to enforce his mortgage, his remedy is to apply to the Revenue authorities. All that the Civil Court can give is a money decree. **Aruna Challam Chetty v Veerappa Chetty, 10 Ind Cas 864.**

14 –S 56 (a)–Jurisdiction.

Where a thugyi gave plaintiffs and defendants a general permission to extend their temporary holdings without specifying boundaries within which their extension might be made and without any limitation as to area, and both plaintiffs and defendants claimed the land in suit on the authority of this permission, *held*, that the Civil Court was barred by. s. 56 (a) of the Burma Land and Revenue Act 1876, from entertaining the plaintiff's suit to establish their right to the land. **Maung Kyi and Ma Gon v Maung Nyeim and Min Aung. L R 1872-1892 499.**

15.—Ss. 56 (a) 55 (a)—Title to land relinquished by landholder—Previous possession.—

Mere previous possession, unless it were such as to confer the status of a landholder or owner would not be sufficient to oust defendant, who was not a trespasser. Title must be proved, 20 Cal 834 Dist. **Maung Hme v Ma Min Dun, L B R.1893-1900, 462.**

16 – S. 55 (b), 56-Jurisdiction–Civil Court's power to grant a mortgage decree in respect of land over which no person has a right created by Government grant or a landholder's right.

Burma Land and Revenue Act II of 1876-*Concld.*

A suit by a mortgagee for a decree for the sale of land, over which no right has been created by a Government grant or a land holder's certificate, is barred by S, 5o of the Lower Burma Land and Revenue Act,read with S.55,proviso(b).

If a mortgagee of land, held under S. 19 of the Land and Revenue Act and Chapter IX of the Revenue Rules, wishes to enforce his mortgage, his remedy is to apply to the Revenue authorites. All that the Civil Court can give is a money decree **Arunchallam Chetty v yeerrappa Chetty. 10 Ind Cas 864.**

Burma Laws Act XIII of 1898.

Notes.—Preamble Rep In Part S. I8 And Sch V Rep Act I Of 1903: S. 4 (b) Sch II Rep Act IV Of 1909; Sch III Virt. Rep In Pt; Bur Act II Of 1904, S, 4 Sch III Rep; As To—Act VII Of 1875—Bur. Act III Of 1905. Act XV Of 1879, Bur Act IV Of 1905. Act II Of 1881 And S. 36 Of Reg, III Of 1889—Bur Act II Of 1905, Act XIX Of 1881—Bur Act IV Of 1902; Reg IX Of 1887—Reg. I Of 1907 Act III Of 1889 And Reg XIV Of 1887--Bur. Act VI Of 1907; Reg. VI Of 1891—Bur Act III Of 1907.

Burma Lower CourtAct XI of 1889.

Notes:—[rep; Act VI Of 1900, S. 48]

Burma Lower Courts Act VI of1900.

Notes.– S.13 Am. Bur. Act IV Of 1901; S. 27 Am; Bur. Act VII Of 1907; Schs. Rep. As To Act XIV Of 1882 Act V of 1908; Sch I Rep; As To Act XV Of 1877,Act IX Of 1908; Ss. 8, 17 Rep In Pt; Act III Of 1909, From Ist Jan 1910]

1—Ss. 2 (b), 30 — Suit for rent of land—" Land suit "—Right of.—

In this second appeal it was contended, on behalf of the respondent, that a suit for rent is not a land-suit as defined in S. 2 (b) of the Act and that, therefore, in the present suit, which was one for recovery of rent of land under a lease, there was no second appeal on questions of fact. *Held*, that a right to rent of land is a right or interest in immoveable property (a) and a suit for such rent is a land-suit; and a second appeal on facts is, therefore, allowed by S. 30 of the Act. 2 B L R 124, Fol:
Kaung Hla Pru v. San Paw, 3 L B R 90.

Burma (Lower) Courts Act-*Concld.*

2—S. 27—Retrospective operation of acts—Matter relating to procedure only,giving of right of appeal. whether is—S. 27, Burma Act, VII of 1907. application of, to suits instituted before it came into force.

The general rule is that status do not operate retrospectively, unless a clear intention to that effect is manifested in the section itself. But status dealing with procedure only apply to pending matters.

The giving of a right of appeal is not a matter of procedure.

So, a party to a suit instituted (in the Small Cause Court, Rangoon) before the Burma Act, VII of 1907, came into force would not be entitled to the right of appeal against the decree of Small Cause Court, given by S. 27 of the new Act even though the decree might be passed after the Act came into force. 1878 L R 3 A C 601. Ref. 1905 L R A C 369 (P C). **Mashedee Khan v. B. Mahomed Azim, 5 L B R 148.**

3—S. 31 (2)—Power of District Judge to direct disposal of certain suits by Additional Judge —S. 57, Civ. Pro. Code, applicability of.—

Under S. 31 of the Lower Burma Courts Act, a District Judge can direct that all suits arising within Municipal limits which may be instituted in the Township Court shall be disposed of by the Additional Judge but, in such a case, if a plaint be presented to the Judge of the Court, he should not return the plaint in order to be presented to the Additional Judge of the same Court. S. 57 of the Code of Civil Procedure having no application. **Maung Gyi v. Lu Pe, 3 L B R 120.**

Burma Lower Town and Village Lands Act IV of 1898.

1—Suit for possession of state lands by Secretary of State—Whether within the jurisdiction of a Civil Court.

On his appeal from a decree obtained by the Secretary of State for India in Council for possession of certain state lands in the Government Cantonment, the question arose, whether in view of the provisions of the Burma Act IV of 1898, the suit was within the jurisdiction of a Civil

Burma (Lower) Town and Village Lands Act IV of 1898-*Contd.*

Court. It was conceded on both sides, that, if the land was in either a town or a village the Civil Court could have no jurisdiction. The sole question that had to be determined, therefore, was whether the land was in a town or a village as defined in the Act. *Held*, if the land in suit was not in a town, it must be in a village, which has been defined in the Act as an area appropriated to dwelling places not included within the limits of a town. It followed, therefore, that the land must be either in a town or in a village and consequently, the suit relating to it could not fall within the jurisdiction of the Civil Court.

Moment v. The Secretary of State for India in Council, 3 L B R 165.

2—Ss. 11, 15 and 41—Suit to recover house-site—Necessity for reference to Revenue Officer—Jurisdiction of Civil Court to entertain suit without such reference.—

The plaintiff sued to recover possession of a house-site in Pantanaw. The defence was that the defendant had obtained permission from the Revenue authorities to occupy the site. *Held*, the Lower Burma Town and Village Lands Acts, 1898, and not the Lower Burma Land and Revenue Act, 1876, applied to the case. The only point for determination was whether the plaintiff's right, as landholders, had ceased under S. 11 of the Act. This matter should have been referred to a Revenue Officer as arising under the last clause of S. 15 of the Act. S. 41 of the Act provides that no Civil Court shall have jurisdiction to determine such cases as the present, unless they have been referred to the Revenue authorities for their decision. Suit remanded for ascertaining the decision of the Revenue Officer.

Yon Byu v. Shwe Taik, 3 L B R 50.

3—S. 41—Suit for eviction from house on village land—Jurisdiction of Civil Courts—Title to house distinct from title to site.—

It is impossible to evict a person from a house, without evicting him from the occupation of the site, on which it stands. Such a suit for eviction is, therefore, one for occupation of the land as well as the house, and is essentially different from a suit for possession of the materials of the house. In the former case, the question of title to the house cannot be treated as distinct from the question of title to the house-site. Where

Burma (Lower) Town and Village Lands Act IV of 1898-*Concld.*

the house stands on village-site which is at the disposal of Government. S. 41 of the Act bars the jurisdiction of the Civil Courts to try a suit for possession thereof. 3 L B R 165, Ref: **Maung Law v. Suppaya Padayachi, 3 L B R 256.**

4—S. 41, whether ultra vires—Claim to right over land as against Government—Jurisdiction of Civil Court—S. 65, Government of India Act 1858—S. 22, Indian Councils Act, 1868.—

Held, by the Full Bench (Robinson, J., diss.) that the provision of S. 41 of the Lower Burma Town and Village Lands Act, 1898, that no Civil Court shall have jurisdiction to determine any claim to any right over land as against Government, was *ultra vires* of the Legislative Council of the Lieutenant-Governor of Burma, because it infringed the 65th section of the Government of India Act 1858, and the 22nd section of the Indian Councils Act, 1861. (3 L B R 165, over: 4 Cal 172, Dist: 5 Bom H C R Appx. All.; 5 Bom H C R 1, 8 Bom H C R 195 and 8 Bom 264, Ref:)

J. Moment v. The Secretary of State for India in Council, 5 L B R 163, (F B).

Burma (Lower) Village Act III of 1889.

Notes:—Rep: Burma Act VI of 190 .

Burma Municipal Act III of 1898.

Notes:—Am Act VI of 1900, S. 47; S. 181 rep. in Rangoon Town, Bur. Act I of 1902, S. 2; Ss. 40, 92 (III), 142 (*h*), 210 (3), 211, 212, 213 Am. Ss. 40-A. 181-A, 181-B Ins., S. 95 rep., Bur. Act III of 1902; S. 38-A Ins., Bur. Act II of 1903; Ss. 111-A, 111-B, 114-A ins., Ss 142 (*f*), (*o*), 147, 158 Am., Bur. Act III of 1906; Ss. 38, 38-A (1), 55, 63 (2), 72 (1), 94 (2), 117. 213 Am., S. 38-B. Ins., Bur. Act II of 1908; S. 142 Am., S. 195-A Ins., Bur. Act II of 1909.

1—S. 45—Tax, imposition of.

Where a notification of the imposition of a tax under the Burma Municipal Act has been published, a Civil Court may not enquire whether, in accordance with the provisions of the Act, the tax has been imposed. **Municipal Committee v. Gurthi Lingaya, I. B R 1872-1892, 405.**

2—Ss. 46 (1) (A) (a) 68, 69 — Street Tram Lines—"Buildings and lands" within the meaning of section—Tramway Company whether occupiers of land on which Tram lines are laid within meaning of Ss. 68 & 69.—

Burma Municipal Act III of 1898-*Concld.*

The tram lines in a certain street, meaning thereby the land of the street, in or on which the Rangoon Electric Tramway Company's sleepers and rails are laid, is land within the meaning of cl. (a) of division A of Sub. S (1) of S. 46 of the Burma Municipal Act.

The Tramway Company are occupiers of the portion of land upon which they have laid the trams rails within the meaning of Ss 68 & 69 of the Act. L R 9 Q B 9 & L R A C 153, Fol.

The Rangoon Electric Tramway and Supply Co., Ld. v. The Rangoon Municipal Committee, 14 Bur L R 23=4 L B R 220.

Burmese Law (Adoption).

1—Definition and rights of keittima and aptittha sons.—

The *keittima* son has the full rights of inheritance of a natural son whereas *apatittha* son has only partial rights of inheritance. The *apatittha* son has nevertheless rights of inheritance. Looking at the definition of an *apatittha* son in the Digest of Buddhist Law, the term would seem to refer to a founding, a child casually adopted whether its parents and relatives are known or not a child casually adopted and brought up in the family of the adoptive parents, being abandoned by its natural parents, a child casually adopted through compassion, a destitute child casually adopted. The principle underlying the definition of the term seems to be that an *apatittha* adoption is a compassionate one which takes place in consequence of the child being destitute with no one to maintain it through abandonment by, or the decease of, its natural parents, or some such similar cause.

Held, in this case on a consideration of the probabilities and of the manner in which the boy was treated, that the adoption was *keittima* and not *apatittha*. **Tet Tun v Ma Chain. 5 L B R 216.**

2—Some probabilities in favour of alleged adoption—One or two important probabilities against it Adoption not generally publishad and not notorious—Valid adoption according to requirements of Burmese Buddist law, whether proved.

Burmese Law (Adoption)-*Contd.*

The plaintiff, an adult, claimed to have been adopted by his uncle. He was able to adduce, from the relationship between himself and his uncle, from the latter's circumstances from his uncle's public letters, through witnesses, and from other sources, good deal of evidence calculated to render his contention probable and successful. It appeared, however, that the plaintiff, when called upon to state his father's name, gave, not his adoptive, but his natural father's name, thus making it doubtful, whether the idea of giving up all his prospective rights in his natural parents' property as the result of the adoption, presented itself to his mind at the time of the alleged adoption; and also, that his relationship with his uncle was not published generally and was not notorious, as it ought to have been had it been true.

Held, that he failed to prove that he had been validly adopted according to the requirements of the Burmese Buddhist Law.

In the absence of anything to show what is necessary to constitute the adoption of an adult, the general principle is that an adult cannot be adopted without his or her consent. But, as an adult (cannot be deprived of any rights without his or her consent),—an adoption depriving rights of inheritance in natural parents' property—it must appear that he or she consented to renounce all his or her prospective rights in his or her natural parents' property.

Per Fox, C. J.—Notoriety amongst the people with whom the parties ordinarily mixed in social life is what is required in evidence of the adoption of an adult.

Per Hartnoll, J—When a person claims a share in an estate on the ground that he was adopted as an adult, the burden of proof lies heavily on him, the more especially as such an adoption is not usual even if it is sanctioned by the *Dhammathats* (11 Bur L R 240=2 L B R 221, Fol. I Ch. T C L P 168 Ref.) **Ma Gyi v Maung Po Tha 14 Bur L R 15.**

3—Burmese law and custom—Adoption—Mode of proof—Publicity—Inference from the facts of the life of parties—Child—Adult.

According to Burmese Law, no formal ceremony is necessary to constitute adoption, and

Burmese Law (Adoption)-*Contd.*

though adoption is a fact, that fact can either be proved as having taken place on a distinct and specified occasion,or may be inferred from a course of conduct which is inconsistent with any other supposition. But in either case publicity must be given to the relationship, and the amount of proof of publicity required will be greater in the cases of the latter category, when no distinct occasion can be appealed to.

In many cases the inferences of the relationship existing, and the publicity of the relation ship itself, may naturally be taken from the facts of the life of the parties, a part from the verbal statements of those concerned Thus when a child who has natural parents leaves those parents and its own home, and is brought up in the house of another who treats it as a father would a child, the inference is not difficult to draw, and the facts from which that inference is drawn are public facts necessarily known to all the persons, friends and acquaintances. But in the case of an adult, when the inference to be drawn from "bringing up" are necessarily absent and where the consequence of adoption is disinherison of those entitled to succeed by law, it is specially necessary to insist on adequate proof of publicity or notoriety of the relationship. **Ma Ywet v Ma Me 11 Bom L R 1193 (P C)=5 L B R 118=10 C L J 253 =6 M L T 302=3 Ind Cas 797=36 Cal 976 =19 M L J 577.**

4—Right to cancel.

Adoption is an institution of Buddhist Law, and for the incidents that govern it, the Court must look to Buddhist Law or to custom, if custom has modified the law. There is no other means of getting light on the subject. Parents who have given a child in adoption to another, are at liberty until the child has grown up to take the child back when they please. **Maung Sein v Ma Mon, U B R 1902—1903 Vol 11 Buddhist Law, Adoption 1.**

5—Adopted child—Rights of——Whether extend to collaterals of adoptive parents.

Under the Buddhist Law, the rights of inheritance of an adopted child are not limited to inheritance from his or her adoptive parents, but also extend to inheritance from their collaterals. (1 Chan Toon's L C 393, Fol: 1 Chan Toon L C 279, Ref:) **Ma Mhaw v Ma Sein 5 L B R 89.**

Burmese Law (Adoption)-*Contd.*

6—Ceremonies, Necessity of—Publicity and notoriety essential—Keittima adoption—Proof.

It has been held that no particular ceremony is required for adoption but there can be no doubt that an essential part of adoption is publicity of the relationship and of the intentions of the adoptive parents in regard to the inheritance of their estate by the adopted child. To establish a *Keittima* adoption proof of publicity and notoriety is essential. **Ma Mein Gale v Ma Kin. U B R 1892-1896 Vol II. 34.**

Notes.—(U B R 1892-1896 Vol II 22 Ref).

7—What is a keittima adopted child?—Manugye Dhammathat (pp 314 and 319, 3rd. Edition.)

When one party seeks to disturb a decision in revision, it is fair that the other party should be at liberty to put forward grounds of dissatisfaction with it on his side, although he might otherwise have let it stand unchallenged. No particular method of adoption is prescribed by Buddhist Law. Evidence of bringing up and treatment as child of adoptive parents and public recognition as such is sufficient proof of *keittima* adoption. The duties of an adopted child are similar to those of a natural born child, and separate living may constitute a disqualification to inheritance by the adopted child, but that the question what constitutes separate living depends upon the circumstances of each particular case Suggested that possible reason for disqualification may be that separate living on part of adopted child might indicate severance of the adoption. Ss 26 & 27 are applicable.

Maung Aing v Ma Kin. U B R 1892—1896 Vlo. II 22.

Notes.—Ref: U B R 1892——1896, Vol II 34, 176, U B R 1906, 3rd Qr. Buddhist Law—Inheritance, 15 U B R 1897—1901, Vol II, 135, 142.

8—Essentials of valid adoption—Ceremonies-Documentary evidence—Publicity—Intention of publicity.

To constitute a valid adoption the law requires no ceremony, no written document, nothing indeed but a request from parents, and a notorious and public taking and bringing up, in order that, or with the understanding that, they *i. e.*,

Burmese Law (Adoption)-*Concl.*

the children, may inherit Just as an open living together is among Burmans presumptive proof of marriage, so also the open bringing up of a child, and supporting such child for so many years, is presumptive proof of adoption especially where the parents are childless and the child is a niece **Ma Gun v Ma Gun** L B R 1872—1892, 25

Notes—Ref 1 L B R 274, Ref 1 B R 1897-1901, Vol II 142, U B R 1892—1896, Vol II 22, L B R 1872—1892 225

9—Adoption by Buddhist having child—Validity

A Buddhist can adopt a child he having a child of his own at the time **Me Bwin v Ma Yin** L B R 1872-1892 100

10—Adoption—Proof—Two adoptions valid—Evidence of adoption

Where it was proved that the plaintiff who claimed to be the adopted daughter of a Buddhist couple and had lived with the couple from the age of three years and the plaintiff's mother as well as others have stated that the old couple had told them that they had adopted the plaintiff and that she was generally regarded as their daughter. *Held*, that the adoption had been amply proved. Inasmuch as even children of well to do parents often assist in cultivating the family acres, no inference against adoption can be drawn from the fact that an adopted daughter worked in the fields for her adoptive parents A second adoption during the lifetime of the first adopted child is not prohibited by Burmese Buddhist law though it is unusual **Ma Shwe Yin v Ma Shwe Nyun** 11 Ind Cas 776

11—Adoption—Essentials—Proof of relationship—Proof of time of adoption not necessary.

Neither ceremony nor a written document is required to constitute the relation of a keittima adopted daughter in Burmese law There must be, on the one hand the consent of the natural parents and on the other, the taking of the child by the adoptive parents with the intention and on the footing that the child shall inherit Where it is proved that the relationship as mother and daughter existed between plaintiff and her adoptive mother.

Burmese Law (Alienation)-*Contd.*

Held that it is a question of secondary, although doubtless considerable importance, when it began, the true question in the case to what was the relation having been proved **Ma Ine Gale v Ma Sa yi** 32 Cal 219=32 I A 72 (P C) =4 L B R 172=8 Sar 743.

Burmese Law (Alienation).

1—Sale by wife of joint property-Its validity—Consent of husband—Power of attorney—Registration Act, s 33

It is settled law that a Burmah Buddhist, with the express or implied consent of his wife, may dispose of their joint property It is a common practice for the husband alone to execute deeds of transfer of joint property Probably it is unusual for the wife to do so but if she has her husband's consent a sale by the wife would be as valid a sale by the husband A deed of sale of joint property executed by the wife alone does not require a registered power of attorney under s 33 of the Registration Act L B R 1872—1892, 403 Ref) **Maung Tun Myat v Raman Chetty** L B R 1893—1900, 37.

2—Widow's right of disposal of property

By Buddhist law the children have rights in the property as well as the widow If the children are young and she undertakes to manage for them she does this under the responsibilities of a trustee She may use the property for necessary subsistence but ought not except for their benefit, to dispose of it otherwise If however there is family necessity to sell, the sale may be valid as against the children, but it will lie on the purchaser to prove the necessity **Nga Shwe Yo v Mi San Byu** L B R 1872—1892, 108.

Notes—Ref L B R 1872—1892 212, 255, 378 U B R 1892—1896, Vol II 171, U B R 1892—1896, Vol II, 121, 4 L B R 296, U B R 1892—1896 Vol II 581 Dist L B R 1872—1892 115

3—Assent of heirs

The law contemplates the devotion of a portion of the estate of the deceased to religious offerings But the Courts cannot uphold a large expenditure on this account incurred without the assent of the heirs A suit by one of the co-heirs to

Burmese Law (Alienation)-*Contd.*

recover her portion of the expenditure is maintainable **Mi Min Gwue v Mi Saung. I B R 1872—1892, 46.**

Notes—Ref I B R *1892—1896*, Vol II 171, 93 L B R 1895—1900 299, 465 U B R 1892—1896 Vol II 397.

4—Poggalika property of priest—Rights of disposal by other members of the same order for funeral expenses of deceased owner

The *poggalika* property of an individual priest, cannot on his death be disposed of by another member of the order unless such sale was necessary to meet the expenses of the deceased priest's funeral. **U Te Law Ka v Maung Po Ka L B R 1893-1900 597**

5—Attachment—Suit to establish right to attach property Sale before attachment valid if bona fide and for good consideration—Fraud—Burden of proof Buddhist Law—Sale of his share by co sharer—One co heir acting on behalf of all

There is nothing to prevent an owner from selling or any one from purchasing property before it is attached, provided the transaction is *bona fide* and for good consideration The burden of proving fraud rests on the creditor who impeaches the sale A sharer has an absolute right to dispose of his own share, even while the property is undivided subject to the right of pre emption by co-heirs (2 L *B* R 167, F.) It is common to find one or more co heirs acting on behalf of the general body of co heirs **Subramanian Chetty v Maung Shwe The 11 Ind Cas 781.**

6—Power of husband to alienate joint property of himself and wife—Whether alienation, transfer of his share and interest

In this case, a Burmese Buddhist husband had executed a deed of sale of the *hnapazon* property of himself and his wife The lower Courts found that it had not been proved that the wife was aware of, or that she had consented, to the sale It was, also, clear that the vendee knew that the wife was interested in the land and yet chose to take a conveyance from the husband alone. The following questions had to be decided and they were referred to a Bench of the Court, (1) Whether a Burmese Buddhist husband can validly sell or alienate the *hnapazon* property of himself and his wife without her consent or against her will? (2) Whether such a sale by the husband, made without the consent of his wife, constitutes a valid transer of his share and interest in the property sold Held, that no grounds having been made out for disturbing the decision of Mr Fulton in the case of Ma Thu v Ma Bu that a Buddhist husband cannot sell the joint property of himself and his wife without his wife's assent, express or implied, the first question must be answered in the negative: (i e) subject to the reservations stated in the above mentioned Ma Thu's case, a Buddhist husband has no power to make a valid sale of the joint property of himself and his wife without her consent or against her will, (a) and that in view of the various decisions forming distinct authorities for the position that under Buddhist law, it is competent for a husband to validly alienate his share alone of the joint property of himself and his wife, the second question must be answered in the affirmative (i e,) a sale by a Buddhist husband of the joint property of himself and his wife, made without her consent, does constitute a valid trasfer of his share and interest in the property sold (1891 S J L B 578 Fol 1874 S J L B 19, 1 L B R 11, 2 U B R (1892 96 303 Ref)

Ma Shwe U v Ma Kyu 3 L B R 66 F B.

7—Sale of undivided estate by eldest co-heir in possession—Suit by other co heirs to recover their shares—Limitation Act, Arts. 10, 142, applicability of

An undivided estate was in the possession of the eldest of the co-heirs, who sold it without the consent of the other co heirs The latter brought the present suit to recover their shares in the estate sold The question for decision was whether or not Art. 10 of Limitation Act applied to the case *Held*, that the suit was governed by Art 142 and not by Art. 10, for the vendor was in possession of the property on behalf of the other co-sharers and his sale dispossessed them **Ma Ko h v Tun E 3 L B R 7.**

Burmese Law (Ancestral Property.)

1—Sister—Division—Ancestral estate.

The widow is entitled to retain possession

Burmese Law (Ancestral Property *Contd.*

against a sister of ancestral estate redeemed by her husband and worked by him, although there has been no actual division by measurement or express agreement. Separate possession and separate living will shift the burden of proving the property to be joint estate on the party alleging the property to be joint. **Mi Pyu v Mi Bon Dok.** L B R 1872–1892, 85.

Notes:—Ref. U B R 1892–1896, Vol II, 121. L B R 1872—1892, 74.

2—Pre-emption sale.

If ancestral property has passed into the hands of third persons, the heirs of the original owner do not possess an absolute right of pre-emption back. But if the possessor wishes it to sell, he must offer it first to them who have a right of inheritance in the land. A sharer in undivided ancestral property, if he wishes to sell his share, must first offer his share to his co-heirs, and consequently a sale to strangers effected without such offer is invalid if the co-heirs promptly assert their rights. **Nga Mysing v Mi Paw** L B R 1872—1892, 39.

Notes:—Cited, 3 L B R 7; Rel on, L B R 1872—1892, 76; Dist L B R 1872—1892 115; Ref: L B R 1872—1892, 378, 168, L B R 50, U B R 1892—1896 Vol II, 283 U B R 1907, 2nd Quarter, Buddhist Law —Inheritance—Pre emption, 1; Fol. 14 Bur L R 91, 14 Bur L R 205=4 L B R 128, U B R 1897—1901, Vol II, 155, 162; Diss 1 L B R 144.

3—Sale—Consent of all the co-heirs is necessary to the sale of undivided ancestral property

One co-sharer cannot alienate even his own interest in undivided family estate without consulting his co-sharers and ascertaining their unwillingness to buy him out. This doctrine has its parallel in the rule which prevales in those parts of India which are governed by the strictest Hindu Law where the consent of all the shareholders is necessary even to the alienation of an individual share. **Mi Te v Po Maung** L B R 1872—1892, 41.

Notes.—Fol. U B R 1897—1901, V I II, 162, 14 Bur L R 91, U B R 1907, 2nd Quarter, Bud Law—Inheritance—Pre-emption 1;

Burmese Law (Ancestral Property) —*Concl.*

Ref. U B R 1892—1896. Vol II 383, 1 L R 50, L B R 1872—1892, 108; Dist L B R 1872—1892, 115.

Burmese Law (Divorce).

1—Burman Buddhists, Law as to Divorce among—Husband and wife—Buddhist Law—Dhammathats. Authority of—Menu Kyay, Authority of—Desertion—Procedure.

In a suit for divorce instituted by a Burman husband on the ground that his wife had deserted him for no reason whatever, and had been living apart for the past eight months, refusing to resume cohabitation with him (there being no charge against the wife of misconduct affecting morality or any bad habits), the wife pleaded that the above ground was, under Buddhist Law, no ground for a divorce, and further pleaded the conduct of the petitioner as a justification for her refusal to cohabit with him. No division of property had taken place between husband and wife. *Held*, upon a reference to the High Court, that upon the Law as administered among Buddhists the petitioner was not entitled to a decree. If the plaintiff in a suit for divorce governed by the above law establishes any of the grounds which the Dhammathats recognize as good grounds for a divorce, he will be entitled to a divorce. The Dhammathats contemplate grounds justifying a divorce other than those mentioned in the judgment of the Special Court in *Nga Nwe Tu Su Ma*, *viz*, other than matricide, patricide, killing, stealing, shedding the blood of a Buddha, rahan, heresy, and adultery. A desertion, properly so called, by the wife is a good ground for a decree by the husband, provided that during the period of one year prescribed by the *Menu Kyay* (ch v, ch 17) the husband has not supplied anything to the wife. Suits for divorce between Burman Buddhists being suits of a civil nature are governed by the Indian Divorce Act, should be commenced by a plaint and not by a petition. The decision of the Special Court is observed upon. Passages in the *Menu Kyay* Dhammathat cited and commented upon. **Moung Tso Min v Mah Htah.**

19 Cal 469.

Burmese Law (Divorce)-*Contd.*

2—Divorce—Suit for bare divorce—Maintainability.

A suit for bare divorce without and as distinct from partition of property, will not lie under Buddhist Law. U B R (1897—01) 28, affirmed ; U B R 1902—03, II, *Budd.* Law Divorce, 1, overruled ; U B R (1902—03) Budd Law Divorce, 12, superseded ; U B R (1904—06) 11, Budd Law Divorce, 3, Ref : **Nga Chit Nyo v Mi Myc Tu. U B R (1910) 2nd Qr 30.**

3—Husband or wife, right of, to obtain divorce without fault on, or consent of other party—Necessity of surrender of joint property.

In this case, the husband sued for divorce. The defendant opposed the suit on the ground that her husband had ill-treated her and forced her to leave him. She also denied that he was entitled to a divorce, by Buddhist Law, and the sole question for decision on appeal was, whether a husband, whatever his own conduct may have been, is entitled, by Buddhist Law, to obtain a decree for divorce against his faultless wife, on condition of surrendering to her the joint property and paying the joint debts

Held, on a consideration of the various texts relating to the question that the texts in the Dhammathas establish the law, that one of the parties to a marriage can separate from the other even if the latter does not consent, provided that the properties belonging to both and their liabilities should be divided. There is no insuperable legal bar to divorce against the party desiring it, where that party is prepared to surrender the share of the joint property to which he would, otherwise be entitled. *Held*, therefore, that the plaintiff, in this case, having offered to resign the jointly acquired property to the defendant he may be granted a decree for the divorce sought by him. U B R (1897—01), 28, Fol. 1 L B R 7 ; U B R (1902—1903) 6 & 12 & 2 Bom 624, Ref :) **Mi Kin Lat v Nga Ba So. U B R (1905) Buddhist Law—Divorce 3.**

4—Divorce by mutual consent—Partition of property - Atet—Lettetpwa property —Nissayo and Nissito.

In a suit for divorce by mutual consent and for partition of property, *held*, on the authority of the *Manuagne*, Book XII, S.3, that, where the relation of Nissayo and Nissito subsists between the husband and the wife with respect to *atet* property, the wife, if she is the Nissito, is entitled to one third of such property ; she is also entitled to a third of the undivided ancestral property, which was inherited by her husband during the marriage. The profits of the *atet or ang* property are *lettetpwa*, and the inherited property being itself *lettetpwa*, its profits are *lettetpwa* also. The partition of such *lettetpwa* property should be made equally, if it was acquired by the joint exertions of the married couple U B R (1892—96), II, 121, 10 B L R 19, U B R (1897—1901), 11, 146, S J L B 110= 1 L C 195 Ref: U B R 1897—1901, 11, 39 and U B R (1902—1903), B L Inheritance, 1, affirmed. **Mi Myin v. Nga Twe. U B R (1906), Buddhist Law—Divorce 19.**

5 Adultery—Cruelty—Whether ground for divorce.

Held, that among Burma Buddhists, the mere fact of the husband committing adultery or taking a lesser wife unaccompanied with cruelty does not of itself entitle the wife to claim divorce.

The committing of adultery under the conjugal roof is not such cruelty as is contemplated by the Dhammathas, as affording a ground for divorce. (1886) S J L B 391: 4 L B R 340, (1881) S J L B 103 Fol:) **Ma Ein v Te Nsung. 5 L B R 87.**

6—Child of divorced couple—Rights of inheritance—Maintenance or renewal of filial relations sufficient to entitle plaintiffs to inherit property acquired during second marriage.

There seems to be a great weight of authority in favour of the proposition that a child of a divorced couple is entitled to inherit from the parent, with which he or she lives, and is generally not entitled to inherit from the other parent, (when that other parent has married again and has children by the second spouse) property acquired during the second marriage, and that visiting the other parent and receiving presents or even maintenance from him does not constitute a continuance or resumption of filial relations, such as would entitle the child to inherit such property.

The fact that the divorced wife and the children received nothing at the time of divorce

Burmese Law (Divorce)-*Contd.*

makes no difference, at any rate so long as it was not alleged that there was any property to divide. (B S J 184; B S I 296; P J L B 469; U B R 1897-01), p. 116, 1 L B R 161, F; P J L B 209, Diss; 2 L B R 85, Ref.

Ma Paw v Ma Mon. **14 Bur L R 236 = 4 L B R 272.**

7.—C. P. C.—O. 2 r. 2—(1882 S. 43) First suit for divorce under Buddhist law——Subsequent suit for partition by the husband barred under S. 43. **See Lon Ma Gale v Mg Pe. 5 L B R 114.**

8.—Partition of property on divorce.

Though it often happens that partition of goods evidences a divorce and a deliberate intention to terminate the status of marriage, it is not essential to the validity of divorce which may be proved by other evidence of intention showing that a termination of marriage and not a mere temporary separation was deliberately intended. (L B R 1872—1892, 14, 73, Ref., 8 Cal 327 Appr.)

Nga Lon v Ma Myaing. **L B R 1872—1892, 206.**

Notes.—Ref: 1 L B R 7.

9.—Civil Pro. Code (Act V of 1908), S. 60—Buddhist Law—Divorce—Wife's share in 'let-tel-Paw' property not alienable but attachable with husband's consent——Decree against wife alone.

The appellant Maung Lo, in execution of decree against Ma Aing, wife of respondent, Maung Pyaung, attached a durion garden which stood in the joint names of Maung Payaung and Ma Aing Maung Payaung applied for removal of attachment, alleging that she had no concern with the durion garden in dispute. The application was refused and Maung Pyaung then brought the present suit for a declaration that the land could not be attached in execution of decree against Ma Aing as it belonged to him. The Township Court found that there had been no proper divorce between Ma Aing and Maung Pyaung. *Held*, that the township Court had decided it correctly, as it appeared that Maung Pyaung, after a long married life with Ma Aing, had separated from her a few years ago and had since lived apart from her, but that there had been

Burmese Law (Divorce)-*Contd.*

no formal divorce nor any division of property acquired during coverture. The durion garden in suit was admittedly inherited by Maung Pyaung from his parents several years after his marriage with Ma Aing. *Held*, that it was not paying but let-tel-paw property and that Ma Aiung had a vested interest in it and that the extent of her interest was one-third. (U B R 1904—1906 Bud. Law—Divorce 19, F.) *Held*, also, that there had been a divorce mutual consent, Ma Aiung would be entitled to receive one-third of the garden as property inherited by her husband during co-venture. *Held*, further, that although a wife could not alienate her share in joint property without her husband's consent, her interest in joint property was attachable (U B R 1902—1903, Vol II Execution of decree, 1 U B R 1904—1906, Bud. Law—Divorce 1, Fol:) *Held*, therefore, that although Ma Aiung had not "a disposing power which she may exercise for her own benefit" over the one-third share in the durion garden, that one-third share, neverthless belonged to her, and that this was sufficient for the purpose of S. 60.of the Civil Pro. Code 1908.

Maung Lo v Maung Pyaung. 8 Ind Cas 992.

10.—Grounds of divorce.

Before a court can order divorce against the wish of one party there must be proof either of some fault committed against the other of a sufficiently serious nature justify divorce according to the Dhammathats, or of some evil deed for which a separation of destinies can take place. Mere willingness on the part of one party to pay Ko-bo or the price of the body will not constitute a ground for divorce. It might equally be held that willingness to surrender the whole of the joint property constituted such a ground. (L B R 1872—1892, 391 Ref.)

Mi Pa Du v Maung Shive Bank. L B R 1872—1892, 607.

Notes—Cited, U B R 1902—1903 Vol II, Buddhist Law—Divorce, 6 U B R 1905, 4th Qr Buddhist Law—Divorce 6 U B R 1892—1896, Vol. II 56; Ref., U B R 1897—1901 Vol. II 28).

11.—Previously married and not married couple—Interest in jointly acquired property—Distinction.

There is no distinction in Buddhist Law as to the interest in jointly acquired property between

Burmese Law (Divorce)-*Contd.*

the cases of a couple who have been previously married and a couple who have not been previously married. **Maung Hmon v Maung Meik. U B R 1904, 2nd Qr., Buddhist Law—Divorce 1.**

Notes.—Rel on: U B R 1907 4th Qr Buddhist Law, Marriage—Joint Property, 1; Ref: 3 L B R 66.

12.—Civ. Pro. Code, 1882, ss.42,43,

In a suit for divorce the cause of action is concerned with the conduct of the parties and not with the property. In a suit for partition of property the cause of action and the evidence would be entirely different. When under Buddhist law a suit has been brought for divorce without partition of property, a subsequent suit for partition of the joint property is maintainable. (Chantoon's leading cases. Vol. II, 31, U B R 1897—1901, Vol. II, 28, U B R 1902—1903, Vol. II, Buddhist Law—Divorce, 6, 22 Mad 24, Ref.) **Maung Tha So v Ma Min Gaung. U B R 1902—1903, Vol. II. Buddhist Law—Divorce. 12.**

Notes.—Superseded: U B R 1910, 2nd Quarter, 30; Ref: U B R 1905, Fourth quarter, Buddhist Law—Divorce, 3; Diss, 5 L B R 114.

13.—Suit for bare divorce without partition—Misconduct of husband.

The rule laid down in U. B. R. 1897—1901, Vol. II, 28, that under Buddhist law a suit for bare divorce without partition of property will not lie, discussed, modified and partly dissented from. Misconduct on the part of a husband which may not in itself be sufficient to entitle a wife under Buddhist law to divorce may nevertheless be sufficient to entitle her to insist on a divorce as by mutual consent. (U B R 1897—1901, Vol. II, 28, 7 L B R 7, L B R 1872—1892, 607, Cited). **Maung Pye v Ma Me. U B R 1902—1903, Vol. II, Buddhist Law—Divorce 6.**

Notes.-Ref: U B R 1909, Bud. Law-Marriage, 1 U B R 1905, 4th Quarter, Buddhist Law Divorce, 3, U B R 1902—1903, Vol. II, Buddhist Law——Divorce, 12, 5 L B R 114; Overruled, U B R 1910, 2nd Quarter, 30].

Burmese Lew (Divorce)-*Contd.*

14.—As by mutual consent - Parties not previously married—Share of property, wife entitled to.

In the case of a divorce obtained by the wife on account of the misconduct of the husband as by mutual consent, where the husband and wife have not been previously married, the wife is entitled on partition to one-third of property inherited by the husband during coverture and vice versa. (U B R 1897—1901, Vol. II, Divorce, 39, Fol.) **Kin Kin Gyi v Maung Kan Gyi. U B R 1902—1903; Vol. II, Buddhist Law—Divorce, 1.**

Notes.—Ref: U B R 1902—1903, Vol. II, Civ. Pro. Code, 3; Affirmed, U B R 1906, 4th Quarter, Bud. Law—Divorce, 19.

15.—Ground for granting divorce.

A divorce cannot be granted merely on the ground of an allegation that the destinies of the husband and wife are not cast together. Nor can a divorce be granted merely on the ground that the husband has not supported his wife for a year, the latter having left her husband's protection without reasonable cause. (19 Cal 469, L B R 1872—1892, 391, 607, Ref.) **Mathin v Maung Kyaw Ya. U B R 1892-1896, Vol. II. 56.**

Notes.—Ref. 3 L B R 175.

16.—Legal representative of deceased debtor—Suit against.—

In a suit against the legal representative of a deceased debtor is not necessary to prove that assets have come into the hands of legal representative if there are assets of which he might become possess. But the decree should mention that it is against legal representative in that character. (8 Bom 30a Fol:) Though three years complete separation may of itself effect a divorce without any formal proceeding or declaration at the end of that time, the period could not be reckoned backward beyond the date of the judicial decree, which must be taken as the starting point for the calculation. (L B R 1872—1892, 19, 28, 391, 20 W R 280, Ref). **Maung Po Maung v L H R L P Nagalingam Chetty U B R 1892—1896 Vol II 53.**

Notes.—(Ref: 3 L B R 176).

Burmese Law (Divorce -*Contd*

16 —Cruelty —

Where a suit is brought by wife for divorce with claim for half the joint property on the ground of cruelty by husband in taking a second wife, and in imputing adultery to first wife decree was passed for divorce as by mutual consent and for equal division of property *Held* that the decree for a divorce as by mutual consent could not be sustained, and that the Court of first instance should have determined whether the grounds alleged by plaintiff were such as to entitle her to a divorce and should have granted or refused divorce accordingly *Held* also—That whether the matters alleged by plaintiff constituted cruelty or not in general she had in this instance by her conduct acquiesced in or condoned the conduct of the husband and was not entitled to a decree *Held*, further—that there having been no divorce the husband was entitled to the custody of the property taken away by the wife (4 All 374 L B R 1872—1892 19 103 Ref) **Maung Kauk v Ma Han U B R 1892-1896 Vol II 48**

Notes —Ref 4 L B R 340 Cited I B R 1897—1901 Vol II 188

17 —Execution of decree—Attachment of joint property of Buddhist husband and wife in execution of decree against husband alone Divorce for purpose of defeating creditor —

Practically a Burman wife and husband are for many purposes partners and if the wife is not included in the proceedings along with the husband, it is much as if a decree were obtained against a partner individually and execution were sought against a partnership property as his solely If it is sought to make both a Buddhist wife and husband, and the whole of the joint property of both liable for a debt the wife as well as the husband should be made a party to the proceedings When a Buddhist wife is not a party to a suit against her husband and the decree is against the husband alone only the husband's interest in the joint property of his wife and himself is liable to attachment and sale in execution **Ma Me v Maung Gyi, U B R 1892—1896 Vol II 45**

Notes —(Cons U B R 1904 2nd Qr B I—Divorce I, Rel on U B R 1907 4th Qr B L Marriage-Joint Property I Ref 3 L B R 66

Burmese Law (Divorce) *Contd.*

18 Execution of decree—Collusive divorce to avoid attachment of property Interest of Buddhist husband and wife in property acquired by the other alone, upon divorce by mutual consent S 3 Ch 12 Manugye says —

A husband and wife both being noble mutually wish to separate The husband having been allowed to take the clothes and ornaments of his rank and the wife the clothes and ornaments of her rank let the remainder of the property be thus divided if there is any property that was acquired by the husband alone or by the wife also let that property who separately acquired it have two shares and the other one **Maung Tha Dun Aung Ma Ming U B R 1892—1896 Vol II 41**

Notes —Relied on U B R 1904 2nd Qr Buddhist Law—Divorce I)

19 —Lettetpwa and payin property—Arbitration award

Parties who mutually agree to refer questions of the division of property on divorce to the arbitration of *lugyis* are bound by the award of the *lugyis* unless and until it is set aside **Maung Nyan Gyi v Ma Tok U B R 1892-1896 Vol II 43**

20 —Divorce on grounds of husband's misconduct—Husband previously married—Wife a maiden at time of marriage—Division of property

The rules regulating the divorce of a husband & wife not previously married should be applied to cases in which one of the parties to the marriage has been previously married, and the other has not been married before And in that case a wife who obtains a divorce from her husband on the ground of his misconduct is entitled to one third of his separate property L B R 1872—1892 219 Ref **Ma E Nyun v Maung Tok Pyu U B R 1897—1901 Vol II 39.**

Notes —Fol U B R 1902—1903, Vol II C P (3)

21 —Restitution of conjugal rights—Divorce by mutual consent

Where in a suit for restitution of conjugal rights, the question was whether there had been a divorce and the Court of first instance held that there had been, while the lower appellate Court held that there could have been no consent to a divorce because the girl's mother had brought pressure to

Burmese Law (Divorce) *Contd.*

bear and reverse the decree of the Court of first instance, *held* in second appeal that what the Court had to decide was whether there was a divorce by mutual consent It was not necessary that there should be a deed of divorce, or that the divorce should have taken place before elders **Ma Ami Gyi v Maung Hmut U B R 1897-1901-Vol II 37**

22 —Rule of Buddhist law with respect to the disposal of property upon divorce on the ground of the wife's adultery where the husband and wife had been married from youth but separated and subsequently reunited

There are two rules of Buddhist Law on the subject of a divorce for adultery one of them relating to the case of husband and wife married from their youth and the other to the case of husband and wife where there has been a previous marriage by one or both or at least by the wife When a woman has been married but one the probability is that she has formed relations through giving birth to children or through the acquisition of property, which ought to be considered when she has entered into a subsequent union which has to be dissolved On the other hand when the woman has been only once married there is no body to be considered but herself and the children and as the latter are the offspring of the husband it is probably immaterial so far as they are concerned to which parent the property goes as they would eventually inherit from one or the other The same *mutatis mutandis* would apply in the case of a husband whom the wife was entitled to divorce for misconduct Where the parties had married no stranger at only each other, they must be regarded as the husband and wife of youth (U B R 1892—1896 Vol II, 116 U B R 1897—1901 Vol II 28 Ref) **Maung Yin Maung Maung v Ma So U B R 1897—1901 Vol II 34.**

23 —Cause of action—

Under Buddhist law a suit for bare divorce without division of property will not lie U B L R 129, 10 Bom 152 Dist M Gyan v Maung Su Wa U B R 1897-1901 Vol II 28

Notes Affirmed U B R 1 10 2nd Qr 50 Ref U B R 1897—1901 Vol II 34 5 L B R 114, U B R 1905 4th Qr Buddhist law—Divorce 3 U B R 1902—1903 Vol II, Buddhist law—Divorce 6 12.

24 —Suit for divorce—Claim to partition of property—Causes of action distinct

A suit for divorce and for division of property do not constitute a single cause of action (U B R 1897-1901 Vol II 1, Diss). Partition of property is not an essential feature of a divorce The termination of the marriage status in itself appears to be a sufficient cause of action and till this question is settled the grounds for partition of the property do not arise and may vary according as the decree for divorce is based on findings of fact as to which party is in fault A suit for divorce need not necessarily contain a prayer for division of the property **Maung Tha Chi v Ma E Mya 1 L B R 7**

Notes—Overruled 5 L B R 114, U B R 1905 4th Qr Buddhist law—Divorce 3

25 Divorce—Validity

The existence of either of the two conditions, namely either a decree or order of Court or a written agreement executed by both parties in presence of respectable witnesses, is not essential to the validity of a divorce between Burman Buddhists **Mi Hnin Ngon v Nga Aung L B R 1872—1892, 73.**

Notes—Ref L B R 1872—1892, 206

26 —Buddhist law according to Ch V of the Dhammathat regarding a wife who is mad, etc. —Intimation of divorce by writing—Weakness and distraction of mind—

The mere sending to the wife a writing intimating the intention to divorce her (the wife being at the time out of her mind) does dot constitute a valid divorce **Mi Chin Mari v Mi Tu Ma L B R 1872—1892, 74.**

27 —Second marriage—Polygamy.

At Buddhist law where no special custom exists a husband who in the life time of his first wife marries a second wife without the first wife's consent, does not thereby commit a fault against the first wife Such a second marriage does not in itself constitute in Lower Burma a ground for divorce **Ma In Than v Maung Saw Hla L B R 1872-1892, 103.**

Burmese Law (Divorce) *Contd.*

Notes.—Ref: L B R 1872-1892, 114, 202,4 L B R 340, 175=10 Bom L R 41=12 C W N 220; U B R 1892—1896. Vol II; 48. Fol: 5 L B R 87.

28.—Re-marriage—Partition of property—Procedure—Finding on issues.

The presumption in the absence of special facts is that the affairs of people divorcing and re-marrying are settled definitely at the divorce or the re-marriage, (L B R 1872 1892, 14, Fol.) Courts ought to record distinct finding on each issue. **Maung Shwe Lin v. Mi Nyein Byu L B R 1872 -1892, 175.**

Notes.—Ref: L B R 1893—1900, 662.

29.—Divorce—Inheritance—Children of divorced wife.

It is a principle of the Buddhist law that the children of the divorced wife shall not inherit the property of the father acquired after his marriage with a second or third wife unless they continue to live and to plan and work with him **Ma Shwe Ge v Nga Lan and Nga On L B R 1872—1892, 296.**

Notes.—Ref: U B R 1892–1896, Vol II 159 L B R 1893—1900, 469, U *B* R 1897—1901, Vol II. 116, 176; Rel on L B R 1893—1900, 299; Fol: 4 L B R 272, 14 Bur L R 236; Dist· I L B R 161,

30.—Essentials — Procedure— Plaint— Petition.

A divorce cannot be had merely because one of the parties has no love for the other, or does not comply with the desires of the other. Desertion, according to the Manu Kye, is no doubt a good ground for divorce· but there is this condition attached namely, during the periods of time prescribed therein the husband should not have supplied anything to the wife. If a plaintiff in a suit to divorce establishes any of the grounds which the Dhammathats recognize as good grounds for divorce he would be entitled to a divorce even if such grounds are not among those particularized in the judgment of the Special Court. In suits for divorces the proper procedure is to present a plaint and not a petition for divorce, the case being not governed by the Indian Divorce Act, and the action being one of a civil nature. Where a petition for divorce is presented with a Court-fee required for a plaint, the Court has power to allow the person who has wrongly instituted proceedings in the form of a petition to amend by converting the petition into a plaint. **Maung So Min v. Ma Ta L B R 1872-1892, 610.**

Burmese Law (Divorce)-*Concld.*

Notes.—Ref. U B R 1905, 4th Qr Buddhst law Divorce, 3.

Burmese Law (Ecclesiastical).

1.—Wuttagan land—Duties of Thathanabaing—Res judicata—Limitation.

A piece of *wuttagan* land was originally the subject of a dedication by plaintiff's grandfather to a monastery and then confiscated and re-dedicated by the Burmese King, and plaintiff, a layman, applied to the *Thathanabaing* for its restoration. The monks in occupation, the defendants, objected pleading the confiscation, and the *Thathanabaing* and his council decided that the land should be restored to the plaintiff. *Held* that the ecclesiastical authorities were competent to make such an order, and the defendants could not object to it and that questions of *res judicata* and limitation did not arise in such a case. U B R 1897–1901, Vol II, 52 Ref. **U Teik Ka v. Nga Tin Byu U B R 1910 4th Qr 78.**

2.—Civil Court whether can give effect to an order of the *Thathanabaing* or of any other ecclesiastical authority until such order is confirmed by a judgment and decree of the Civil Court·

A Civil Court cannot give effect to an order of the *Thathanabaing* or of any other ecclesiastical authority until such order is confirmed by a judgment and decree of the Civil Court. The decision of the *Taunghyin Sayadau* cannot be treated as if it were a judgment and decree of a Civil Court and it cannot be executed without even giving the other party an opportunity of showing cause against its execution. So far as the Civil Courts are concerned, the Sanad is merely an authoritative declaration that for the time being the *Taunggwin Sayadau* is the ecclesiastical who has supreme control as *Thathanabaing*. **Shin Kunthala v. Shin Sanda U B R 1908 2nd Quarter Buddhist Law—Ecclesiastical 1.**

Notes.—Ref: U B R 1909 4th Qr Buddhist Law —Ecclesiastical 5,

Burmese Law (Ecclesiastical)-*Contd.*

3.—Authority of Thathanabaing—Jurisdiction of Civil Courts.

Where a monastery is *thingika* property which was dedicated to the monastic body before the sect to which the defendants (schismatics) belong came into existence, *held* that, according to ancient custom, the *Thathanabaing* had authority to decide disputes relating to it. It is not the province of the Civil Courts to decide whether an order of the *Thathanabaing* or any other Ecclesiastical authority is strictly in accordance with the *Vinaya* or not. A defendant may object to the jurisdiction of a Civil Court, but if he declines to appear to contest the case on the merits, he does so at his peril, and, if on appeal, the question of jurisdiction is decided against him, he will not be allowed to re-open that case on the merits. **U Kuthala v. U Sanda U B R 1910 2nd Qr 35.**

4.—Civil Courts duty of—Civil Courts should abstain from deciding points which fall within the spehere of Ecclesiastical jurisdiction.

The Civil Courts are bound by the decisions of the Buddhist Ecclesiastical authorities in matters within their competence and they should also abstain from deciding points which fall within the sphere of Ecclesiastical jurisdiction. U B R 1897—1901 Vol II 42, U B R 1892—1896 Vol II 59, 72 Ref. **U Wayama v U Ahsaya U B R 1902—1903 Vol II Buddhist Law—Ecclesiastical 1**

5.—Award by ecclesiastical superior—Effect either as order of ecclesiastical authority or as ordinary arbitration award—Buddhist priesthood—Succession of one member to another in respect of religious buildings and other kinds of property—Possession — Dispossession — Specific Relief Act, s. 9.

A dispute having arisen between two Buddhist monks, the appellant and respondent, as to the right of inheritence and possession in a monestary and other property left by a deceased member of priesthood, the matter was referred by the *Thathanabaing* or head of the Buddhist *hierarchy*, to the *magwadi Sayadaw* and other *Sayadaws* or high ecclesiastical dignitaries, for decision. An award was given in favour of respondent defendant, and the

II C C 63

Burmese Law (Ecclesiastical)-*Contd.*

appellant-plaintiff was dispossessed irregularly under orders of the district executive authorities. In the litigation that ensued, an unsuccessful attempt was made to confine the matter, to begin with, to proceedings under s. 9 of the Specific Relief Act. The action was eventually fought on the question of the validity of the decision of the *megwadi Sayadaw*, which was impugned as not final on the ground that leave had been given for further reference on appeal. It was clear enough from the evidence that that award was pronounced by the ecclesiastical authorities appointed by the *Thathanabaing* or head of the Buddhist church for the purpose *Held:*—If it was an ecclesiastical decision in an ecclesiastical matter, the ruling of this Court in Circulars No 72 of 1893 No. 84 of 1895 would apply, and there would be no room for questioning the action of the ecclesiastical superiors of the parties within the scope of their authority. If on the other hand, the award was of a secular nature or partly secular and partly ecclesiastical, it would make little practical difference, for it had been shown that the plaintiff himself agreed to the reference to the arbitrators, or whatever was their proper character, being made. Either way the plaintiff was bound. The only cause he could show against the award now was its alleged want of finality, and this objection was founded on the assertion that leave was given to appeal from the decision, By this was meant apparently not exactly an appeal to higher authority but a reference to some other ecclesiastical law expert to hear and decide the case. Supposing, however, that such leave was given by the *Megawadi Sayadaw*, and that he could give it, which was doubtful from the evidence adduced by the plaintiff himself as to the *Thathanabaing* objecting to order and refusing to return it to plaintiff, still the plaintiff took no advantage of such permission and he could not, of course, be allowed to keep the matter open indifinitely. Apparently, however, the truth of the matter was that the *Thathanabaing* gave the plaintiff fifteen days within which to appeal or make a reference. The plaintiff did nothing, and after the expiry on the time allowed, the order of the *Thathanabaing* was issued to carry into effect the award of the *Sayadaws*. In whatever aspect, therefore, the award was viewed, it would seem that the appellant-plaintiff has no good cause

Burmese Law (Ecclesiastical)-*Contd.*

now for challenging its validity. U Okgantha v. U Thiri, U B R 1892—1896 Vol II 82.

Notes—Cited U B R 1897—1901, Vol II, 45.

6—Ecclesiastical jurisdiction of the hierarchical authorities of the Buddhist community—Suit for ejectment from a Kyaung—Poggalika and Thinkiga gift.

Where the plaintiff-respondents sued to evict the defendant-appellant from a monastery on the ground that they were the beneficial owners thereof or successors to the original owner to whom the monastery had been given by the King of Burma as a *poggalika* gift; that they were recognised as such by the *Thathanabaing*, and that the defendant declined to leave the monastery though ordered to do so by the *Thathanebaing*, and the defandant denied the status of the appellant and the validity of the *Thathanabaing's* order, *held*—that the plaintiffs were the constituted authorities, that it was for the defendant to obey them, subject to appeal to their ecclesiastical superiors, and that the Court of first instance had rightly evicted him. U B R 1892—1896, Vol II, 59 17 Mad 222, Ref.

U Te Zeinda v U Teza.
U B R 1892--1896, Vol II, 72.

Notes:—Ref. U B *R* 1902—1903, Vol II, Buddhist Law—Ecclesiastical, 1.

7—Gift—Poggalika—Thingika—Gifts having reference to a future state of existence are divided into two kinds—Poggalika and thingika.

In poggalika gifts, the person to whom the offering is made has a right to keep it In thingika gifts, it becomes the property of the chief of the assembly of priests. After a supporter of religion has made such gifts, he has no right to any further claim on them."

Maung Talok v Ma Kon U B R 1892—1896 Vol II, 78.

8—Suit for ejectment from a kyaung—Poggalika and thingika gifts—The ceremony of making a libation of water in the consecration of land and buildings—Authority of the Thathanabaing and Thudama Council in matters of ecclesiastical discipline and control.—

It is the desire of the British Government to protect the Buddhist faith as far as it is in their power to do so. The orders and proceedings of the Buddhist ecclesiastical authorities so long as

Burmese Law (Ecclesiastical)-*Contd.*

they keep within their jurisdiction and do nothing contrary to law, cannot be questioned in the Civil Courts. U Te Za v U Pyinnya, U B R 1892—1896, Vol. II, 59.

Notes.—Ref: U. B. R. 1892—1896, Vol. II 72, U. B. R. 1908, 2nd Qr, Buddhist Law—Ecclesiastical, 1; U. B. R. 1909, Buddhist Law—Ecclesiastical, 5; U. B. R 1902—1903, Vol. II, Buddhist Law—Ecclesiastical, 1.—

9—Duty constituted Buddhist ecclesiastical authority—Decision of—Enforceable by Civil Court.—

In dealing with cases of this kind, *viz.*, suits to enforce an order of the Tabayin Sayadaw, the Courts have to ascertain that the matter is one within the jurisdiction of the Buddhist ecclesiastical authority and that a duly constituted authority has given a decision. It is not necessary that a decision in a matter within his jurisdiction by a duly constituted Buddhist ecclesiastical authority should be confirmed by a Civil Court. The duty of the Civil Court is to enforce it, if it is shown to be a decision enforceable. U. B. R. 1892—1896, Vol, II, 59, U B R 1897—1901, Vol. II, 42, 45, Ref. Wun Chit v U Zawta. U B R 1897—1901 Vol. II 52.

Notes.—Cited, U B R 1910. 4th Qr. 78.

10—Ecclesiastical jurisdiction—Suit for ejectment from a monastery—Appointment of Thathanabaing.—

In a suit by pongyi to eject another pongyi from a monastery in accordance with a decision purporting to be that of the *Thathanabaing*, before the Pakan Sadaw, called the Thamudi Thathanabaing and also before 12 Sayadaws, called Thathanabyu Sayadaws, these authorities decided in the favour of plaintiff, the case being heard *ex parte*. The suit was to enforce these decisions. The defendant among other pleas, denied the jurisdiction of the Pakan Sayadaw and of the Sayadaws who had given the decisions in question and the Lower Courts held that the Pakan Sayadaw had been duly elected and that the Courts should now recognize him as the *Thathanabaing*. *Held*, in second appeal that it was not shown that the Pakan Sayadaw could be recognized by the Civil Courts as *Thathanabaing* of Burma and that it was not shown that the

Burmese Law (Ecclesiastical)-*Concld.*

authority of the Sayadaws had been accepted or recognized. The dicision of the Lower Courts was reversed. U. B. R. 1892—1896, Vol. II, 59, 72, 82, U B R 1897—1901, Vol. II, 42, cited. **U Thanwaya v U Kethaya U. B. R. 1897—1901 Vol. II 45**

Notes.—Affirmed, U. B. R. 1897—1901, Vol. II, 52.

11—Suit for possession of a kyaung-Authority of Buddhist ecclesiastical authorities in ecclesiastical matters.—

Until the contrary is established not only the *Thathanabaing* in Council, but also other Buddhist ecclesiastical authorities have jurisdiction in ecclesiastical matters. This being so, not only should the Civil Courts be bound by the decisions of these authorities in matters within their competence, but they should also abstain from deciding points which fall within the sphere of ecclesiastical jurisdiction. U. B. R. 1892—1896, Vol. II, 59, 72, Ref. **U. Thatdama v U. Meda U B R 1897—1901 Vo. II, 42.**

Notes.—Cited, U. B. R. 1897—1901, Vol. II, 45; Expl., U. B R. 1897—1901, Vol. II, 52.

Burmese Law-Gift.

1—Death-bed gift—

Ordinarily Buddhist Law is not applicable to gifts. (U. B. R. 1892—1896, Vol. II, 400, Ref.) A promise to give for no consideration will be valid in Burma without delivery of possession, provided that, in other respects, it fulfils the conditions specified in s. 25 (1), Contract Act. Whatever law may be applied to ordinary gifts, death-bed gifts must be held to be a question of inheritance, to which Buddhist Law is applicable. **Ma Pwa Swe v Ma Tin Nyo U B R 1902—1903 Vol II Buddhist Law Gift 1.**

Notes.—Ref: U B R 1908, 3rd Qr. B L—Gift, 7 U B R 1907, 1st Qr. B. L. Gift. U B R 1902——1903 Vol II Probate and Administration 3.

2—Gift, revocation of—Buddhist law not applicable to gifts—Succession—Inheritance—Meaning of terms—Burden of proof—Settlement of issues—Need for making parties clearly understand points on which evidence is required.—

It is undoubtedly the duty of the Courts to

Burmese Law (Gift)-*Contd.*

see that the issues framed are clearly understood by both parties, and this is particularly necessary when the issues are of a technical character, or are drawn in a technical manner, and when, as is so frequently the case in Upper Burma, the parties are ignorant and inexperienced in our judicial ways. It may easily happen that a party omits to produce essential evidence from sheer inability to comprehend what is wanted, and care should always be taken to point out distinctly the matters upon which the production of evidence is required. S 53 of the Civil Justice Regulation specially gives ample powers to the Courts to ensure the production of evidence which they themselves deem necessary in the interests of justice even when the parties fail to do what they ought on their own behalf. Suit by Burmese father for recovery of land transferred ten years before to his daughter and her husband, solely enjoyed by them ever since, and entered in their names and as their property in the revenue records. Suit brought on allegation of temporary transfer, but trial of case confined to question of power of father to revoke gift once made to child and followed by delivery of possession. *Held*—that the burden of proof was entirely on the plaintiff, who was bound to show that the ownership of the land was not that of the defendants in possession, and that the question was not one of succession, inheritance, or a religious usage or institution so as to make Buddhist law the rule of decision, and that therefore the rule of decision must be found in some other law, if any, for the time being in force, and otherwise in the principles of equity, justice, and good conscience. Such other law would, to some extent, by the Contract Act, s 25 and Expl. 1, under which the gift having been actually made, be valid as between donor and donee in the absence of any incident that could be attached to it not inconsistent with the provisions of the Act. Such incident could not be inferred from the passages in the Dhammathats permitting parents to recall gifts made to their children those passages being of the nature of religious or moral precepts which could not be applied as binding in the practical affairs of life, unless their general acceptance as having such force were proved as a matter of custom among the people. **Maung at Gyi v Ma U Me. U B R 1892—1896 Vol. II 400.**

Burmese Law (Gift)-*Contd.*

Notes:—Ref: U B R 1907 1st, Qr. Buddhist Law—Gift, 1, U B R 1897—1901, Vol II, 421, U B R 1892—1896, Vol. II, 377, U B R 1902—1903. Vol. II, Buddhist Law—Gift. 1.

3—Possession-What is requisite to transfer possession-Thingika gift of mortgaged land—Assent of son to gift by father not necessary—No vested interest possessed by son in father's estate before father's death—Diversion of estate from natural heirs to religious endowment should be strictly looked into.—

S. 43 of the sixth chapter of the *Manugye Dhammathat* deals with the mutual power over the property of each other pertaining to teachers and scholars, parents and children, husbands and wives, masters and slaves. It discusses the case of teacher and scholar and says the others are the same. It is obvious that the case treated of is that of joint property, and the object is to lay down some rules of partnership. There is no authority for holding that a son can exercise any restraint over the alienation of property by his father. It is necessary for the Courts to look strictly into transactions by which the estates of Buddhists are diverted from their families. **Maung Hmon v Ucho. U B R 1892—1896 Vol II, 397.**

Notes—Cited U. B.R. 1897-1901, Vol. II 62.

4—A gift by a Buddhist monk to take effect after his death.

A gift made by a Buddhist monk, not accompanied or followed by delivery of possession, and intended to take effect only on the death of the donor, is not valid. (U. B. R. 1892—1896, Vol. II, 397, U. B. R. 1897—1901, Vol. II, 59, L. B. R. 1872-1892, 70, Ref:) **U Thathana v U Awbatha. U B R 1897—1901 Vol II, 62.**

Notes—Ref. U. B. R. 1907, 1st Qr., Buddhist law—Gift 1.

5—Gift—Validity—Necessity for strict proof, especially of transfer of possession, which is the crucial test.

Actual parting with possession is the only true test of the completion of a gift, and Burmans evade that final and crucial test if they possibly can. The result is that, as a general rule, a genuine gift is not commonly made except for religious purposes and under special circumstances. The safest course in all matters of this kind is to insist on strict proof, and in this case, the evidence was most unsatisfactory **Maung Shwe Thwe v Ma Saing U B R 1897—1901 Vol II, 59**

Notes: Cited, U. B. R. 1897—1901, Vol. II,62.

6—Gift by Buddhist monk.

Under Buddhist law a layman upon embracing a religious life becomes *ipso facto* divested of all property, which thereupon vests as it would upon his divorce or decease. **Ma Pwe v Maung Myat Tha U B R 1897—1901 Vol II, 54.**

Notes:-Cited, U. B. R.1905, 4th Qr., Buddhist Law Inheritance, 11.

7—Bona-fide *purchaser*—*Notice.*—The Courts will protect a *bond fide* purchaser for value, without notice, against a person claiming under a deed-of-gift not followed by possession. **Nga Myat Ok v Nga Bo. L B R 1872—1892 11.**

8—Revocation.

The right in property obtained by gift, where the gift has been accepted under a condition to support the donor, will terminate if the donee neglects to fulfil the condition. Every gift from a parent to a child does not raise by necessity the inference that the child is bound, by a condition of the gift, to support the parent in case of need. In cases other than those of inheritance, succession, marriage, and religious usage, the Court should, before applying the Budhist law, look at the effect of their decisions and consider whether that law is equitable. Although under Buddhist Law a donor, who has become poor, may revoke his gift, the Court declined to apply the law where a gift of immoveable property had been perfected by ten years' possession, and where the donee's name had been registered as owner **Mra Do Aung v Shwe U. L B R 1872—1892. 22.**

Notes.—Appl. L B R. 1872-1892, 197; Ref: U B R 1892—1896, Vol II, 400, L B R 1872—1892, 219.

9.—Possession Revenue Register.

Execept in the special case of gift made to a child on the occasion of entering the priesthood, a gift is not under Buddhist law complete unless

Burmese Law (Gift)-*Contd.*

it be followed by a transfer of possession, even though there be a written deed of gift, or though the name of the donee at the instance of the grantor be entered in the revenue register.

(4 B H C A C 31, Ref)

Maung Ni v Nga Po Min.
L B R 1872-1892 44.

Notes: Fol L B R 1893—1900, 504 ; Ref U B R 1892—1896, Vol. II, 159. L B R. 1872—1892. 70. Appl. L B R 1872—1892, 197.

10.—Priesthood.—

Absence of delivery of possession does not invalidate a gift given on the occasion of the donee entering the priesthood The court should not, under this law, decree immediate and exclusive possession of gift to the donee or his representative, as against his parents, the donors. That is to say the Courts cannot decree possession of the gift to the donee until the death of his parents.

Nga Pan U v Mi Kyu. L B R 1872-1892, 30.

Notes--Ref U B R 1907, 1st Quarter, Bud. Law—Gift, 1 ; Appl, L B R 1872—1892, 197.

11.—Possession.

Where a gift is made for the purposes of evading the ordinary Buddhist rules of inheritance,the Buddihst Law applies. There is nothing to prevent a man from making a gift to one or more of his children in the absence of others. A gift of property made by a father to his children holds good, and such property is not liable to partition after his death, provided that delivery of possession has taken place. The law requires strict proof of delivery, and delivery cannot be presumed from mere continuance of possession at any rate in the case of sons actually living with and dependent on an aged father. (U B R 1907—1908, Buddisht Law—Gift, 1, Ref; U B R 1897—1901, Vol II, 59, 3 L B R 8, Fol).

Maung Pan U v Ma Kyi Nyo
8 Ind Cas 1200.

12.—Deed of gift without delivery of possession—Registration of deed, effect of.

It has been held in this Court, in several cases, that delivery of possession is necessary to complete a gift among Buddists in this province. (L

Burmese Law (Gift)-*Contd.*

B R 1872—1892 44, L B R 1893—1900, 9 U B Cir 87 of 1893. Fol.) *Held*, that a deed of gift though duly registered does not become effective if no possession is given. (20 Cal 464 Fol)

Gura v San Tun Baw.
L B R 1893—1900, 504.

13.—Gift to priest—Poggalika and Sangika gifts—Individual and general gifts—Claim on poggalika Kyaung by recipient after he has left the priesthood.

A gift made with a view to future existence, whether *poggalika* and *sangika*, always retains its religious charactar and cannot be claimed back for secular uses In the case of *poggalika* gifts the recipient can dispose of the same to any other priest. In the absence of his having specifically disposed of the same to some other priest on his death, the original donor has a right of selecting another individual priest as the recipient of his offering. Failing the exercise of such selection the gift would become *sangika*. Property derived from parents or otherwise acquired purely as defined in section 409 of the Digest does not become *sangika*, but reverts to the natural heirs of the deceased. In the case of *Poggalika Kyaung* the recipient cannot after he has left the priesthood make a gift of it to another priest ; it ceases to become his personal property when he leaves the priesthood. **Maung on Gaing v U Pandisa. L B R 1893-1900, 614.**

14 - Parents making gift to children at the time of entering priesthood—Delivery of possession also made—Property in donee—Power of disposal.

Where there has been delivery of possession of the property given to children at the time of entering priesthood, the property passes absolutely to the donee, and the parents have no longer any power of disposal over it. (L B R 1872 1892, 2nd Edition, 30 Dist).

Hla U v Aung Dun 6 L B R 32.

15.—Gift by parent to a Koyin on his entering the priesthood—Possession taken by donee—Gift irrevocable by parents—Subsequent disposition by parents invalid.

In the case of a gift by parents to their son on his entering the priesthood, the parents can only sell and utilize the property gifted, where deli-

Burmese Law (Gift)–*Concld.*

very of the possession has not taken place and where the property given remains in possession of the parents. Where there has been delivery of possession of the property given, the property passes absolutely to the donee and the parents have no longer any power of disposal over it.

Ma Hla U v Mg Aung Dun 11 Ind Cas 862.

16—Necessity for delivery of possession under Mahomedan Law–Subject-matter of gift remaining in donor's hands, effect of—Contract Act S. 25, Expln. 1—Buddhist Law (Gifts)

S. 4 (1) of the Upper Burma Civil Court Regulation (or s 13 of the Burma Law Act, 1898) only refers to cases of succession inheritance, marriage or caste, or any religious usage or institution And questions relating to gifts which do not fall under any of those heads, must be governed by s 25 Contract Act. This has been so held in regard to gifts by and to Buddhists The effect of Expl 1 to S 25, Contract Act, is that a gift actually made is valid, though it may not have been expressed in writing or registered.

The Mahomedan Law does not render it impossible for a husband to make a gift to his wife of the house in which they both live. Actual delivery of possession is not necessary. If the character of the possession changes, the mere retention of the subject-matter of the gift in the hands of the donor would not affect the validity of the gift.

Under the Mahomaden Law, the husband takes a fourth of his wife's estate, where there are children.

It depends upon the circumstanaces of each case whether the Mahomedan or the Buddhist Law applies to gifts. C. A. (208) of 1905 (unpublished), 28 All 127 Ref **Abdul Gafur v Deyan Singh U B R (1907) Buddhist Law Gift 1.**

17—Gift—Death-bed gift—Validity.

Held, that according to the Buddhist law the gift of an entire estate to a stranger, made by a person *in extremis*, though accompanied by delivery of possession, is void as against the natural heirs. U B R (1902–1903) II Buddhist Law—Gift p. 1 Ref. **U. Naga v Maung Hla. U B R (1908) 3rd Qr. Buddhist Law—Gift 7.**

Burmese Law (Husband & Wife).

See also Cases under.—

(1) Burmese Law (Divorce).
(2) Burmese Law (Marriage).

1.—Lettet Pwa and Hampazon property—Property acquired after marriage, interest of husband or wife in—Power of Husband to alienate property which he has inherited after marriage.

The wife or husband has an interest in property acquired by the other by inheritance after marriage when they are living together and helping each other. In considering what power the husband has of alienating property which he has inherited after marriage the court should be guided by the rules applicable to a partition upon divorce when neither party is in fault. The rule as to equal division upon divorce only applies to property conjointly acquired after marriage. (L B R 1872—1892, 110, 113, L B R 1893—1900, 295) **Maung Po Sein v Ma Pwa. L B R 1893—1900, 403.**

2—Husband and wife—Power of husband to alienate joint property of himself and wife—Whether alienation, transfer of his share and interest.

In this case, a Burmese Buddhist husband had executed a deed of sale of the *Hunpazon* property of himself and his wife The lower courts found that it had not been proved that the wife was aware of, or that she had consented to, the sale, it was also clear that the vendee knew that the wife was interested in the land and yet chose to take a conveyance from the husband alone. The following question had to be decided and they were referred to a Bench of the Court:—(*1*) Whether a Burmese Buddhist husband can validly sell or alienate the *hunpazon* property of himself and his wife without her consent or against her will ? (*2*) Whether such a sale by the husband, made without the consent of his wife, constitutes a valid transfer of his share and interest in the property sold. *Held* that no grounds having been made out for disturbing the decision of Mr. Fulton in the case of **Ma Thu v**

Burmese Law (Husband & Wife). —*Contd.*

Ma Bu that a Buddhist husband cannot sell the joint property of himself and his wife without his wife's assent, express or implied, the first question must be answered in the negative, i. e. subject to the reservations, stated in the above mentioned Ma Thu's case a Buddhist husband has no power to make a valid sale of the joint property of himself and his wife without her consent or against her will. (L B R 1872—1892, 578 Fol, L B R 1872—1892, 19, 1 L B R 11, U B R 1892—1896, Vol II 303 Ref), and that in view of the various decisions forming distinct authorities for the position that, under Buddhist Law, it is competent for a husband to validly alienate his share alone of the joint property of himself and his wife the second question must be answered in the affirmative (i. e.,) a sale by a Buddhist husband of the joint property of himself and his wife, made without her consent does constitute a valid transfer of his share and interest in the property sold 1 L *B* R 184 over U B R 1892—1896, Vol. II 46, 201, U B R 1902—1903 Vol II Ex. of decrees, U B R 1904, Buddhist Law—Divorce 1, 1 L B R 198, 3 L B R 8, L B R 1893—1900, 568, 3 L B R 167 Ref) U B R 1907 4th. Quarter Buddhist Law—Marriage—Joint property, 1, Ref)

Ma Shwe U v Ma Kyu, 3 L B R 66, F B.

3.——Act done by husband in pursuance of common business binding on wife- Sale of immoveable property by husband without knowledge of wife—Apparent acquiescence subsequent to sale, by wife no proof of consent—Presumption.

For many purposes *B*urmese husbands and wives may be regarded as partners, and, where the husband manages a business on behalf of himself and his wife, acts done in pursuance of the common business would no doubt bind the wife, but this principle cannot, we think, be applied to such a transaction as the sale of immoveable property belonging to both. In such a case further evidence is required, besides the fact that the transaction was in some way connected with the business, in which it might perhaps be presumed that the wife made no open protest against the sale *B*ecause a wife consents to or acquiesces in a mortgage the presumption does not arise that she also assents to a sale of the property. Nor should apparent acquiescence subsequent to the sale be regarded as proof of consent by the wife to such sale. (L B R 1893—1900, 37, 568, L B R 1872—1892, 578, Ref) **Maung Twe v Ramen Chetty 1 L B R 11.**

Notes.—Ref: 3 L B R 66.

4.—Joint property

Three years absence with neglect on the part of the husband to provide the wife with the means of subsistence, is required to give the wife the right of re marriage. Until the expiration of that period the relation of marriage subsists, unless, of course, it is put a stop to by some formal act of separation The Burmese law recognizes the husband as the lord of his household The wife cannot retain possession of joint property in opposition to her husband. So long as marriage subsits the Courts cannot decree an absolute dominion over it to either husband or wife, but the husband, rather than the wife, is entitled to retain possession of it in trust for both. **Maung Ko v Ma Me. L B R 1872—1892. 19.**

Notes—Ref U B R 1892—1896, Vol. II, 48 U B R 1892 1896, Vol. II, 53, 3 L B R 66, 3 L B R 175, L B R 1872–1892, 126, L *B* R 1872—1892, 578, U *B* R 1892—1896, Vol. II, 303.

5.—Divorce—Profession of faith—Apostacy—Estoppel under s. 115 of the Evidence Act.

In a suit for divorce from a Mahomedan husband, brought by a *B*urmese woman professing the *B*uddhist faith, but at the time of her marriage simulating conversion to Islam, and married with Mahomedan ceremonies, the Mahomedan Law should form the rule of decision, and the Courts cannot grant a divorce in such a case when no fault is established on the husband's side. **Kumal Sheriff v Mi Shwe Ywet. L B R 1872—1892, 49.**

6.—Divorce—Joint property.

Where a woman has a separate establishment from her husband and takes no share in the management of his business, and performs the duties of a wife no more than by receiving his visits, is not entitled to hold the property acquired by her husband, who carried on his business in the house of his first wife, as joint property. Where a divorce takes place against the wish and without any fault on the part of the wife, the hus-

Burmese Law (Husband & Wife) -Contd.

band may take back his separate property.
Maung Kyin v Ma baung. L B R 1872—1892,27.

Notes.—Ref: L *B R* 1872-1892. 103. 110, Relied on. L *B* R 1893-1900, 295: Cited, U *B* R 1897-1901, Vol. II, 138.

7.—Liability of Buddhist wife for obligations contracted by husband—Wife not privy to obligationer benefited by it—*Buddhist* law how far binds Courts.

To hold a wife personally responsible for an obligation contracted by her husband to which it is shown that she was in any way privy, and from which it is not proved that she received any profit, is certainly not, in accordance with justice, equity, or good conscience. The wife is not personally liable for an obligation contracted by her husband, who had been absent from home three years. In matters other than succession, inheritance, marriage or religious usage, our Courts are only bound by *Buddhist* Law so far as it is just and equitable **Mi Nu v Maung Singh** L B R 1872-1892, 28.

Notes.—Ref: 3 L *B* R 175 U *B* R 1892 1896. Vol, II, 53.

8.—Ancestral estate — Widower — Wife's mother.

On the death of a wife the husband is entitled to retain possession of his wife's share in ancestral estate which has been in their separate possession, to the exclusion of the wife's mother.
Mi Tun Byu v Nga Yan. L B R 1872—1892, 32.

Notes.—Ref: L *B* R 1872—1892. 74; U *B* R 1892—1896. Vol. II, 121.

9.—Wife's duty.

So long as the marriage bond subsists the wife is, by Buddhist law, required to do her part in contributing to the joint-comfort and well-being. (Special Court judgment in Civil Appeal No 10 of 1882, 1, Fol) The husband is the lord of the wife. There is no authority for the proposition that while the marriage subsists the wife is to have exclusive possession of the husband's property or the joint property. (L B R 1872—1892, 19, R.) **Neg Kan Za. v. Mi Le.** L B R 1872—1892 126.

Burmese Law (Husband & Wife) -Contd.

10—Restitution of conjugal rights—Divorce—Rights of divorce on mere caprice.

A suit between a Burman Buddhist married couple for restitution of conjugal rights will lie. This right is not lost by the plaintiff's temporary abandonment of the defendant for a shorter period than that mentioned in Manukye Book 5, Chapter 17. **Nga Nwe v Mi Su Ma.** L B R 1872—1892, 391,

Notes:—Ref, 3 L B R 175, L B R 1872-1892, 607, 5 L B R 87 L B R 1872—1892, 610, U B R. 1909, Buddhist Law—Marriage, 1, U B R 1892-1896, Vol II, 53. U B R 1905, 4th Qr; Buddhist Law—Divorce. 3,

11.—Joint property —

A Burmese husband cannot sell or alienate the joint property of himself and his wife without her consent or against her will. L B R 1872—1892, 19 **Ma Thu v Ma Bu.** L B R 1872—1892, 578.

Notes:—Ref 1 L B R 11, U B R 1892-1896, Vol. II. 121,303. 1 L B R 184 D, 2 L B R. 321; Fol: 3 L B R 66.

Burmese Law (Inheritance)

1.—Divorce of parents by mutual consent—Son's right of inheritance.

The mere fact of a divorce having taken place between the parents by mutual consent, with equal division of the parents' joint property, accompanied by the fact that the child of the first marriage has, during his minority, lived with his divorced mother, does not divest the son of his ordinary legal right of inheritance under Buddhist law expressed in the ordinary rule that "on the death of the father who has married two wives in succession, the child of the first marriage is entitled to one eighth share in property acquired during the continuance of the second marriage", as propounded by *Sandford*, J C in Nga Po Thit's case (B S J 18, **Maung Ba Kyu v Ma Xan Byu.** L B R 1893—1900, 299.

2.—Children of father by a first and second marriage-Division of property inherited from a grandparent after death of father-Limitation.-

Where there are children of one father by a first marriage as well as by a second marriage

Burmese Law (Inheritance)-*Contd.*

the children of the first marriage, should have equal shares with the children of the second marriage in property inherited from a grand parent after the death of the father. **Maung Ye v. Ma Me:** **L B R 1883—1900, 418**

3.—Legitimate child.

A child begotten in chance intercourse is entitled to inherit where there are no legitimate children. **Nga Ka Yin O v. Ma Gyi,** **L B R 1872, 1892, 15.**

Notes:—Ref; 2 L B R 54.

4.—Mother and children.

According to Buddhist law on the death of the father no child other than the eldest can claim a share of the inheritance from the surviving mother The position of children in relation to their parents discussed. L B R 1872-1892, 39,108, 41, Ref. **Mi Saung v Mi Kun, L B R 1872-1892, 115.**

Notes:—Ref: U B R 1892—1896. 138, 581 L B R 1893-1900, 585, 2 L B R 255, L B R 1872,-1892, 212, 255.

5.—Succession-Parents and children

On the death of Buddhist parents who have during their life-time divided the bulk of their property, but reserved a share for their own support, that share should be divided among the children according to the ordinary rules of succession without reference to the fact that the parents lived or died with any of the children. **Ko Ti Ma Bi Maung Po v Ma Dut Baing Sauk Maung Shwe O Nga Ti Dut, Mi Ba And Mi Gun,** **L B R 1872.—1892. 170.**

Notes:—Appl, L B R 1872-1892, 191.

6.—Joint property-Widow-Children by former marriage.

Where a father on the death of his wife marries again and dies, leaving no issue by the second wife, the children of the former marriage take collectively one eighth share out of the property acquired during the second marriage; the widow takes the remaining seven shares. (L B R 1872 1892, 18, 110, Ref. **Mi So v Mi Hamat Tha And Nga Hmyin,** **L B R 1872 - 1892, 177,**

Notes:—Ref 2 L B R 174; 4 L B R 189; L B R 1893-1900, 295, 299; Fol; L B R 1893-1900, 361.

H C. C. 64

Burmese Law (Inheritance)-*Contd.*

7.—Kettima son Thaheta son—Law relating to.

There is nothing in Buddhist Law to render a child whose parents are dead or unknown incapable of adoption. This was an appeal to recover a share in the estate of the Pakan Mingyi Kadaw, (deceased). The estate is in the possession of the first respondent defendant, who asserts his right to it as being the *kittima*(adopted) son of the Mingyi Kadaw.The plaintiff appellant is a relation of the Mingyi Kadaw. *Held* that the respondent Maung Kan Gyi was legally adopted as a *kittima* son and as such was entitled to inherit. That he did not conduct himself as an enemy so as to render himself incapable of inheriting. And as it was admitted that a *kittima* son would oust the appellant from a right to succession the appeal was dismissed. U B R 1892-1896 Vol II. 22 Ref; L *B* R 1872-1892, 25.

Ma Tin Shwe v Maung Kan Gyi. **U B R 1897—1901 Vol II, 142.**

Notes:—Cited: 2 L *B* R 224,

8—Child of first marriage.

On the death of the father, who has married two wives in succession,the child of the first marriage is entitled to one-eighth share in property acquired during the continuance of the second-marriage. **Nga Po Thit v Mi Thaing.** **L B R 1872—1892, 18.**

Notes.—Fol., L B R 1893 1900, 361; Ref: L B R 1893—1900, 299, L B R 1872—1892, 110, 2 L B R 174, L B R 1872—1892, 103, L B R 1872—1892, 177.

9—Buddhist Law-Inheritance-Son of divorced wife—Filial relations—Maintenance by father—Revival of lost rights.

The children of separated parents are included among those children who cannot inherit, and no distinction is made between sons and daughters. The mere fact of a father helping to educate or maintain a son is not sufficient to revive rights which such son had lost in law and intention at the time of his mother's divorce. L B R 1872—1892, 184, 266 L B R 1893—1900, 469, Chan Toon 450, D; L B R 1893—1900, 299, Diss. **Mi San Mra Rhi v Mi Than Da U 1 L B R 161**

Notes.—Ref: 5 L B R 133, 2 L B R 174; Fol, 14 Bur L R 286, 4 L B R 272.

Burmese Law (Inheritance)-*Contd.*

10—Inheritance—Shares of widow and of children by former marriages.

Where the plaintiff appellant the third wife (childless) of her deceased husband sued his children by the two former wives for a share in the estate left at his death and there was no evidence regarding the estate of the at the time of, or during the st of, either of the former m held, (1) that appellant was e fourth share of her husband's p s sessed by him at the time of r a seven eighth share of the *letpwa* p jointly acquired during her marriage) the absence of evid of deceased h his third marriage, his children by the first two marriages shared eq ly *paraphernalia* and *letpwa* property remaining after the widow had taken her share (3) that in cases like the present one, when *payin* property changes its character during a marriage, the presumption is that it had become *letpwa* of that marriage The childless widow take two eighths of the property acquired during the third marriage and onefourth of the property bro husband to the third marriage irrespective time it was acquired. (B L R 1879—189 U B R 1892—1896, Vol II, 159, U B R 18 1896, Vol II, 184, U B R 1897—1901, Vol II, 126, L B R 1872—1892, 6 L B R 187 1892, 18, L B R 1893—1900, 361, U B R 1892 1 92 110, L B R 1872-1892, 223 L B R 1893 1900, 312, L B R 1893—1900, 418 U B R 1897 1901, Vol II 79 1 L B R 161. U B R 1892—1896, Vol II 102 Ref. **Ma Ba We v Mi Sa U 2 L B R 174 P B.**

Notes.—Fol 3 L B R 8, Ref 4 L B R 110.

11—Orasa son—Partition—Right of grand son to claim a share on re-marriage of grandfather

The term *orasa* has two distinct meanings It applies to all legitimate natural born children as opposed to adopted illegitimate children and it means also the eldest legitimate son or daughter or as has been said the eldest legitimate child. It is in the sense of the eldest son or daughter that it is generally used in the reported decisions The eldest born son is the *orasa* by right, but he does not obtain the complete status as such till he attains his majority, and becomes fit to assume his father's duties and responsibilities and to assist in the acquisition or management of the family estate. If he dies before he attains his majority, or if he is incompetent to fulfil the above conditions, then the next younger brother subject to the same conditions, succeeds to his position as *orasa* It, however, the eldest son attains his majority and fulfils the conditions and then dies before his parents, his position as *orasa* remains unfilled and the next brother will not succeed to it These principles are consistent with the previous decisions, and they reconcile the rulings and texts which provide for the devolution of the status of *orasa*, in certain circumstances and the texts which distinguish between *orasa* and *kanitha* children, even after the death of parents It may also be deduced from the texts that a son when the *orasa* has attained his majority death of his father that he can claim his share of the inheritance, unless the mother is living There is no authority which recognises the right of an *orasa* son, who is a minor at the death to claim from his mother a share on attaining majority. The principles set forth in the system also to explain the rules concerning the right of grandchildren, to claim a share on the death of one of their grandparents 1 L B R 59 2 L C 61 1901 2 L C 207 1 L C 1 L B R 198 2 L B R 255 1 2 L C 124, 1 L B R 101 cited **Tun Myaing v Tun 2 L B R 99.**

Notes:—Ref U B R 1905, 4th Qr., Buddhist Law—Inheritance 11

12—Illegitimate step son

In the absence of legitimate children illegitimate children are entitled to inherit. (2 U B R 1892—18. 6 Buddhist Law—Inheritance, 141 L B R 1872 1892, 15 Bol) Step-children inherit from their step parents to the exclusion of collaterel heirs. (U B R 1897—1901 Vol II, 1 Ref) Therefore the absence of legitimate children a step son, though illegitimate may inherit from a step mother to the exclusion of collateral heirs **Ma Sein Hla v Maung Sein Hnan 2 L B R 54.**

Notes Ref U B R 1906, 3rd Qr Buddhist Law Inheritance, 15

13 Children who voluntarily separate from their mother on her second marriage,—

When the children of the mother separated from her on the occasion of her second marriage and taken their share of the inheritance of their

Burmese Law (Inheritance)-*Contd.*

parents and for many years continue to form no part of the second family they are not entitled to claim any share in the property jointly acquired by their mother and her second husband. (L B R 1872—1892 184, Ref.) **Maung Shwe Yan v Ma Ngwe U B R 1897—1901 Vol II, 11.**

Notes —Ref U B R 1897—1901 Vol II, 176

14.—Descent — Step-children — Step grandchildren Blood relations

Excepting undivided ancestral property, the estate of a deceased step parent or grand-parent goes by descent to the step children or step-grandchildren in preference to collateral relatives by blood Collateral blood relations or descendants can succeed to an inheritance only when there are no possible heirs in the descending line, step children are treated as entitled to some share of the inheritance like descendants by blood and in the absence of natural descendants, step descendants are classed as heirs entitled to succeed the bond of blood yielding to the more important consideration of having a descendant living representative. The rule as to reaching inheritance or obtaining a vested interest applies to where the claimants to inheritance are of different classes, that is in different degrees of proximity to the deceased. Thus, if there is no nearer heir a grand child, all the grandchildren belong the same class and are on an equal footing their, although their parents have died before reaching the inheritance Where there are no children but only grandchildren surviving the latter succeed on the same footing as children although their parents had died without reaching the inheritance or obtaining a vested interest, principle of Buddhist law on this point appears being that this rule is requisite only where distinction has to be made between the claim different classes of heirs and its application unnecessary when the nearest heirs all stand in the same legal relationship to the deceased owner of the estate to be divided (L B R 1892–1896 Vol II 121 Ref.). **Maung Bon v Maung Po Kywe U B R 1897–1901 Vol II, 66**

Notes — Ref U B R 1897—1901 Vol II, 193, 126, 157, 161, U B R 1904, 3rd Qr., Buddhist law-Inheritance 1 U B R 1906 3rd Quarter, Buddhist law-Inheritance 15 U B R 1905, 4th Qr Buddhist Law-Inheritance, 11, U B R 1905, 2nd Qr., Buddhist law-Inheritance, 7, Fol.,U B R 1897 1901, Vol II 531

15—Question whether mere absence of joint living excludes a child or grandchild from inheritance Necessity for filial neglect to exclude.

The Buddhist Code does not give any meritorious value to mere living together or make the opposite state of things a reason for exclusion. (L B R 1872 1892, 170, L B R. 1893—1900, 299 Ref) There must be some filial neglect to exclude. (U B R 1897 1901 66, 122, 126, U B R 1892 1896, Vol II 159, 194, 110 Ref) **Ma Tack Maung Te v Ma Nyun U B R 1897-1901 Vol II, 193.**

Notes. Ref U B R 1906, 3rd Qr Buddhist Law Inheritance, 15 U B R 1904, 3rd Qr Buddhist Law—Inheritance 1.

"—Suit for share of inheritance between sons of deceased and sons of first wife—Ate Oksa and ank Oksa—Children entitled to three fourths of the property to which they have a double claim and half of that to which they have a single claim.—

The Burmese Lawyers recognised the difficulty of treating property acquired by a father by inheritance during his second marriage as either *abet oksa* or *auk oksa* They therefore invented a special rule of equal division for it. The three quarters rule applies to the *aet oksa* only. The principle is that children should get three-quarters of the property to which they have a double claim from both father and mother, and half of that to which they have a single claim (L B R [illegible], I) The second wife held entitled to [illegible] her husband's ancestral property [illegible] coverture U B R 1892 [illegible] U B R 1897–1901. 126, 161, 469, Ref) [illegible] **Maung Fun Gyaw v Ma Balo U B R 1897 1901 Vol II, 185.**

17—Suit for partition between son of head wife, son and daughter of second regular wife and son of slave concubine—Shares to which each is entitled Heirs inherit estate when the person from whom they inherit dies and not when their inheritance is partitioned —

Property is acquired by inheritance not by partition Heirs inherit an estate when the person from whom they inherit dies and not when their inheritance is partitioned. For the case where their is one head wife with one son, one free

Burmese Law (Inheritance)-*Contd.*

concubine with one son, and one slave concubine with one son, the slave concubine's son is entitled to one and a half shares against the head wife's son's four shares and the free concubine's two shares The system of multiplying shares explained in s 2 of the Manu Wunnana and s 230 of the Attath ankepa followed (L B R 1897-1901 Vol II, 113 116, 126, Ref) **Maung Twe v Maung Aung U B R 1897-1901 Vol II 176**

18—Inheritance—Illegitmate child.

An illegitimate daughter is entitled to share half of her father's estate with his widow **Ma Shwe Zi v Ma Kyin Thaw 8 Ind Cas 991**

19—Eldest representative of eldest child ranking with surviving uncles and aunts.—

In Buddhist Law a grand child whose parents have pre deceased their parents, is entitled to rank with the surviving uncles and aunts only if he is the eldest representative of the eldest child, the other grand-children taking only one fourth of the share that their parents would have enjoyed had they survived (1 L B R 198 Fol). **Ma Thin v Ma Nyein 8 Ind Cas 594**

19A—Inheritance Child of a divorced couple

The general rule among the Buddhists which allows the child of a divorced couple to inherit only from one parent, namely the parent with whom he or she lives, and not from the other, is not confined to cases where one or other of the parents remarries and has issue by the new marriage It applies with equal force to a case where the father does not re marry but lives the rest of his life with a child by an earlier marriage (4 L B R 272 Appr) The mere fact that a daughter is on affectionate terms with her father is not sufficient to establish her contention that the family tie giving her a continued right of inheritance in her father's estate was kept unbroken after her mother's divorce (1 L B R 161, Ref) **Ma Hla Hin v Maung Chit Po 8 Ind Cas 1202**

20—Inheritance—Suit by eldest son for one fourth share—Limitation Act, art. 123—

The Burmese Law of Inheritance where it conflicts with the Limitation Act cannot be enforced in the Courts (L *B* R 1872—1892, 51 L *B* R 1892—1896 Vol II 9 Ref) Art 123 of sch II of the Limitation Act applies to a suit by an eldest son for one fourth share of the estate of his father and mother, on the mother's death In such a case limitation begins to run from the date of the mother's death (L B R 1893—1900, 415 L B R 1893—1900 625, L *B* R 1872—1892, 378 1 L *B* R 231 Ref) **Maung Po Min v U Shwe Lu 2 L B R 110,**

Burmese Law (Inheritance)-*Contd.*

21—Suit by children against their widowed mother for protection of joint family property.—

When the mother is alive the children are not entitled to partition of inheritance On the mother attempting to alienate the property improperly they might possibly be entitled to sue to restrain her from parting with it (L B R 1872—1892, 108, Ref) **Maung Hmu v Ma Min Dok, U B R 1892—1896, Vol II 174**

22 Exclusion of illegitimate child—Imperfection of birth is not cured by subsequent regular union of parents —

When there are regular heirs, there would be no reason for admitting an illegitimate heir Illegitimate grand children are excluded from inheritance of grandparents when the latter have left legitimate children surviving them **Maung Pyu v Ma Chit U B R 1892—1896 Vol. II, 141**

Notes —Ref 2 L B R 54.

23—Children of first wife—Daughter of subsequent wife—Shares —

The plaintiff now respondent, was Ma Meinkale daughter of one of the wives of Maung Tun E deceased Maung Tun E left two sons, Maung Chit Saya and Maung Aung Tha and a daughter Ma Thin On by his first wife, a daughter Ma Meinkale by a subsequent wife and a widow Ma U Ma without children The questions that arose in the case were what was the property subject to division, and what share of that property was Ma Meinkale entitled to in accordance with Buddhist law The Court of first instance, following ss 7 and 66 of Book X of the Manugye, gave respondent one fourth of the property after deducting and adding certain items, and the lower appellate Court found the Dhammathats conflicting, but considered respondent entitled to a fourth share of the pay in property *Held*, that the rule is to divide the property into four shares of which the children of the first marriage received two and the child of the next marriage and the surviving widow, one each (L B R 1872—1892, 46 95 Ref) **Maung Chit Saya v. Ma Meinkale U B R 1892—1896 Vol. II, 93.**

Burmese Law (Inheritance)-*Contd.*

Notes.—Ref U B R 1892—1896, Vol II 102, 2 L B R 174

24—Priority of birth—Rights of eldest son or daughter passing to next eldest as representative of the father or mother —

According to Buddhist law priority of birth is recognised and certain duties pass by succession to the next eldest son or daughter The following are the principles as to the succession of the children on the death of the father First The eldest son, if competent is representative of his father and in that capacity is entitled to one-fourth of the inheritance on the death of the father Second Where there are both sons and daughters the eldest competent son is preferred to any daughter Third The rights of the eldest son or daughter pass to the next eldest as representative of the father or mother. **Ma Mya v Maung Po Thin, L B R 1893—1900, 585**

Notes.—Ref 1 L B R 198 Expl 2 L B R 292

25—Divorce—Partition on divorce —

It is dangerous to hold that an only daughter has, after her father's death and before partition with her mother, an interest in the estate capable of alienation. (L B R 1872—1892, 108 115, 123, Ref:) A woman who has obtained a divorce by a decree of the Court cannot be made to relinquish all her property, the forfeiture of property being a punishment for improper desertion (1 Bom 97, Fol.) **Maung Po Lat v Mi Po Le L B R 1872—1892, 212**

Notes —Ref L B R 1872—1892 265 L B R 1893—1900 295

26—Succession—Daughter of divorced wife —Joint property —

Where a husband and wife divorced by mutual consent and the young daughter remained till her father's death in the house of her mother and her mother's second husband and did not renew the filial connection with her own father, and where there was no special contract at the time of the divorce to a contrary effect, the daughter is not entitled to share in the *letteipwa* acquired after the divorce by the father and the second wife **Mi Thaik v Mi Tu, L B R 1872—1892 184**

Notes —Appl L B R 1872—1892 191. Ref, L B R 1872—1892, 295, 2 L B R 85, U B R 1893—1900 Vol II 159, 110, L B R 1893 1900, 299 469, U B R 1906 3rd Qr Buddhist Law—Inheritance, 15 1 L B R 161 U B R 1897—1901 Vol II, 176, 113, 116 Fol 4 L B R 272, 14 Bur L R 236, Dist 1 L B R 161

Burmese Law (Inheritance)-*Contd.*

27—Daughter removed from her father's family and continuously resident with her divorced mother—Rights in father's family.—

A child removed from the father's family, and continuously resident with her divorced mother after she is of an age when she might assist in the affairs of her father's family appears to be in the position nearly of a child *adopted* from the father's family into mother's family and, while she acquires or retains rights in her mother's or new family's property she loses right in the family whence she came. A person is not obliged to claim all that he is entitled to claim. **Maung Hmat v Ma Po Zon, L B R 1893—1900, 469.**

28—Share of eldest daughter by second wife.-

Where there is a son competent to assume the parental duty, an eldest daughter by a second wife cannot claim a share in her deceased father's estate during the life time of her mother (L B R 1872—1892 115, Ref:) **Ma Me v. Ma Myit, L B R 1893—1900, 48.**

29—Step-daughter—Step mother—Hnapazon —Joint property —

Property inherited by a father from his ancestor during marriage is not *hnapa on* or joint property of the husband and wife On his death, leaving a daughter by a previous marriage and a widow the daughter is entitled to one-half and the widow to an equal share In deciding such a case the Court must be guided by analogy in applying the rule prescribed by the Dhammathat for the division between a daughter and her stepfather of property inherited during coverture by the mother from her ancestors (L B R 1872—1892, 18, L B R 1872—1892, 27, Ref.) **Maung Shwe Ngon v Ma Min Dwe, L B R 1872—1892, 110.**

Notes —Ref U B R 1906, 2nd Qr, Buddhist Law—Divorce 19, L B R 1893—1900, 418, 403 295 U B R 1892—1896, Vol II, 121, 102, 159, 4 L B R 189, 110, L B R 1872—1892, 184, U B R 1897—1901, Vol. II 185,

Burmese Law (Inheritance)-*Contd.*

146; Dist: L B R 1893—1900, 295; Disc: L B R 1872--1892, 177.

30—Illegitimate daughter—Concubine.—

The case of the kanina or damsel's son is provided for in the Dhammathats, although not always by mention of the Sanskrit name. When the deceased left legitimate children it was held that his daughter by a damsel not recognized as concubine could not share in the property. (L B R 1872--1892, 114, 184, 1 Bom 71, 2 Bom 67, 4 Bom 546, Ref:) **Ma Le v Ma Pauk Pin, L B R 1872--1892, 225**

Notes:—Ref: L B R 1872—1892, 135; 3 L B R 175, U B R 1892—1896, Vol. II, 145.

31—Daughter of divorced husband and wife living with mother and separating entirely from her father.—

Daughters of a divorced wife, who live with their mother and do not maintain filial relations with their father, but live entirely separate from him, are not entitled to a share in his estate when there has been a division of property at the time of the divorce. (U B R 1892—1896, Vol II, 102.194, 623, 110, 159, U B R 1897—1901, Vol II, 104, Ref.) **Ma Pon v Mong Po Chan. U B R 1897—1901, Vol II, 116.**

Notes-Ref., U B R 1897—1901, Vol II, 176, U B R 1906, 3rd Qr Buddhist law—Inheritance. 15. 2 L B R 85: Fol., 4 L B R 272.

32—Eldest daughter, claim of to a share of the general joint estate on the death of the mother—Rights of eldest child—Claim of eldest son to one fourth share of the mother, when the father marries again.

The hasty abuse of a father on a single occasion—conduct which was also forgiven and was not made a ground for any public declaration by the father—is not such conduct as to deprive the plaintiff of any rights he had. The principle that a daughter gets a share on the death of her mother and the son on the death of his father simply because the daughter and son perform the family duties of the mother and father respectively, is not to be found clearly enunciated, although, as noted above, there are indications of such a principle. The son gets the father's official and personal belongings when the father dies, and in a corresponding way the daughter takes her mother's official and personal belongings; but as regards the rest, while some Dhammathats are indefinite, others, notably the Vilasa, Kyetyo, Rasi and Dhammathat Kyaw appear to give rights to the eldest child, because he or she is obtained by the prayers of the parents in early married life and helps the parents before other children can. Occasional passages, however, put the daughter in an inferior position to a son. It may not be very clear from the Dhammathats now available that a son can claim a one-fourth share from his father when he lives separately and when the father does not marry again, though this has been held; but we do not think it open to reasonable doubt that when the father does marry again, the eldest son, especially if he be the eldest child, can claim a one-fourth share of the general joint estate of the parents. **Maung Seik Kaung v Maung Po Nyein. 1 L B R 23.**

Burmese Law (Inheritance)-*Contd.*

Notes—Fol: 5 L B R 231; Ref: 2 L B R 110, 255; 1 L B R 198.

33—Partition—Rights of single daughter on death of father.

A daughter, being an only child, if entitled to claim a one fourth share of her parents' joint estate from her mother, when the latter re-marries after the father's death. (L B R 1872—1892, 378, 1 L B R 23, L B R 1893—1900, 48, L B R 1872—1892, 115, Ref.) **Ma Thin v Ma Wa Yon 2 L B R 255.**

Notes—Cited. 2 L B R 292, 3 L B R 15; Ref., 4 L B R 181.

34—Partition of property between two daughters as sole successors and heirs—What rule of division?—Whether equality or one of the special methods of computation mentioned in the Dhammathats?—If latter which?—In the absence of proof on this point rule of equality prevalent according to local custom followed.

When the rules are conflicting and uncertain, when there is no proof as to what Dhammathat ought to be followed or what rule ought to prevail, when it cannot be shown that a particular direction is a living rule and not meraly a dead-letter, and when the circumstances of the case are not such as are contemplated by the object of the rule, the Courts may safely accept a custom which there is a reasonable amount of evidence to establish if such custom is consonant with

Burmese Law (Inheritance)-*Contd.*

equitable principles. The only rule of Buddhist Law shown to be operative in respect of the partition of inheritance between two sisters on the same footing, except as regards age, is that of equality of partition. (U B R 1892 1896, Vol II, 102, 111, Ref.) **Ma Po v Ma Sye Mi. U B R 1897- 1901 Vol II. 79.**

Notes Dist. U B R *1897* 1901, Vol II, 107; Ref: U B R 1897—1901, Vol II, 146, 2 L B R 174.

35 -Position of daughter of divorced wife who lives with her mother or mother's family and not her father.

Under Buddhist law a child has no vested interest in the father's property and cannot interfere to prevent him from disposing of it, and if that is so it is difficult to see what right there can be to the proceeds or the disposal or what power to control the father's dealing with such proceeds in any way he may think fit If the father chose to spend all the money obtained by the sale of his property the child could not make him responsible for its reimbursement, and the fact that instead of spending the money the father chooses to keep it or to buy property with it so as to make the money or the property subject to a different rule of inheritance cannot apparently affect the matter. The father might make a gift of such property to the person entitled to inherit it after the conversion, and the person entitled to inherit the original property if it had not been converted could not prevent him. The deceased Maung Myat No left a wife Ma Kywe the defendant, and a daughter by her, Ma U Gywe. He had previously had other wives, of whom one, Ma Kyi Su, was by mutual consent divorced some 16 years before. By Ma Kyi Su he had a daughter, Ma Sein Nyo, the plaintiff, who went to live with her maternal grandmother and mother, who, having remarried, subsequently resided in the same house. Ma Sein Nyo never lived with her father but only visited him from time to time. All Maung Myat No's property was apparently acquired before his Marriage with Ma Kyi Su or after his marriage with defendant. His sister Ma Kaung Gywe jointly owned part of the property. She divided it after his last marriage and by an instrument of transfer conveyed her share to him and his wife, the defendant, partly for the purpose of a religious trust, partly in consideration of the payment of debts, and partly as a gift. Plaintiff sued for a three-fourth share of whole estate. The first Court gave her a half share of the ancestral property and no share of the *hnitpazon lettetpwa* property acquired after the marriage with defendant on the ground that she had not duly maintained the filial relation. Defendant did not appeal and plaintiff appealed unsuccessfully. In second appeal by plaintiff, *held*—that plaintiff was not entitled to a threefourths share of the estate as she was not brought into the second marriage by the father, and probably was not entitled to any share at all, the principle of Buddhist law being, in the absence of testamentary power, that the continuance of the family tie for purposes of inheritance should be manifested by plain and unmistakable outward signs, and their being apparently no clear reason for the distinction drawn as to the right of inheritance in respect of ancestral and non-ancestral property; that, if plaintiff was entitled to any share, it was not necessarily a half, the deceased having left not only a widow but also a daughter by his last marriage; that the trust property was not a part of the estate subject to division; that the property transferred by Ma Kaung Gywe was not ancestral but acquired during the second marriage; that the current income of all property being *hnitpazon lettetpwa* any property [illegible] by the expenditure of such income would [illegible] the same. (L B R 1872—1892, 44, 110, 181, 191, 296, U B R 1892—1896, Vol II, 194, Ref). **Ma Sein Nyo v Ma Kywe, U B R 1892—1896, Vol II, 159.**

Notes—Ref: U B R 1st Qr., Buddhist law—Marriage, 1: Ref: U B R 1897–1901, Vol II 116, 126, 185, 193, U B R *1906*, 3rd Qr, Buddhist Law- Inheritance, 15, 2 L B R 174.

36—Husband and wife—Survivorship—Succession Certificate Act. s. 4.

Husband and wife, under Buddhist Law, always take from each other by succession and not by survivorship It is necessary therefore for the survivor to obtain a certificate under the Succession Certificate Act, before he or she can recover through the Courts debts due to the deceased. (2 Bur L R 50 Ref.) **Ma Naw Za v Ma Thet Pon L B R 1893—1900 334.**

37—Succession—Distributive shares amongst widows—Alienation of property by a Buddhist before death—Distribution by Buddhist law of

Burmese Law (Inheritance)-*Contd.*

the estate of a deceased Buddhist in certain fixed shares.

A Buddhist cannot dispose of his property will. **Ma Bwin v Ma Yin, L B R 1872—1892, 95.**

Notes—Ref. L B R 1872—1892, 429, L B R 1893—1909, 132, U B R 1892—1896, Vol II, 93.

38—Marriage—Kanwin.

The Buddhist Law favours the equality of the sexes, and in many ways treats marriage as creating a partnership in goods. *Kanwin* is property set apart at the time of marriage by the bridegroom or his parents for the joint purposes of the married pair. Where property is not set apart as *kanwin* but is simply entrusted by the parents to the bridegroom to manage, he and the parent shall share it equally. If he died without children his widow shall take half and his parents half. (L *B* R 1872—1892, *22*, Ref.) **Ma Hla Aung v Ma E. L B R 1872—1892, 219.**

Notes—Ref. U *B* R 1897—1901, Vol II, 39.

39—Succession—Wife's property inherited after marriage-Close analogy of *B*urmese system with that of Tamil inhabitants of Jaffna—The question as to the interest taken by a husband in property inherited after her marriage by his deceased wife considered but not decided.

The *B*urmese rules about women's separate property of different sorts are somehow connected with the Hindu Law The closest analogy to the *B*urmese system is contained in the rules of the Tamil inhabitants of Jaffna in Ceylon, called the Thasawalamy, compiled by the Dutch rulers in A.D. 1907. About these Mr J D Mayne remarks that they probably contain the customary law of Southern India before British Courts introduced Brahman shastrees to interpret Hindu Law in the Madras Presidency. These rules begin by dividing property into three classes ; hereditary, when brought by the husband; dowry, when brought by the wife ; and acquisition, if acquired during the marriage. The second rule lays down that property inherited by the wife devolves like her dowry, There are so many resemblances between these rules and those of the Burmans as to induce one to suggest that they should be closely studied when the question of the surviving husband's or wif's interest in property on the

Burmese Law (Inheritance)-*Contd.*

death of the other comes up for decision.

Nga Tun Lu v Nga Po Yauk and Mi Min Thwe. L B R 1872—1892, 255.

Notes:—Ref. 4 L B R 110, 4 L B R 189.

40—Husband and wife—On death of one succession of other to inheritance.

The only restriction proved from the authorities to exists in regard to the general rule of inheritance by husband or wife from one another relates to impartible immoveable property and not to ordinary partible estate. Deceased husband or wife may have married before or after death of parents but must have survived them so as to be in reach of inheritance "Inanimate property applies to land among other things" (L B R 1872—1892, 32, 35, 105, 110, 578 Ref) **Mi Lan v Maung Shwe Daing. U B R 1892—1896, Vol. II, 121.**

Notes—Ref U B R 1906, 4th Qr Buddhist Law Divorce, 19, U B R 1897—1901, Vol II, 79, 66, 146, 164, Fol. 14 Bur L *R* 91.

41—Claim of wife to inherit the property of her deceased husband, to whom she was unfaithful.

Under the Buddhist law a wife who was unfaithful to her deceased husband forfeits whatever rights she had to inherit although there may have been no formal divorce. **Maung Tok v Ma Kin. U B R 1892—1896, Vol II, 116.**

Notes.—Ref U *B* R 1897 1901, Vol II, 34.

42—Succession—Act X of 1865.

The estate of a Burman Buddhist dying in the life-time of his wife includes the whole of the property acquired during his marriage with her. **Ah Foon v Mi Anyo E. L B R 1872—1892, 402.**

43- Power of parents to dispose of their property—Partition—Interest of widow in the family property.

There is, in the parents, an absolute disposing power of the property of the parents, and a parent may even revoke at any time during his child's life, a present given by the parent to the child. On the death of one of the parents the eldest son or daughter may claim his or her share, and the remainder of the property vest in

Burmese Law (Inheritance)-*Contd.*

the surviving parent for himself or herself and the remaining children. Although without the consent of the surviving parent the other children cannot obtain their shares, yet the surviving parent may, if so minded, partition the inheritance. retaining his or her share; and as to the part of retained (as the surviving parent's share) it is at his or her absolute disposal. A Burmese Buddhist widow has not an absolute interest in the whole of the family property on the death of the husband, but she has an absolute right in respect of her own share and a life-interest in. the remainder, and she has not the right of absolute disposal of the remainder, but only a power of sale in case of necessity. L B R 1872—1892, 108, Ref; L B R 1872—1892, 39, Not Fol.) **Ma On, Maung Pya Gyi and Maung Gyi v Ko Shwe Ko Tha Dun, Ma Waing and Ma Bwin. L B R 1872—1892, 378.**

Notes.—Ref: 2 L B R 255, 110, 1 L B R 23, 4 L B R 128, L B R 1893—1900. 312, U B R 1892—1896, Vol II, 138, 171, 4 L B R 256, U B R 1892—1896, Vol II, 400, 581, 14 Bur L R 205=4 L B R 128. Not Fol. L B R 1893—1900, 65; Fol 2 L B R 167, 4 L B R 287; Cited, 3 L B R 15, Cited & Rel. on, 1 L B R 50.

44—45—Husband and wife dying without issue—Rights of inheritance to estate of—Divided and undivided ancestral estate.

Held, that (1) on the death of a husband or wife without children, the survivor succeeds to the whole of the deceased's estate, including the right of the deceased to a share in undivided ancestral property. (2) The survivor can enforce partition and obtain the deceased's share. (3) If he does so, on his death, his natural heirs alone succeed to the property which fell to his share on partition. (4) If he fails to do so, on his death his heirs are entitled to enforce partition and to obtain two-thirds of the share of the first deceased, whose natural heirs succeed to the remainder. (U B R 1892—1896, Vol II, 121, 184, U B R 1897—1901, Vol. II, 79, 8 W R P C 1 Ref. L B R 1895—1900, 524.). **Maung Walk v Maung Nyein. U B R 1897—1901, Vol II, 146.**

Notes.—Rel: U B R 1897—1901, Vol II, 169, U B R 1907, 2nd Qr Buddhist Law—Inheritance—Pre-emption 1, U B R 1906, 4th Qr. Buddhist law – Divorce, 19, U B

Burmese Law (Inheritance)-*Contd.*

R 1905, 2nd Quarter, Buddhist law—Inheritance, 7.

46—Family of chief wife—Family of lesser wife.

Case where it was held that the separation of residence affords a presumption that a certain Burmese woman had not the status of one entitled to share in the inheritance and that this presumption has not been rebutted by evidence showing a higher status. (U B R 1892—1896, Vol II, 194, Cited. L B R 1872—1892, 27, Cited. **Ma Hmon v Maung Paw Dun. U B R 1897—1901, Vol II, 138.**

Notes.—Ref. U B R 1910 3rd Qr Civil 42; Expl. U B R 1897—1901, 160.

47—Position of concubine or lesser wife living along with head wife, and of child of such concubine living with father—Apparent principle of Buddhist law with respect to marriage.

Effect of subsequent regular marriage after death of head wife on position of offspring of concubine or lesser wife. *Held*—that such offspring is not the son spoken of in the Dhammathats as brought by the father with him when he contracts a second marriage. Share of such offspring seems to be provided for by the rules relating to the case of a head wife with a free concubine or lesser wife. (L B R 1872—1892, 225, U B R 1892—1896, Vol II, 194 Ref.) The provisions of Buddhist law which come nearest this case are those relating to a head wife and a free concubine, and a superior and inferior wife. The former are a little complicated by the introduction of slave concubines, and, any way, the difference between the shares in the two cases is insignificant, only about one-thirty-fifth, so that the proportion of three to two may be accepted. **Ma Shwe Ma Hlaing, U B R 1892-1896—Vol II, 145.**

Notes.—Ref. U B R 1897—1901, Vol II, 488; Fol: U B R 1910, 3rd Qr Civil, 42.

48—Exclusion of husband from shares in estate of parents—Law when wife predeceases her parents.

If a person dies, leaving children, before the death of his or her father or mother the children are entitled to a share in the grand parents' estate and their surviving parent is excluded. (U B R 1897—1901, Vol. II, 146, Ref. **Naung Te v Ma Kyu U B R 1897—1901, Vol. II, 169.**

Burmese Law (Inheritance)-*Contd.*

49-Second wife entitled to share in inheritance with first or chief wife when she has clearly the status of a wife.

A wife of a distinctly inferior class. who is in the position of a concubine and who has a separate establishment, has no claim to inherit a share in her husband's estate; but the mere fact that she lives in a house separate from that occupied by the husband merely raises a presumption that her status is inferior, the presumption being not conclusive but rebuttable. When the husband has lived indifferently with both his wives and when neither of them can really be considered as having lived separately from him, the status of both wives seems to be precisely the same though one may have been the first or chief wife.(U B R 1892—1896, Vol II, 194, U B R 1897—1901 Vol II, 138. Expl.

Ma U Byu v Ma Hmyin, U B R 1897—1901 Vol II, 160.

Notes—Ref: U B R 1910, 3rd Qr, Civil, 42.

50—Property inherited by husband during marriage—Interest of widow—Widow share in the joint property.

In property inherited by a Burman Buddhist during his marriage, the interest which his widow takes, when children of the marriage survive their father, is the same as her interest in her deceased husband's share of the property jointly owned by him and her, *i. e.* a life-estate with a power of sale in case of necessity. (L B R 1872 1892, 108, 378, 4 L B R 189, Ref. **Ma Nye v Ma Yauk. 4 L B R 256.**

51—Second wife.

When a husband dies, a second wife has a right to share with a first wife in the property of her husband, although none of it had been acquired since the second marriage. Her share in the joint property of the first marriage will be one-fourth as compared to three-fourths falling to the share of the first wife. **Mi Ka v Maung Thet L B R 1872–1892, 6.**

Notes—Ref., 4 L, B. R. 110, 2 L. B.R. 174, L. B. R. 1872—1892, 103, U. B. R. 1910, 3rd Qr., Civil, 42.

52—Succession—Right of parents to a share of the property of their deceased children where such parents and children have been living together.

Burmese Law (Inheritance)-*Contd.*

The general rule that property shall not ascend is laid down in the Manu Kye Dhammathat, Book X, ss. 1, 18 and 19, but the rule is not without exceptions. Where, after separation from his adopted brothers and sisters, an adopted son lives with his adoptive mother, such mother succeeds to his property on his death to the exclusion of his adopted brothers and sisters. **Mi San Hla Me v Kya Tun L B R 1893—1900, 116.**

53—Manugye Book X, s. 29—Ascent of property when there are no direct descendants.

On the death of a person who leaves no surviving husband, wife, or direct descendants, his parents succeed to his estate in preference to all other relatives. U B R 1892—1896, Vol II, 184, L B R 1893—1900, 116, 524, U B R 1897—1901, Vol II, 109, 111,66. **Ma Po Hmon v. Maung Kan, U B R 1897—1901,Vol. II, 157.**

Notes.—Fol. 5 L B R,231.

54.—Authority of Manugye Dhammathat Book X, s. 62, denied—Inheritance can ascend when there are no descendants.—

Under ordinary circumstances s. 62, Book X, of the Manugye Dhammathat is unsuited to the conditions of modern life. The rule laid down in Upper Burma Rulings, 1892—1896, Vol II p. 184. namely, that "when it cannot go by descent the inheritance is allowed to ascend" must be taken as a settled principle of law in Upper Burma. U B R 1892—1896, Vol II, 184, Ref.

Ma Sa Bwin v. Ma Thi, U B R 1897—1901 Vol. II, 111.

Notes.—Ref., U B R 1897—1901, Vol II, 167, 172.

55—Claim to share of inheritance before death of both parents—Waiver of interest in portion of estate by surviving parent.

It appears clear enough that the parent can only give the children property of which he or she is in possession. As in the case of any other gift, delivery is essential to its validity, and possession cannot be conferred on the child when the possession of the property is not in the parent. Surviving parent cannot give one heir status to sue another for share of inheritance with

Burmese Law (Inheritance)-*Contd.*

out being in position to put former in possession of share to be claimed.

Maung Po Saung v Ma Ngwe Su. U B R 1892—1896 Vol II, 138.

Notes—L B R 1872—1892, 115, 378, Ref.

56.—Inheritance—Absence of descendants, husband or wife—Preferential right of parents to succeed—Exclusion from inheritance-Proof of deliberate neglect of ordinary duties of affection and kindred necessary.

Where a deceased Burman Buddhist has no direct descendants and leaves no surviving husband or wife, the parents should inherit to the exclusion of all other relatives. (L B R 1893—1900, 524, U B R 1892—1896, Vol II, 184, U B R 1897—1901, Vol II, 157, Rff.) When desertion and intentional and deliberate neglect of the ordinary duties of affection and kindred are proved against any one claiming to inherit, his or her right of inheritance is, under the Burman Buddhist Law, lost. 9 Bur L R 88, 11 Bur L R 228, Ref. **Shwe Gon v. Hnin Bwin 5 L B R 231=9 Ind Cas 442.**

57.—Jointly acquired property—Payin property or property anterior to second marriage—Step-father's claim to estate of deceased wife, and to estate of deceased step-daughter—Claim of paternal relatives to latter.—

Held that as in this case Ma Ein Nyein admittedly had every-thing and defendant nothing when she took him as her second husband, and as the property in dispute was land acquired by transfer of the proceeds of disposal of other land, the presumption was that the original fund was preserved, the object of investment only being changed and that in the absence of proof the burden of which was on defendant, there was no necessary presumption that any of the property was *lettetpwa* or jointly acquired after the second marriage under the circumstances. *Held*, also—that the step-father had no good claim as against the relatives of the father of his step daughter to the estate left by the latter. In the absence of a husband or descendants the estate of the step-daughter must ascend, and her father being dead, must go to the nearest collaterals. The uselessness in general of evidence of the performance of death-bed attentions and funeral obsequies pointed out. When there had been no deliberate and intentional neglect

Burmese Law (Inheritance)-*Contd.*

of deceased indicating a severence of the family bond, evidence of that kind may safely be put aside and left out of account. **Maung Chit Kywr v Maung Pyo. U B R 1892—1896 Vol II, 184.**

Notes—Fol 2 L B R 174, 5 L B R 231; Ref. U B R 1902—1903, Vol II, Probate and Administration, 7 U B R 1897—1901, Vol II, 111,146, 157, 164, 172; Dist: U B R 1897—1901, Vol II 126, 131; Cited U B R 1897—1901, Vol II, 131.

58—Ascent of inheritance when it cannot go by descent—Parents preferred to brothers and sisters and grandparents to uncles and aunts.—

The Buddhist law is opposed to the ascent of inheritance, but when it cannot go by descent the inheritance is allowed to ascend, first to the father and mother, and, failing them, to the first line of collaterals, and, in the absence of heirs in that degree, to the grandfather and grandmother and next line of collaterals. U B Cir. No. 75 of 1895 Fol. **Maung Shwe Bo v Baung Pya. L B R 1893—1900, 524.**

Notes:—Ref: U B R 1897=1901 Vol. II 146.

59—Suit for possession of land—Heirs on either side being uncles and aunts or their representatives— Shares to which each entitled.—

Plaintiffs-appellants sued for possession of six plots of land measuring 80 acres to which they alleged they were entitled, as heirs of Tun Maung, deceased. The Court of first instance dismissed the suit on the grounds that defendant-respondent, as the uncle and guardian of Tun Maung and as having paid his funeral expense was entitled to inherit on Tun Maung's death to the estate he left. On appeal the District Judge confirmed this decision. The principal facts were:- (1) That the land in question came from Tun Maung's maternal grandfather and was in fact his mother's (Miyan Gyaw's share of the inheritance, which, on the division after his mother's death, was put down as his share; (2) that at this time Tun Maung's father, Yan Aung, was still alive and consequently that the land in question, his wife being dead was his property, till he died, when it became that of Tun Maung, the only, or only surviving, son of himself and Mi Yan Gyaw; (3) that from, or very soon after, the partition the land in question came into the possession of defendant-respondent on behalf of

Burmese Law (Inheritance)-*Contd.*

Tun Maung, then a minor, and that he has ever since enjoyed the usufruct of it; (4) that Tun-Maung lived partly at least with defendant-respondent when not in Lower Burma. Both parties claimed to have paid the funeral expenses and defendant-respondent also alleged having paid Rs. 112 during Tun Maung's life-time to pay for his journeys to Lower Burma. The Lower Courts held that it was not proved that plaintiffs-appellants paid the funeral expenses, and that it is proved that defendant-respondent did. On this point it was clear from the evidence taken on commission that the funeral expenses were met by contributions from the relations who happened to be at the place in Lower Burma, where Tun Maung died, including plaintiff-appellant Tun Aung, and by the people of the village. *Held*—that defendant-respondent having for many years enjoyed the usufruct of the land in question, could not be allowed to plead payments on deceased's account as a reason for refusing to share the inheritance with any person who might be entitled to share it. *Held* also—that Tun Maung having inherited the land on the death of his father, his relatives on his mother's side had just as much right to inherit as those on his father's. *Held* also-that the plaintiff-appellants represent an uncle and an aunt and are entitled to two shares out of six, the remainder being the shares of the remaining four uncles and aunts or their representatives. U B R 1892-1896, Vol. II 184; U B R 1897-1901 Vol. II, 111, Ref. **Maung Tun Aung v Maung Yan Pyo U B R 1897—1901 Vol II, 172.**

Notes:--Dist U B R 1905 1st Qr. Buddhist Law Inheritance 5.

60--Step-grandchildren-Original and joint property-Joint living.-

Where the question was, to what shares, if any, of the original property of Maung Tun and of the jointly acquired property of Maung Tun and Ma U, the plaintiff-appellant, Ma Kyi Byun, was entitled to, *held* that the appellant Ma Kyi Nyun was entitled to a share in the estate of her deceased grand-father, whether original or jointly acquired, with her step-grandmother. *Held*, also, that under the circumstances stated, the share of the grandchild in jointly acquired property is one-eighth. *Held*-also, that the weight of authority inclines to the position that the grandchild's share in the original property is one-half. 7 Cal 453 U B R 1892—1896 Vol II, 159, 184; U B R 1897—1901 Vol II, 122, 66 Ref. **Ma Hnin Dok v Ma U. U B R 1897—1901 Vol II, 126.**

Notes.—Ref U B R 1897=1901 Vol II. 164, 176, 185, 192.

Burmese Law (Inheritance)-*Contd.*

61—Brothers and sisters already divided--Estate of divided deceased sister—Equal rights of elder brothers or sisters on failure of younger brothers or sisters—Exclusion of children of brother predeceasing his divided deceased sister.—

It is a principle of Buddhist Law that only those closely related should inherit (see Dhammathatkyaw, s. 378, Digest) and that relations of the same degree should inherit to the exclusion of those of a more remote degree, that, for instance, children should exclude grandchildren. There are certain exceptions to this rule (*e. g*, in cases where there has been no division). In such cases elder brothers within reach of the inheritance would share equally, and one brother so within reach dying before distribution, his children would take *per stirpes* and not *per capita*. In cases where there has been division, however, if the eldest brother predeceases his sister, his children cannot succeed to her estate where there is a surviving second brother; the surviving second brother is the sole heir. In the case of brothers and sisters already divided, the elder brothers or sisters inherit only on failure of younger brothers or sisters; but the second of such elder brothers or sisters would not exclude one older than himself or herself. The principle that property does not ascend, does not operate in such a case, the eldest is not barred from equal rights with the second. **Maung Hmaw v Ma On Bwin 1 L B R 104.**

Notes:—Fol: 5 L B R 70, U B R 1905, 1st Quarter, Buddhisht-law-Inheritance, 5; Cited, 2 L B R 298; Ref & Overruled, 1 L B R 198.

62—Partition of property between grandchildren and step-grandparent—Attathankepa, s. 226—Manu Gye X, 21.—

On the authority of s. 226 of the *Attathankepa*, grand-children are entitled to inherit specified shares of the estate of their grand-parents. L B R 1893—1900, 299 L B R 1872—1892, 37 Ref.

Ma Sa v. Ma Thet Hnow U B R 1897—1901 Vol. II, 122.

Notes:— Ref: U B R 1897—1901 Vol. II 126, 193.

Burmese Law (Inheritance)-*Contd.*

63—Claims to estate of deceased by widow and by grandchild descended from former wives who had been divorced or separated from—Diversity of rules—Paying property—Meaning of.—

Held that as it was not proved that any of the estate was *paym* of the grand-father in the time of the grandmother of the grand-children, the widow alone was entitled to the property. L B R 1872—1892, 184, 223, U B R 1892—1896 Vol. II, 103 Ref. **Maung Kya Nu v Ma Bwin. U B R 1892—1896, 110.**

Notes:—Ref: U B R 1892—1896 Vol. II, 116, 193,

64—Absence of joint living-Ground for exclusion from inheritance of children, grand-children and step-children.—

Mere absence of joint living is not sufficient to exclude a child or grandchild from inheritance and filial neglect must be proved. The same rule applies to step-children. U B R 1897—1901 Vol II, 193, 379, 66 Fol. **Maung Kyaw Yan, Ma Mein Ma Gyi, Mathet Tu, Ma E Me, Maung Thet Pon, U Bya, Ma E Myein. Maung Shein v Maung Po Win and Ma San Me. U B R 1904 3rd Qr. Buddhist Law 1.**

65.—Share of grand-daughter in her own grand-parents' estate as against her step-grand-parents.

As against the step-grandparent the grand-child is entitled to one half of her own grand-parents' estate. (U B R. 1892—1896, Vol II, 121, 171, 184; U B R. 1897—1901, Vol. II, 126, *Ref*), **Maung Rado v Ma Kyin. U B R 1897-1901 Vol. II, 164.**

66,—Parents predeceasing grand-parents—Grand-children representing deceased parents, Shares of.

Among grand-children whose parents have predeceased their grand-parents the only one who ranks with the surviving uncles and aunts is the eldest representative of the eldest child ; the others only take one-fourth of the share that their parents would have enjoyed had they survived. (1 L B R 50, 23, 93, 1904, Chan Too's Rulings 233, 418, L B *R* 1872—1892, 585, Ref). **Ma Saw Ngwe v Ma Thein Yin. 1 L B R 198.**

Notes.—(Cited, 3 L B R, 219, 2 L B *R* 292 ; Fol, 3 L *B R* 8 ; Ref; 3 L B R 66.)

Burmese Law (Inheritance)-*Contd.*

67.—Partition of property—Intestacy—Testamentary disposition—Gift without possession—Shares among grand-children

The finding of the lower Courts that a Burman *Buddhist* has no power to dispose of property by will as she pleases is upheld. The Court refused to uphold an alleged deed of-gift made by an old woman shortly before her death purporting to convey all her possessions to one member of the family with whom she was living. Under Burmese Law delivery of possession is an indispensable condition to the validity of a gift. **Ma Thi v Ma Nu. L B R 1872-1892, 70.**

Notes.—Doubted, U B R 1897—1901, Vol. II, 62, U B R 1892—1896, Vol. II, 561).

68.—Adopted children—Effect of separate living from adoptive parents—Adopted child also a blood relation—Adopted child returning to house of natural parents.

Manukye, X 5—26.—A Burmese Buddhist cannot disinherit his or her children, whether adopted or natural. As regards *kettima* children, the *Manukye* and the *Attathankepa* do not explicitly require joint living of parents and children where there are no direct natural descendants. The requirements of residence might be more safely relaxed in the case of an adopted child who is also a blood relation. (L B R. 1872—1892, 8, 191, U B. Circulars, 35 of 1893, Ref.) The strict letter of the *Dhammathats* is not to be taken as the present rule of law in this matter. Customs and conditions have modified the ancient rule ; and there should be some liberality of construction in questions concerning the maintenance of the bond formed by adoption. Where, therefore, an adopted child who was also a blood relation went to live in her natural parents' house, but maintained her relationship with her adoptive parents, *held* -that she did not forfeit any rights that by adoption she may have acquired.

Ma E v Maung Shwe Kaing. L B R 1893-1900. 520.

69.—Adoption—Gift—Proof of possession—Widow's right of disposal of her share of estate.—

A *kittima* adopted son takes the position of natural son when there are no natural children. On death of father leaving widow with eldest *auratha* son and no other children the widow

Burmese Law (Inheritance)-*Contd.*

has an absolute right of disposal over her share of three fourths of the estate (L B R 1872—1892, 108, 378, Ref) **Maung Sa So v Mi Han. U B R 1892-1896, Vol II, 171.**

Notes —Ref U B R 1897—1901 Vol II, 164

70 —Adopted child—Rights of—Whether extend to collaterals of adoptive parents

Under the Buddhist Law, the rights of inheritance of an adopted child are not limited to inheritance from his or her adoptive parents but also extend to inheritance from their collaterals **Ma Thaw v Ma Sein, 5 L B R 89= 3 Ind Cas 716**

71 —Manugye Dhammathat Book X, s 29-Manu wunnana, s 46—Dhamma Vilasa s 58—Adoption.

Adoptive parents stand in the same position as natural parents and have the same rights so long as the relationship constituted by adoption subsists, also parents are entitled to inherit in the absence of direct descendants. L B R 1893—1900, 116, Ref **Ma E Dok v Maung Ngwe Hlaing U B R 1897--1901 Vol II 109**

Notes —Ref U B R 1897—1901, Vol II 157

72.—Adoption

An adopted child by marrying and living separately from his adoptive parents does not by the mere fact of marriage forfeit his rights of inheritance in his adoptive family But the burden of proving that he has performed the duties necessary to be performed by an adopted child will be thrown upon him, and, in the absence of such proof, the Courts will disallow his claim to inherit. Mere occasional assistance on the part of the adopted child is not sufficient to preserve his rights of inheritance **Nga Min Gyaw v Me Pi. L B R 1872—1892, 8**

Notes— Ref L B R 1872—1892, 225 U B R 1897—1901, Vol II 135 L B R 1872—1892, 191, U B R 1892--1896, Vol II, 22, L B R 1893—1900, 520

73—Partition of property—Laws relating to shares awardable to children and adopted children.

Burmese Law (Inheritance)-*Contd.*

This appeal is based mainly on the grounds that the property in dispute is *lettetpwa* property and not the *payin* or *attetpa* property of the defendants mother and that the law as to share, awarding plaintiff only one fourth, has been wrongly applied The plaintiff-appellant is the daughter of Maung Tha Po, and the defendant respondents are the (adopted) son and daughter of Ma Kywin Maung Tha Po and Ma Kywin married 25 years or more ago, having at the time the aforesaid children. Maung Tha Po had no property, Ma Kywin owned the land in dispute Ma Kywin died shortly before Maung Tha Po Maung Tha Po had no property when he married Ma Kywin and when divorced on two occasions by her, received only small money payments and no share of land The lower appellate Court held that the money with which the lands were redeemed could not have been common property of husband and wife, and came to the conclusion that the lands were the *payin* property of Ma Kywin and granted plaintiff a onefourth share as the defendants had admitted plaintiff's claim to that share, though otherwise the plaintiff's claim would have been rejected *Held*—in second appeal, confirming the decree of the lower appellate Court that the lands in question were *attetpa* or *payin* property. *Held*, further that the one fourth share which the defendants were willing to allow the plaintiff was all she was entitled to U B R 1892—1896 Vol II 184 Dist **Ma Lin Si v Maung Wa Yon U B R 1897—1901 Vol II, 131.**

74 —Adopted son—Adoptive parents- Natural parents

Although the plain rule of law is that a *heittima* son living apart from his adoptive parents loses his claim to inherit their estate, yet it is to be construed with due regard to the circumstances of each case, and if it is shown that, though living separately, the adopted son maintained the tie of relation with his adoptive parents, he would not be excluded from the inheritance. U B R 1892—1896, Vol II, 22, 176, L B R 1872—1892, 8, 191, Ref **Maung Shwe Thwe v Ma Saing U B R 1897—1901 Vol II, 135.**

Notes.—Ref. U B R 1906,3rd Qr Buddhist Law —Inheritance, 15

Burmese Law (Inheritance)-*Contd.*

75.—Adopted child—Second wife

A second wife has a right to share in the property of a deceased husband with a first wife and an adopted daughter, although the property had been altogether acquired before the second marriage was contracted (Special Appeal No 2 of the 4th Qr of 1871, Fol) The publicly adopted child stands in the same position as regards inheritance as the natural child Where the mother dies, an only daughter is entitled to her mother's personal belongings and also to one-fourth share in the family property while the father lives, and on the death of the father to three-fourths of the remainder The father's second wife will be entitled to three-sixteenths.

Ma Gun v Ma Gun L B R 1872—1892, 33

Notes.—Ref U B R 1892—1896 Vol II 153, L B R 1872—1892, 103.

76—Adopted son— Separation --Undutiful conduct

The question whether an adopted son who for many years has lived apart from his adoptive father has been guilty of such negligent and undutiful conduct as to disentitle him to inherit is one of evidence (L B R 1872—1892, 8, 170, 184, Ref) The burden of showing that he had not been undutiful lies on the adopted son because of his separate residence for so many years Such burden would be discharged by giving proof that the father,near his death, acknowledged him as his adopted son and that he acted as such, without dispute, in performing the funeral A man must not be disinherited on mere suspicion or ambiguous evidence

Maung Po Sein v Maung In Dun, L B R 1872—1892, 191

Notes —Ref U B R 1897—1901, Vol. II,135, U B R 1892—1896, Vol II, 59, 22, L B R 1893—1900, 520

77—Shares of elder and younger brother—Adoption-Shares of adopted and natural child —

Where land was taken in mortgage and was let out to tenants by one brother or the other, and further advances on mortgage were made sometimes by one brother and sometimes by the other, the general presumption from the circumstances is that all the immoveable property belonged to the joint estate, and the clearest proof is required that any of it was owned otherwise and was separate property. All the immoveable property ought to be dealt with on the same principle and it is clear that there is every reason to believe that the whole of it was joint, and that the evidence that one brother rather than the other had most to do with any portion of it at any particular time, practically proves nothing contrary to the general ownership in common. In this case what were virtually two suits for partition were dealt with in one action. Plaintiff, Ma Gyan,claimed the shares of her father,Maung San Aung in the undivided estate of himself and his elder brother, Maung Kywin, first defendant; the question in this first case was whether certain parcels of land belonged to the common estate or were the separate property of one or the other brother and it was held in second appeal that the same principle must govern all the items in dispute, namely, that, as there was a joint estate of which portions were alternately dealt with by one brother or the other, there was no presumption from such dealing at any particular time that there had been a permanent separation of interests, but on the contrary the continuance of the unity of the estate must be presumed in the absence of clear and distinct proof the other way of which there was none It was agreed in the Courts below that the respective shares of the elder and younger brother were to be calculated in accordance with s 163 of the *Attathankepa Dhammathat*, namely, 437/729ths and 292/729ths. In what may be called the second case, the questions were whether Ma Gyi, the daughter of Maung Kywin, had been adopted by Maung San Aung, whether that adoption continued up to the time of Maung San Aung's death, and if so, what share of inheritance Ma Gyi was entitled to As to the first point,Ma Gyi was taken by San Aung as an infant on her mother's death. No formal document was drawn up, but as the parents were brothers this was considered natural enough There was evidence that the child was brought up as daughter of the house, she never returned to her own father's house, and it was held that the arrangement would never have been allowed unless it was a *kittima* or full adoption. With regard to the second point Ma Gyi married and lived in a different house from San Aung, but the residences were close together, and there was no evidence of interruption of filial relations. It was therefore held that the continuance of the adoptive state must be presumed On the birth of a child of his

Burmese Law (Inheritance)-*Contd.*

own, the plaintiff Ma Gyan, a good many years after Ma Gyi's adoption, Maung San Aung might have wished to set aside the adoption, and this he might possibly have done by making suitable provision for Ma Gyi on her marriage, or by arrangement with her own father, or by otherwise coming to an agreement with her in settlement of her claims to inheritance, but, as he had done none of these things, the adoption must be treated as still subsisting. The requirement in the *Dhammathats* as to joint living must receive a reasonable construction adopted to the changed conditions of modern times in the country, the object of the requirement doubtless being to provide a rough and ready means of settling questions of disputed succession turning on the unbroken maintenance of the family tie The real issue for determination in such cases is whether the surrounding circumstances proved to exist, establish an intentional severance of the family tie or not. The Buddhist in practice has no testimentary power which would prevail against the established rules of inheritance and consequently the conduct of the several parties in their lifetime is of the greatest importance as a guide to what they intended their respective relations should be in respect of rights of inheritance upon the death of the owner of the property to which contending claims are made. (U B R 1892—1896, Vol. II, 24 Ref.)

Ma Gyan v Maung Kywin.
U B R 1892—1896, Vol. II, 176.

Notes —Ref: U B R 1897—1901, Vol. II, 135.

78.-Claim to share of joint property of brother and sister working together, both being alive-Law of inheritance not applicable.

This suit was brought by a young woman against her brother and his wife for a third of their property. Her parents died when she was a little girl, and her brother kindly brought her up and took care of her, and she gave some help work as a toddy-tapper. In return for his kindness she has thus put him in Court. The parents not only left no property, but even died in debt, and the plaintiff's brother had that burden to discharge in addition to her maintenance. *Held*,—in second appeal, reversing the decree of the Courts below, that Buddhist law was inapplicable, the suit not coming under the law of inheritance, but being in fact of the nature of a claim to a share of the profits of a partnership,

Burmese Law (Inheritance)-*Contd.*

the existence of which was not proved, and that no cause of action was disclosed by the proceedings. **Maung Taing Gyaw v Ma Ein Ta. U B R 1897—1901, Vol, II, 102.**

79.—Manugye Dhammathat, Ch. X, S. 26—Partition of property between brothers and sisters —Equality of shares-Adoption-Child given in adoption loses claim to inherit any share of the estate of his natural parents-Evidence-Burden of proof.

The adopted child drops out of his own family and is provided for in that adopting him. The expectations and arrangements of the members of the family he has left are framed accordingly, and it would be manifestly inequitable to let the child adopted into another family come back into his own and disappoint the reasonable calculations for the future which have been made therein. The number of prospective co-parceners in the inheritance of the original family is reduced by the adoption, and the adoptee cannot be permitted to come back and, as it were, to be born again. Apparently an adoptee drops even more completely than a deceased child out of the original family, for the deceased may leave children of his own who are admitted to a certain share, which does not seem to be the case with the children of an adoptee. *Held*, that in such cases as the present the burden of proof is shifted by a comparatively small amount of *prima facie* evidence from the claimant to the manager and *de facto* trustee of the estate. There is nothing against partition in equal shares. (U B R 1897—1901, Vol. II, 79, Ref.) **Maung Pan v Ma Hnyi. U B R 1897—1901, Vol. II, 104.**

Notes.—Ref: U B R 1897—1901, Vol. II, 116.

80.—Inheritance cannot ascend—Brothers and sisters.

Elder brothers and sisters are postponed to younger brothers and sisters in the law of inheritance. Except where there are no other relations, inheritance cannot ascend.

Mi A Pruzan v Mi Chumra. L B R 1872—1892, 87.

Notes.—Ref; U B R 1897—1901, Vol. II, 22.

81.—Children of brother and sister—Succession among children-Succession *per capita*.

The parties in this suit were children of a brother Nga Pa and of a sister Mi Pu. There was

Burmese Law (Inheritance)-*Contd.*

another sister Mi U. Maung Pa and Mi Pu predeceased Mi U. The question before the Court was (a difference of opinion regarding some trees having been waived by the applicant) as to the shares which the nephews and nieces of Mi U, who had died leaving property, were entitled to, that is to say, whether they were entitled to equal shares *per capita*, or whether they could claim only to divide what would have been their parents' shares, supposing Maung Pa and Mo Pu had survived Mi U. *Held* that the children of Mi U's brother Maung Pa were entitled to half and the children of Mi Pu were entitled to the other half of Mi U's property. U B *R* 1892—1896, Vol. II, 93. 102, Ref.) **Maung Kyaw v Ma Tu.**

U B R 1892—1896, Vol. II, 189.

82-83-84.—Buddhist Law—Inheritance—Arbitrator's award-Validity and binding effect of award.

Rights of Buddhist co-heirs to contract between themselves irrespective of rules of Buddhist law. Tendency in favour of equality of sharers. (U B R 1892—1896, 93 L B R 1872—1892, 110, Ref.) **Mae Mya v Ma Kun,**

U B R 1892—1896, Vol. II, 102.

Notes.—Ref: 2 L B R 174.

85—86—Land-tax.

There is no law or rule which gives any title to the person who is in possession of land, and who has failed to pay the tax on it, to remain in possession, to the exclusion of the rights of others. It would be a strange doctrine that a man in possession of land should be able to extinguish the rights of others not claiming through him, by omitting to pay the Government Revenue. He, if any one should be punished for the omission to pay the revenue. To enable him to take

Burmese Law (Inheritance)-*Contd.*

advantage of that omission and defeat thereby the claim of others would be to allow him to take advantage of his own wrong. The fact that no revenue has ever been paid on land will not bar the Courts from decreeing a claim to possession of the land based on the law of inheritance.

Nag Nwe v Maung Tha Dun Aung.

L B R 1872-1892. 17.

87.—Family arrangement—Inheritance.

Among the Burman Buddhists, the father, foreseeing that the heirs may quarrel about the division of the property on his death, not infrequently arranges a special contract before his death among these heirs where they bind themselves, among themselves to accept a certain proportion or a specified field, or specified area of land, or a certain number of cattle, or particular chattels. The motive of convenience inducing the heirs to accept such an agreement is often aided by a religious awe of the father and a religious feeling of obedience to his wishes. But such an agreement will not usually give them a cause of action against him during his life. (L B R 1872—1892, 22, 30, 44, Ref.) **Mi Thit Mi Sin v Maung To Aung and Maung Gaing.**

L B R 1872-1892. 197.

Notes.—Ref. L B R 1893—1900, 469.

88.—Inheritance.—Eldest representaive of eldest child ranking with surviving uncles and aunts. In *B*uddist Law, a grandchild, whose parents have pre-deceased their parents, is entitled to rank with the surviving uncles and aunts, only if he is the eldest representative of the eldest child, the other grand-children taking only one fourth of the share that their parents would have enjoyed had they survived. I L *B* R 198 Fol. **Ma Thin v. Ma Nyein.** **8 Ind Cas 594.**

89.—Eldest daughter's share in property, inherited by her mother from her mother,

II C C. 66

Burmese Law (Inheritance)-*Contd.*

A female *Burmese Buddhist* inherited some property from her mother. She died leaving a a husband and five daughters. *Held*, that the eldest of the daughters was entitled to succeed to one-fourth share of the property. (3 L *B* R 8; 2 L B R 255, Ref.) **Tha Tu v. Maung Bya. 4 L B R 181.**

90.—Death of husband and wife within a short time of each other-Rights of relatives to succeed to estates.

Where on the death of a husband, his wife inherited all his property, as his widow, but within a very short time after his death the widow also died, leaving her surviving neither descendants nor ancestors, the relations of both may inherit the estate. As has been observed in 2 U *B* R (1897 1901), 66, the apparent reason of this distinction seems to be that, when husband and wife die within a short interval of each other, their joint interest in the estate is regarded as predominant, whereas when one lives long after the other, the presumption arises that the joint interest has completely merged in the sole interest of the survivor. (U *B* R (1892-96), 136; U *B* R (1897-1901), 66 and 146, Ref:) **Ma Kadu v. Ma Jon. U B R (1905) Buddhist Law 7.**

91.—Orasa child-Daughter surviving parents with brother-Whether such daughter, orasa child —Share of children of such daughter.

The plaintiffs sued the children of the orasa daughter of the original owners to recover a third of the properties left by them *Held*, that the plaintiffs' position was untenable. The Plaintiffs' mother was neither the eldest child nor the eldest daughter of the original owners. She was not even the eldest survivor among a family consisting of daughters only, for, at the time of her mother's death, who survived her husband she had an adult brother. There is no

Burmese Law (Inheritance)-*Contd.*

authority for the suggestion that a second daughter, who is also the fifth child, can under any circumstances, become an *orasa*, child so long as there is a brother surviving and competent to assume the headship of the family. As there were two children of the original owners still living, the plaintiffs could get only one-twelfth, and not one-third of the properties of the owners. **Po Sein v Po Min. 3 L B R 45.**

92.—Grand child of first wife deceased share of in the presence of second wife and her child.

The question in the case was as to the share that could pass on inheritance to a deceased *Buddhist's* grand-child by his first wife on the one hand and his second wife and her daughter on the other. *Held*, that, under the *Burmese* Law, a grand child, whose parents died, after one grand parent and before the other, is not to receive any share on the death of the surviving grand parent, only because, and if, their parents had already received their portion. Otherwise, according to the law, nine twentieths of the *atetpa* property and oneeighth of the *lettetpwa* property of the grandparent would pass to the grand child. **Sein Tin v Mi On Kra Zau 3 L B R 219.**

93.—Property inherited by Burman Buddhist father after death of first wife and before marrying his second wife-Share of child by deceased wife.

Where *Burman Buddhist* inherits property, moveable or immoveable, after the death of his first wife, by whom he had a son, and before his marriage with his second wife, by whom he had children and dies leaving him surving, his son by his first wife, his second wife, and children by her, it was held that the son by the first marriage is entitled to one half share of such property. 2 L *B* R 174, 2 L C (Chan Toon), 97, I L C (Chan Toon) 292, S J L *B* 110, 6, 255, P J L B 534, Ref: **Ma Leik v. Maung Nwa. 4 L B R 110.**

Burmese Law (Inheritance) *Contd.*

94.—A Methila nun, whether a woman loses rights to property by becoming—Orasa meaning of.

The question was whether, under the Burmese Law, a woman by becoming a nun renounced her property and died a civil death. *Held*, a nun does not occupy a position analogous to that of a monk. The Methila nuns especially undergo no ceremony of ordination as a nun but are simply lay devotees corresponding to religious laymen. Counsequently there is nothing in the Buddhist Law to support the proposition that a woman loses her rights to the property held by her, be reason of her having joined the order of Methila nuns,

Held, also, that the eldest born son is the *Orasa* by right and the eldest son (or eldest capable son), whether eldest child or not, clearly has the special privileges possessed by an *Orasa* son under Burmese Law. U B R (1897-01), 54 & 66 & 12 L B R 292 Ref. **Mi Min Din v Mi Hi Hle U B R (1905) Buddhist Law Inheritance II**

95.—Priority between sister and sister's daughter,—

In this case the question for decision was, whether, under Buddhist Law, the daughter of a deceased sister is entitled to any share in competition with the sister of the owner. *Held*, that in the case of collateral succession, the general principle of the nearer, excluding the more remote takes full effect and that so long as there is a surviving brother, he excludes the children of a previously deceased brother. Applying this principle, the sister excluded the sister's daughter. (U B R 1897-1901 172. Distd.) **Ma Ma Gale v Ma Me. U B R (1905) Buddhist Law 5.**

96—Share of child of deceased first wife in property inherited during second marriage.

A Burman Buddhist had a child by his first wife. After the death of the first wife, he contracted a second marriage, and by the second wife he had another child. During the continuance of the second marriage, he had inherited certain property from his mother. His second wife predeceased him. He died last, leaving him surviving the two children one by his deceased first wife, and the other by his deceased second wife. *Held*, the two children were entitled each to a moiety in the property inherited by the deceased from his mother. S J L B 110, 177, 223 and 255; P J L B 361 and 418. Ref: **Maung Gale v Maung Bya 4 L B R 189.**

Burmese Law (Inheritance)-*Contd.*

97—Deceased sister's daughter's estate—Exclusion-Surviving brothers and sisters excluding children of deceased brothers and sisters.

Held, that, under the Buddhist Law, applying the general principle that only those closely related should inherit and that relations of the same degree should inherit to the exclusion of those of a more remote decree, the surviving brothers and sisters of a deceased sister inherit the estate of the deceased sister's daughter to the total exclusion of the children of the brothers or sisters who predeceased that sister. 1 L B R 104 and 2 U B R (1905), Inheritance 5, Fol: **Kan Gyi v Ma Ngwe Nu 5 L B R 70.**

98—Right of daughter of divorced wife to succeed to her father's property as against his sister.

Where the husband divorces his wife, after she was conceived, and dies without other wife, child or grandchild, the child by the divorced wife is to succeed to his estate. If the father lived alone, the child succeeds to the whole estate. If the father lived with his coheirs the child succeeds to half and the coheirs to the other half. Therefore, where a person dies leaving only a sister and a daughter by a divorced wife, they share his property equally. The rule that the daughter of a divorced wife, who lives with the mother and does not maintain filial relations with the father, is not entitled to a share of his estate, does not apply to the above case. (U B R (1892-96) 11, 22, 159, U B R (1897-1901), 116, 135, 193, 166, Ref:) **Mi Nyo v Mi Nyein Tha U B R 1906 Buddhist Law Inheritance 15.**

99—Inheritance—Division among children of same parents after parents' death—Division in equal or unequal shares.

The question for decision in this case, was, whether, under the Buddhist Law, Burmese daughters inherited the estate of their deceased parents in equal or unequal shares. *Held*, on consideration of all the authorities on the subject, that children of the same parents, dividing an inheritance, after their parents' death, take each an equal share. (1 L B R 198; (1897) 1 L C 418; (1892) 2 L C 107 and (1897) 1 L C 441, Fol. **Ma Kyi Kyi v Ma Thein 3 L B R 8.**

Burmese Law (Inheritance)-*Contd.*

100—Funeral ceremonies Assistance in sickness—Desertion—Will.

Only when actual neglect or desertion is shown on behalf of those who are entitled to inherit is the person who assists in sickness and buries in death entitled to exclude the heirs from the inheritance. *Quære;*—Whether the Will as known to English law has any place in the Buddhist law? Whether a Will can cause the devolution of property contrary to the law of inheritance?

Nga San Yun v Nga Myat Thin. L B R 1872—1892 46.

Notes—Ref L B R 1872—1892, 70, 95, L B R 1893—1900. 299, 465.

101—Hired attendant ministering during illness and performing funeral ceremonies—Right of inheritance in estate of deceased.

A hired attendant who attends members of a family during their sickness and buries them with means derived from the family estate does not thereby acquire a right of inheritance in such estate. **Maung Shwe No v Maung Chit Twe L B R 1893—1900, 465.**

102—Review of judgment—Sufficient reason.

Where it is requisite for the ends of justice, a review can be granted where there is an apparent error of law or where the decision has preceded on a mistaken view of law, but not because of a ruling of law later than the decision of the case nor for the purpose of rearguing the case on previous materials in the mere hope of inducing the same Court to take a different view The law in question ought to be sufficiently settled and determinate to permit of its definite ascertainment. Where the law itself is so uncertain that it is impossible to say positively what it really is, the remedy of a review can hardly be properly applicable. (6 All 292, 24 W R 186, 382, 1 Bom 54, 11 Cal 775, 1 Cal 184, 7 Mad 307, 10 W R 143, L B 1872—1892, 33, 9 All 36, 10 Mad 357, 14 Cal 627, Cited.) Position of the lesser wife or concubine during the life-time of the chief wife and with her consent considered. Illegitimacy is an ambiguous and inconvenient word to employ in regard to Buddhist law. It does not appear in the original Burmese what is meant by the term is incompetency to inherit under certain conditions, or inferiority and postponement of claims to inherit to those of other heirs. Right of son of lesser wife taken during the life time of the chief wife and with her consent, brought up by father like the offspring of a regular union to share the inheritance with a second wife and child pointed out.

Ma Hlaing v Ma S we Ma. U B R 1892—1896 Vol II 153.

Notes—Ref U B R 1902—1903, Vol II. C P C 3; Cited, U B R 1897—1901, Vol II, 488.

103—Attetpa property—Lettetpwa property—Out-of-time grandchild, Share of—Estate of grand-parents.

Where the plaintiff sued for three-fourths of the *attetpa* property of her grand parents and one-eighth of the *lettet pwa* property, *held*, that as she was an out-of-time grandchild, *i,e.*, her parents had predeceased the grandfather, she was only entitled to one fourth of the above shares.

Ma Pu v Ma Le' 1 B L R 93.

Notes—Cited, 3 L B R 219; Ref., 1 L B R 198.

104—Let tet-pwa—Atet property—Partition.

A native Judge interpreting the Buddhist law ought not to ignore its difficulties; he should give reasons for selecting one rule out of several. On the death of a person leaving no widow but a son by his fourth wife and the daughter of a daughter by his first wife, the daughter of the daughter by his first wife takes one-eighth and the son seven-eighths in the *lattet-pwa*, or joint property acquired during the fourth marriage; and in the *atet*, or property acquired by the deceased prior to his fourth marriage, the grand-daughter takes four-fifths and the son one fifth. **Nga San On v. Mi Shwe Daing, L B R 1872—1892, 223.**

Notes—Fol., L B R 1893-1900, 361; Ref., 2 L B R 174, 4 L B R 189, U B R 1892—1896, Vol II, 110.

105—'Kanwin' or marriage portion—Property gifted as, to bride—Death of bride childless—Husband's right to inherit.

Where a gift of a certain property has been made as 'kanwin' at the time of the marriage ceremony, and such property has been delivered into the possession of the bride, even if the bride dies childless in her parents' house, the husband is entitled to inherit such property as against the parents-in-law. **Lu Gale v Maung Sein. 6 L B R 16.**

Burmese Law (Inheritance)-*Contd.*

106—Partition—Mother marrying twice—Division on second marriage between herself and children by first marriage—Legality—Property acquired thereafter during second husband's lifetime—Property acquired after his death-Children after two marriages - Mode of division.

H. a Burmese woman, married twice. By her first marriage she had four children, and by the second marriage she had two children. On her second marriage, she effected a division between the children of the first marriage and herself. She acquired some properties after such division and during the lifetime of her second husband, and acquired some other property after his death. *Held*, that a division on the re-marriage of the mother is authorised; that the children of the second marriage are entitled solely to the property acquired by the mother after the division and before the death of the second husband; and that, as regards property acquired after the second husband's death, the children of each marriage take *per stirpes* and not *per capita*. (4 L B R 110, Ref.)

Ma We v Mang Cheik 6 L B R 28.

107—Inheritances—Orasa son—Devolution of the status on the next eldest son—Transmission of right.

If a first-born son dies in infancy, the status of 'orasa' is capable of devolving on the next eldest son and does so devolve when he attains his majority, provided that he is unaffected by any of the disabilities or disqualifications mentioned in the texts on the subject. He can transmit the superior right of inheritance to his own issue in the same way as an 'orasa,' who is actually the first-born of the family, can do. (L B R 1872—1892, 585, 8 Bur L R 60, 3 L B R 45, 2 L B R 292, Fol.)

Ma Hnin Gaing v Ma Tha Li 10 Ind Cas 778.

108—Buddhist Law—Succession—Husband and wife—Status of lesser wife living separate from the head wife—Association of husband in public—"Mistress" distinguished from lesser wife or concubine—Presumption arising from separate living of lesser wife—Presumption from second marriage—Marrying two sisters.

In order to get any share in the inheritance, a second wife must prove that her status was superior to that of a lesser wife or concubine. If she succeeds in proving this, she would be entitled to share on equal terms with the chief wife. Separation of residence affords no more than a presumption that the woman has not the status of one entitled to share in the inheritance, which can be rebutted by proof of the existence of a higher status. (U B R 1892—1896, Vol II, 194, U B R 1897—1901, Vol II, 138, 160, Expl.) A second contemporaneous wife is not of necessity a lesser wife or a concubine. A lesser wife or concubine, who lives with the husband, gets two-fifths of the inheritance, but when she lives separately, she gets nothing. U B R 1892—1896, Vol II, 145, Rel. on.) No formal demand in marriage and no ceremony are necessary, or even usual, in the case of persons who have been married before. The chief wife's consent to the second marriage is not required for entitling a second contemporaneous wife to inheritance. There is no such presumption in Burmese Buddhist Law that a Burmese woman, who co-habits with a man who, she knows, is already married, is a mistress and not a wife. There is no prohibition in the Buddhist Law against a man marrying two sisters. It is a mistake to use the word (mistress) with reference to a lesser wife among the Burmans. The Buddhist Law speaks of wives and concubines. The mistress of Western Europe is a different thing from the concubine of the *Dhammathats*. To convert a wife or even a lawful concubine into a mistress seems to be consistent neither with Buddhist Law nor with the cause of religion and virtue. Where it was found that the husband sometimes lived with the head wife and sometimes with the lesser wife, that he lived with both the wives on two occasions for a number of months, that he took the lesser wife also on his visits to Rangoon Shwezettaw *pagoda*, his oil wells, etc., and where it was abunbantly clear from the admitted facts that, during a long course of years, the head wife accepted the relations between the lesser wife and the husband without any sign of dissatisfaction. *Held*, that the lesser wife was satisfactorily proved to be a wife entitled to inherit on an equal footing with the head wife. **Mi Shwe Ma v. Mi Me, 12 Ind Cas 191.**

109—Succession—Attendance during last illness—Giving expenses for funeral rites—claim to the property of the deceased.

A Burman Buddhist died, leaveing no wife, children, brothers or sisters; the plaintiffs who

Burmese Law (Inheritance)- *Concld.*

were his younger brother's children brought a suit for the possession of the property: *Held*, that the defendant who lived with the deceased and who admittedly attended him in his last illness and also paid the expenses of the funeral with the evident intention of recouping himself from the estate the whole of which was in his possession, should be referred to the plaintiffs, who failed to attend or visit the deceased in his last illness and whose neglect was not cured by their attempt to borrow money for the funeral. **Maung Shwe Thaung v Maung Tu, 11 Ind Cas 777.**

Burmese Law (Joint family.)

1—Marriage of member of—Separate property—Limitation.

It is doubtful whether a Burmese Buddhist family is ever a joint family within the meaning of art. 127, Limitation Act. However that may be, a member of the family who marries certainly ceases to be a member of a joint family. Property acquired by a married son or daughter does not become part of the joint family; it is the separate property of the married member. 6 All 442 Ref: **Maung Aung Ge v Ma Hla Win, L B R 1893–1900, 415.**

2—Joint ancestral property—Suit for share of, by joint heirs excluded therefrom against other joint heirs—Limitation—Limitation Act, arts. 127, 142, 144.

A suit by Burmese Buddhists as joint heirs, against other joint heirs and their alienees, for recovery of a specific share in joint family property, must be brought within 12 years from the time the exclusion from share became known to plaintiff. A suit by a sharer under Buddhist law for a share against alienees from one of the sharers would, if there was a dispossession when the plaintiff was in possession along with the other sharers be governed by art. 142 and if there was no dispossession, by art. 144. **Maung Tun v Ma Taw, L B R 1893—1900, 132.**

Burmese Law (Maintenance)

1.—Wife having means and maintaining herself—Right of suit for maintenance.—

By Buddhist Law, a suit for maintenance will not lie where the wife has means of her own and has maintained herself. 10 Cal 777 Ref. **Ko Ong v. Ma Yon L B R 1893–1900, 31.**

Burmese Law (Maintenance)-*Concld.*

2.—Husband and wife.

It is the duty of the husband to provide subsistence for his wife, and to furnish her with suitable clothes and ornaments. If he fails to do so he is liable to pay debts contracted by her for necessaries; but it appears that this law would not be applicable where she has sufficient means of her own. No authority is found for saying that where the wife has maintained herself she can sue her husband for maintenance for the period during which she has done so. **Maung Hmun Taw v. Ma Pwa L B R 1872—1892, 258.**

Notes.—Ref., L B R 1893—1900, 31.

See also cases under:—

Burmese Law (marriage)

Burmese Law (Marriage)

1.—Husband and wife—Desertion of one by the other for a period, whether dissolves the marriage tie—Dhammathats, effect of custom on.

The point referred to the Full *B*ench in this case was, whether the desertion of the husband by the wife *vice versa*, for the period specified in the Buddhist Law Texts has the effect of dissolving the marriage tie, in the absence of any further and express act of volition on the part of either of them. *Held*, that, even if the actual texts of the *Dhammathats*, supported the proposition that marriage is dissolved by mere desertion, it must be remembered, in applying the personal law that it is in course of time apt to change by the development of customs inconsistent with such law. Further, it is quite conceivable that a husband and a wife may quarrel and live apart, each on their own means, without the least desire to proceed to the extremity of a divorce and the idea that marriage can be terminated at all, without the wish of one or the other of the parties to it, is contrary to and inconsistent with the fundamental principle of the marriage contract.

Held, however, (Fox J. *dissentiente*) that the decision should be based only on the correct interpretation of the Texts, irrespective of how the *B*urmese community may regard the matter and such texts have laid it down that, at the end of

Burmese Law (Marriage)-*Contd.*

three years of continued desertion of a wife by a husband or at the end of one year's continued desertion by a wife of her husband, the marriage of the husband and wife is dissolved without any further and express act of volition on the part of either party. **Thein Pe v. U Pet, 3 L B R 175 (F B).**

2.—Right of wife to mortgage her interest in joint property without her husband's consent.

The texts declaring that the husband is lord of the wife must be construed in the present day in a strictly limited sense. Practically in respect of their respective rights to property, the Burman Buddhist husband and wife occupy a position of equality.

It is settled Law that the husband is not at liberty to alienate joint property without his wife's consent, but that he can make a valid transfer of his share and interest in such property. The same rules apply to the case of alienations by the wife.

Thus, where a wife mortgaged her interest in a house and land which was *hmapazo» lettetpwa* without the consent of her husband, it was held that the mortgage was valid. 3 L B R 66; U B R (1892-96), II, 45, 204 U B R (1902-03) II. Ex of decree I; U B R (1904-06) Buddh Law-Divorce I, Ref. **Nga San Ya v. Nga San Va. U B R (1907) Fourth Quarter, Buddhist Law-Marriage—Joint Property, I.**

3.—Marriage—Custom—Chinese, Buddhist—Validity of marriage with Burmese Buddhist—necessary facts to be proved.

Whese it is sought to establish a marriage between a Chinse Buddhist and a Burmese Buddhist woman, it must be shown that the practices the husband followed differ from those followed by all Chinese Buddhist and are the peculiar characteristics of Burmese Buddhist.

No presumption as to his being a Burmese Buddhist can be drawn from the fact that he bears a Burmese name. For it is a matter of common knowledge and experience that Chinamen long resident or born in Burma; adopt Burmese names.

In such a case the customary law applicable to Chinese Buddhists must be followed, (2 L B R 95 Fol.) **Maung Tun Tha v. Ma Pu 8 Ind Cas 452.**

Burmese Law (Marriage) *Contd.*

4.—Marriage of minor without parents consent—Subsequent co-habitation in parent's house—Proof of consent.

A, a minor girl, who eloped from her parents' house with B, returned to her parents' house and lived and co-habited there with B, and ate together with him there.

Held, that it was a perfectly valid marriage according to Burmese Buddhist Law, and that the subsequent consent of the parents may be presumed from their conduct towards A and B.

Quære: Whether the consent of the parents is essential to ethe validity of the marriage of a minor child ? (I L B R 297 doubted.)

Maunga Chit Pe v. Ma Tin. 8 Ind Cas 437.

5.—Restitution of conjugal rights, suit for—Whether lies—Rights and duties during marriage—Right to divorce.

There is nothing in the Buddhist law (as explained in U B R (1904-1906), II Budd Law Div p 3) as to divorce at the will of one party, without any fault in the other party, on the surrender of all the joint property and payment of all the joint debts.

A suit for restitution of conjugal rights naturally lies, and this is not inconsistent with the Buddhist Law U B R 1904-1906 II Budd. Law, Div p 3 Con and expl. **Naga Chin Dat v. Mikin Pu. U B R (1909) Ist Quarter, Buddhist Law I.**

6—Seduction—Pregnancy—Damages.

The Specific Relief Act, which is of greater to obigation than the Buddhist Law, says distinctly that a contract to marry cannot be specifically enforced. All persons are supposed to know the law, and women ought to know, that if they consent to sexual familiarity without marriage, they take the risk of the paramour ultimately refusing to marry. If there is no promise to marry, the woman who has consented has no right to sue. If there has been a promise to marry, the Court would look at all the circumstances before awarding damages, and the amount if any, awarded would depend on the circumstances as the Dhammathats very plainly show. When there has been no promise to marry, a Burmese woman cannot recover damages for seduction resulting in pregnancy. **Nga Po Thaik v Mi Hnin Zan. L B R 1872—1892, 235.**

Burmese Law (Marriage)-*Contd.*

Notes.—Ref. L B R 1872—1892, 533, 14 Bur L R 149=U B R 1907, Contract 5 ; Fol. U B R 1897—1901, Vol II, 499, Cons U B R 1907, 2nd Qr Contract 5.

7—And divorce—Inheritance—Rights of child of wife who has left her husband—Form of suits for share of inheritance.

Under Buddhist law, a divorce may be effected by the voluntary departure of the wife from the husband for a period of one year. If such departure is without good and sufficient reason, the wife loses all claim on the joint estate. The right of a child of the defaulting wife to inherit her father's estate depends on the special circumstances of the case (L B R 1872—1892, 184, U B R 1897—1901, Vol II, 45 Ref.) The valuation of an estate upon an application of letters of administration affords no exact criterion of what the share of each person entitled to share in the estate will eventually amount to. Such valuation is a valution of the property which the applicant expects will come into his hands. Some of the property may never be realized, or perhaps more may come to the administrator's hands The sharers are entitled to share in what actually does come to his hands. Consequently in a suit by a sharer for his or her share in an estate the taking of an account is almost necessarily involved, and in such a suit there should ordinarily be a prayer asking for an account and for the due administration of the estate under the orders of the Court, as contemplated by s.213, Civ Pro Code, 1882. In such a suit all interested parties should also be joined. **Ma Thet v Ma San On 2 L B R 85.**

Notes:-Overruled, 3 L B R 175 ; Ref 14 Bur L R 236 ; Fol 4 L B R 272.

8—Wife living in house different from that of wife with whom husband messes—Right of inheritance after husband's death, Extent of—Living and eating together—Marriage, Essence of—Separation of residence, Presumption arising from.

Wives who live in separate houses from that of the wife with whom the husband takes his meals are not entitled to obtain, on the death of the husband, anything more than has already come into their possession. Living and eating together is not an essential of marriage, but merely a formal proof of the validity of a marriage. Separation of residence does not afford more than a presumption that the woman has not the status of one entitled to share in the inheritance left by her deceased husband, a presumption which can be rebutted by proof of the existence of a superior status. **Ma Gywr v Ma Thi Da. U B R 1892—1896, Vol II 194.**

Burmese Law (Marriage)-*Contd.*

Notes.—Ref. 3 L B R 175, U B R 1897—1901 Vol II, 116, 193, U B R 1910, 3rd Qr Civil 42; Ref: U B R 1897—1901, Vol II, 138: Expl. U B R 1897—1901, Vol II, 160.

9—Suit by respondent plaintiff as wife of deceased to recover his estate from brothers and sisters.

When a divorce has occurred strict proof is required of the renewal of connubial relations when the question is whether there has been a re-union or not, just as clear proof of marriage in the first instance is required when the point in dispute is whether the status of a wife has been acquired or not. In this case the evidence of a re-union is altogether unsatisfactory, and the circumstances go to show that the probability is all the other way. **Maung Lu Gyi v Ma Nyan. U B R 1892—1896, Vol II, 202.**

9.A—Consent of both parties is necessary to a valid marriage.

Among Burmese Buddhists, as among other civilized people, a woman, whether a minor or not cannot legally be married without her consent or against her will (U B R 1897—1901, Vol. I, 330, Ref. **Maung Taik v Ma Cho. U B R 1897—1901, Vol II, 197.**

10—Ante-nuptial Contracts—Proof.

Buddhist Law recognises certain property as the separate property of the wife. It is called "*thin thi*" and includes what belonged to the wife before marriage, and what has been given specially to her since marriage. It is distinguished from '*kan win*" which is property set apart at the time of marriage for the joint purposes of the married pair, and from "*knit pason*" which is property acquired jointly after marriage. In ante-nuptial contracts it must be proved by clear evidence that, marriage was the consideration of the promise. On grounds of public policy, ante-nuptial contracts, which are not the usual incidents of a Buddhist marriage, must be admitted with caution and only on strict proof. **Maung Ba v Ma Ok. U B R 1902—1908, Vol. II Buddhist Law, Marriage, 1.**

Burmese Law (Marriage)-*Contd.*

Notes.—Rel. on. U B R 1904, 1st Qr Buddhist Law—Marriage, 1.

11—Suit to recover money raised on mortgage of her separate property and lent to her husband.

A Burmese wife is entitled to sue her husband during marriage to recover, with interest, money raised on mortgage of her separate property and lent to her husband for his separate use. U B R 1902—1903, Vol II Buddhist Law, marriage 1, U B R 1892—1896, Vol II,159, Ref. **Ma Mon v Maung So. U B R 1904, 1st Qr Buddhist Law-Marriage 1**

12 - Restitution of conjugal rights—Ill treatment and desertion.

Where plaintiff-appellant left the house without any sufficient cause after ill-treating defendant-respondent and since then he has failed to exhibit any sign of affection for her, *held* that plaintiff appellant is not entitled to a decree for restitution of conjugal rights. Ill-treatment and desertion by petitioner is a valid plea of justification under Buddhist Law. (10 Bom 301, 28 Cal 751,) **Maung Sein v Kin Thet Gyi U B R 1904. 4th Qr Buddhist Law 5**

13 -Acquisition of property during marriage-Right of widow to dispose of her share of property after death of husband—Property partitioned between widow and her son.

Certain property was acquired during the marriage of M S and M B. On M S's death, M B had an absolute right to dispose of her share in the property. The property was partitioned between her, and her son. What she obtained came to her in her right of widow. Consequently she could dispose of the property without the consent of her grandson. **Maung Po U v Ma Ba Li. 14 Bur L R 57.**

14'—Burmans—Inheritance—Wife and concubine—Their rights-Maya Nge, whether concubine 'Letsonmaya, 'meaning of the term.—

A Burman Buddhist may have at the same time two or more wives,who are on equal footing though one of them may be styled the head wife, and her status may be superior to that of a free concubine When a *Maya Nge* is mentioned in the *Dhammathats*, it is such a wife that is referred to and not a free concubine.(L B R 1872-1892 6, U B R 1897-1901, Vol II, 160 Ref). In Burma,

II C, C 67

Burmese Law (Marriage)-*Concld.*

though polygamy proper is undoubtedly coming to be looked on with more and more disfavour, it is by no means extinct. Of the wives who have borne an equal number of male children, the chief wife is the one first married. A wife who is barren may be "put away" but not divorced, and then another wife may be married without fault, and this rule appears to be the only one according to which a subsequently married wife can be set over a previously married one as his chief wife. The term "letsonmaya" means a wife who lives on terms of equality with her husband. Eating out of the same dish is but one, though perhaps the chief, *indictum* of such equality. A wife living separately from her husband, who is not entitled to inherit, is not at all a wife but a concubine. Separate residence merely affords a presumption, which, however, may be rebutted, that such a woman is a concubine and not a wife. (U B R 1892-1896. Vol II 115, Expl,U B R 1897-1901 Vol II 160, U B R 1897-1901, 194, Rel on). **Mi Kin Gyi v Mi Kin Gyi U B R 1910 3rd Qr 42=8 Ind Cas 1169.**

15.—Husband and wife—Husband's rights over wife's payin property—Distinction between maiden wife and eindaungyi as regards husband's control over wife's payin-Amendment of plaint-When to be refused—Estoppel.—

A Buddhist wife, who is an *eindungyi*, may alienate her *payin* property in any way she likes, without even consulting her husband, provided that she does not give it to a paramour. An amendment of plaint should not be allowed on second appeal, when such amendment involves fresh issues and fresh evidence. Where a husband allowed his wife to receive certain land in mortgage in her sole name and to take the rent, the mortgagor is justified in the belief that the transaction only concerned her and himself and that she had power to reduce the debt if she wished to do so. The husband is estopped from disputing a redemption by the wife. **Nga Tan Baw v Nga Kan 12 Ind Cas 200.**

Burmese Law (Marriage)——Decree passed against a wife alone—-Husband and wife being Buddhist—Attachment by actual seizure of joint property to the extent of the wife's interests lawful—**See Execution of decree-Application for execution and powers of Court. U B R 1902-1903, Vol. II Execution of decree, 1.**

Burmese Law (Partition).

1.—Between father and daughters, the children of successive wives on the former marrying again.—

U Myaing, who had successively married three wives who had pre-deceased him, was on the point of marrying a fourth wife when his daughters by his former wives claimed partition of inheritance. At the time of partition U Myaing had by his first wife two children surviving, by his second wife one child, Ma Tha Zu, and by his third wife Ma E Ma, one child Ma Shwe Sein. There was also a daughter of Ma E Ma by former husband. All the property to be divided was the jointly acquired property of Ma E Ma and U Myaing. *Held*, that the property should have been divided into nine shares, of which U Myaing should have kept five, and given two to Ma Shwe Sein, the daughter of himself and Ma E Ma, and two to the children of the first two marriages and the step-daughter. **Ma Ta v Ma Thu Za. L B R 1893-1900. 312.**

2.—Husband and wife—Partition of divorce—Property inherited by wife—payin and Lettetpwa property.—

The distinction between a division of property between husband and wife upon divorce and a succession to property by inheritance being sufficiently obvious, this distinction must be kept well in mind in interpreting the texts and rulings as to the various descriptions of property and the division of inheritance of the same under Buddhist Law. (L B R 1872—1892, 110, Fol.) As between husband and wife property inherited by the wife during coverture is viewed as *lettetpwa* and not *payin* when a partition of property is made between husband and wife on divorce. It does not by any means follow that property is to be viewed as joint property of the husband and wife, if on the wife or the husband dying during coverture, the estate of the deceased becomes distributed among the heirs. Property inherited by a wife is acquired during coverture, if the income of the inherited share is enjoyed during coverture, whether a distribution of inheritance into separate aliquot shares be made between the heirs before she is divorced from her husband or after such divorce. (L B R 1872—1892, 212, Ref: L B R 1872—1892, 110, 177, Dist:).

Ma Ngwe Bwin v Maung Lun Maung. L B R 1893—1900, 295.

Burmese Law (Partition)-*Contd.*

3—Of property jointly acquired during one marriage between the children by that marriage and the children by other marriages.

Manukye, X, 66, 67.—The rule for the partition of property jointly acquired during one marriage between the children by that marriage and the children by other marriages is that laid down in paragraphs 66 and 67, Ch. X of the *Manukye's Dhammathat*. The children by the marriage during which property is acquired take double the share taken by the children of any other marriage. **Ma Min E v Ma Kyaw Tahi, L B R 1893—1900 361.**

4—Burden of proof——Division—Ancestral estate.

The burden of proving the division of ancestral property lies upon the party asserting division. **Ma Hnin Si v Ma Hnin Yi. L B R 1872—1892 22.**

5—Title of eldest son who has obtained his one fourth share to share thereafter in the remainder of the estate.

There is no authority for thinking that the eldest son, after taking his one-fourth share of the estate of his deceased father, retains any right to a further future partition or any right in the remainder of the estate, except the right of pre-emption in case of sale by the remaining co-heirs. (L. R. R. 1872—1892, 76, U. B. R. 1897—1901, Vol. II, Fol.) In such a claim for pre-emption the co-heirs would have to be made defendants or joined as plaintiffs. **Maung Hmu v Maung Po Thin 1 L B R 50.**

Notes.—Ref: 1 L B R 198.

6- Partition—Gift—Mutation of names—Notice to mortgagee of claim—Effect of a subsequent mortgage on family partition—Transfer of Property Act (IV of 1882), Ss. 41, 123—Specific Relief Act (I of 1877), s 42, proviso—Mortgage by third person—Declaratory suit by real owner—Buddhist law.

A declaratory suit by the real owner that a mortgage effected by the person in possession does not affect the property is not repugnant to the proviso to s.42 of the Specific Relief Act. It is not necessary in such a case to seek the cancellation of the mortgage instrument or possession of land. Where a Burman Buddhist, on his

Burmese Law (Partition)-*Concld.*

second marriage, transferred the joint property of himself and his first wife to their daughter by way of inheritance, evidently with the intention of keeping the land out of the hands of his second wife: *Held*, that the transfer operated as a partition of inheritance and not as a gift. A partition between father and daughter is not invalid merely because the father assigns to the daughter a larger share than she could claim under the ordinary law of inheritance, or if the father thinks it expedient to make over the whole of the joint property to the daughter. A transferee cannot be allowed the benefit of the principle contained in s. 41 of the Transfer of Property Act, when the slightest inquiry would have sufficed to acquaint the mortgagee with the fact that the land stood in the real owner's name in the Revenue maps and registers. **Maung Hmwe v Ma Lun Aung 11 Ind Cas 855.**

Burmese Law--(Pre-emption)

1—Right of pre-emption—Right of widow to dispose of family property subject to children's right of pre-emption.—

A Buddhist widow has a right of absolute disposal in respect of her own share, after her husband's death, and a life-interest in the remainder. This decision does not overrule the law relating to the right of pre-emption but is subject to the general rule, regarding the right of all co-sharers to pre-emption. Where a mother after the father's death sold her right over joint family property to a stranger, *held*, the son has a right of pre-emption over the whole property. 2 L B R 167, L B R 1872-1892. 378, L B R 1893—1900, 65, Ref: **Mo Thi v. Tha Kwe, 4 L B R 128=14 Bur L R 205.**

2—Pre-emption, widow's right of—Widow's right to inherit.—

According to Buddhist Law, a person selling ancestral property, whether it has been divided or not, must offer it to his co-heirs, before selling it to strangers. A sale to strangers effected without such offer is invalid, if the co-heirs promptly assert their rights.

A Buddhist widow is the heir of her husband whether there are children or not. The eldest son has a right to claim one-fourth on the death of the father, but this fact does not alter the position of the widow.

Where the widow has inherited her deceased husband's share, and the co-heirs of the husband have sold their shares to strangers, the widow has the right of pre-emption. Such right to pre-empt will be strengthend all the more by the fact that she has a son by her deceased husband. (29 Mad 298; U B R (1897—1901), 231; S J L B 39, 41, 76; P J L B 26; U B R (1897—1901), 155 and 162; 1 L B R 144=2 L C 129 and 7 All 775, Ref: U B R (1892—96), 121; U B R (1897-1901), 146, S J L B 76; U B R (1892—96), 58, Ref:) **Nga Tin v Nga Shwe On, U B R (1907), Burmese Law, (Inheritance and Pre-emption), 1.**

3—Suit for Pre-emption under Chinese Customary Law—Suit by Chinaman-Indian Succession Act, Ss 5 & 331—Burma Laws Act, S.13.—

In a suit by a daughter for pre-emption of certain properties which had belonged to her father, who was a Chinaman, brought under the Chinese Customary Law, it was *held*:—

(1) if the father was not a Buddhist, the provisions of the Indian Succession Act applied to him, and not the law of China.

(2) if he was a Buddhist his estate would be exempted from the operation of the Indian Succession Act by S. 331 of that Act, and the Buddhist Law would form the rule of decision.

In this case, the father being a Chinese Buddhist, it would be necessary for the plaintiff to show that there is a Chinese Buddhist Law in China applicable to Chinese Buddhists only, as apart from the customary law of the country, applicable to all the inhabitants whether Buddhists or not, and that by that law there is a right of pre-emption in respect of the land in dispute. (2 L B R 95, Ref:) **Apana Charan Chodry v. Shwe Nu, 4 L B R 124.**

4.—Sale of undivided ancestral property—Pre-emption.

A sharer in undivided ancestral property if he wishes to sell his share must offer it to his co-heirs, and a sale to strangers effected without such offer is invalid if the co-heirs promptly allege their rights. (S. J. L. N. pp. 39, 41, Fol.) The right of pre-emption is in the co-heirs collectively, and there is no law by which a single co-heir can enforce pre-emption unless the consent of the other co-heirs has been obtained. U B R 1897—1901. Vol. II, 155, Fol.; L B R 1872—1892, 39, 41, 76, Ref.) A co-heir is not estopped from enforcing the right of pre-emption because other parts of the estate have been sold without protest. **Maung Law Dok v Ma Po. U B R 1897—1901, Vol. II, 162.**

Burmese Law (Pre-emption)-*Concld.*

Notes —*Ref:* U B R 1897—1901, Vol. II. 511, U B R 1907, 2nd Qr., Buddhist Law—Inheritance—Pre-emption, 1.

5.—Sale of ancestral property to persons not belonging to the family—Pre-emption:—On their failing to agree to purchase it, the owner would be free to sell as he thinks fit. (L B R 1893—1900, 26. Ref.; L B R 1872—1892, 39, 76. Fol.)

Maung Shwe Nyun v Ma So. U B R 1897—1901, Vol II, 155.

Notes.—Ref: U B R 1897—1901, Vol. II, 511 U B R 1907, 2nd Qr., Buddhist Law-Inheritance—Preemption, 1; Fol., 14 Bur. L R 91, U B R 1897-1901, Vol. II, 162.

Burmese Law—Widow.

1—Widow's share of joint property absolutely at her disposal — Division of one-fourth share among the eldest son and his brothers—Division of property between the widow and her children on her re-marrying —

The widow has absolute power of disposal over one-half of the joint property of herself and her deceased husband. (L B R 1872—1892, 121,378, Ref.) **Maung Hlaing v. Maung Tha Ka Do, L B R 1893—1900, 65.**

Burmese Law—Will.

1—Testamentary power.—

A Burman Buddhist cannot make a Will. The testamentary power is not in a Burmese Buddhist. **Maung Me and Mi Min Nyo v. Sit Kin Nga, L B R 1872–1892, 429.**

Notes:—Ref: L B R 1893—1900, 9, 132.

2—Ancestral estate.—

The right to share in ancestral estate is not affected by any instructions or Will on the part of a co-heir. **La U v. Mi Saung Ma, L B R 1872—1892, 12.**

3—Chief Commissioner — Validity of Wills made by Burmese Buddhists.—

No Will by a Burmese Buddhist having heirs which dispossess of property, moveable, or immoveable, contrary to the Burmese Buddhist Law of Inheritance should be admitted as valid. There may possibly be some family customs in some remote part of the province, which the Chief Commissioner is unacquainted with, where this rule would not lie. In that case, of course, there will be an exception; and it appears probable that in some cases, as for cruelty or for a blow, a father or mother may legally disinherit an heir; but as a general rule, and without some special act of the Legislature, the Courts are bound to decide questions of inheritance, between Burmese Buddhists solely by the Law of Burmese Buddhists or by well ascertained custom.

Anonymous, L B R 1872—1892, 430, Note.

Burmese Law (Will)-*Concld.*

Burmese Law—(General).

1—Maiden lady bringing up two girls and a boy—One girl's father administering estate under Letters of Administration—Other girl suing and getting decree for whole estate as keittima adopted daughter of deceased—Suit on behalf of first girl—Boy put on record as party — Decree against second girl directing her to pay 1/3 share to first girl and another third share to boy.—

A maiden lady, deceased, had three persons living with her, (1) S, the daughter of B, with whose father the deceased was living, (2) P, a boy, and (3) L, another girl. On her death, Y, the father of S applied, as father and guardian of S, for Letters of Administration to the estate of the deceased, and obtained it from the Court. A similar application was also made on behalf of L, but was refused. L, thereupon, instituted a suit in *forma pauperis* against the estate of the deceased, administered by Y, for possession of the whole of it, as *keittima* adopted daughter of the deceased. The suit, to which S and P were wrongly not made parties, and which was very badly conducted, was resisted by Y, but was finally decreed in favour of L as the adopted child of the deceased was entitled to inherit. Afterwards, the sister of Y, instituted, as next friend of S, the present suit on the ground that, S not being a party to the former suit, the decrees in it were not binding on her, and that she alone was entitled to the whole estate. P, who wished to put forward his claim, was permitted to be put on the record as second plaintiff in a suit in which the original plaintiff claimed the whole estate. The suit was decreed in favour of S, who was held by the District Judge to have been adopted by the deceased and not L and P.

Held that S's right to share in the estate as *keittima* adopted daughter of the deceased had been proved and that L should make or pay over 1/3 share of the property, which she had obtained or may hereafter obtain from Y under the decree in the former suit, to the properly constituted guardian of S, that L's right to share in the estate

Burmese Law (General)-*Concld.*

as *keittima* adopted child having been established in the former suit where S's claim was represented fully, the question of L's right to share in the estate should not have been gone into in the suit.

Regarding P, though the evidence of his having been adopted was not so strong, yet the deceased having brought him up also, and Y, the person who should have known best the position P occupied in the house, having admitted shortly after the death of the deceased, that P was one of three children adopted by the deceased. *held*, setting aside the decree of the District Court, that L should make or pay over to P also a 1/3 share of such property as she had received or should hereafter receive under such decree. **Ma Bu Lone v. Ma Mya Sin, 14 Bur L R 9.**

Burning Ghat.

Burning Ghat—Partial dedication—Abandonment of user-Reversion—**See** Burial ground. **10 C W N 1044=4 C L J 343 =33 Cal 1290.**

Business carrying on.

See Jurisdiction—Causes of jurisdiction—Dwelling, carrying on business or working for gain.

Bustee Land.

Bustee land—valuation of :—**See** Calcutta Municipal Act, s. 557.

10 C W N 289=3 C L J 169=33 Cal 396.

Butcher's License

See Madras District Municipalities Act, s. 198.

Buttai.

See (1) Jagir and Mafi Estates.
(2) Occupancy Rights.
(3) Tenancy Act (XXVIII of 1868).

Butwara.

See (1) Partition.
(2) Evidence Act s. 35.

Butwara.

1—Evidence Act S. 35—Butwara Chitta—Admissibility—Limitation.

A *Butwara Chitta* is not admissible in evidence under S. 35 of the Evidence Act (6 L R 139 and 25 Cal 90 Fol:).

In a suit by a tenant for possession of jote lands against his landlord, the question whether the plaintiff is a tenure-holder or a raiyat has an important bearing on the question of limitation as it is impossible to decide it without first ascertaining the nature of the plaintiff's tenancy because on that depends the question whether the case is governed by the general limitation or the special limitation provided by Sch. III, Art. 3. Bengal Tenancy Act. **Iswar Chandra Das Sarkar v Tara Nath Chakrawarti. I Ind Cas 807.**

Butwara-*Concld.*

Butwara Papers.

1—*Butwara papers*-Admissibility in evidence—Estates Partition Act (VII B. C. of 1876), S. 57. The partition paper prepared under S. 57 of the Estates Partition Act is admissible in evidence under s. 13 of the Evidence Act, as a record of a transaction in which the right to certain plots is recognised.

The field book or *chitta*, which describes the various plots, is also admissible under S. 9 of the Evidence Act, as explanatory of the partition paper, which without the *chitta* might be very difficult to understand. 10 W R 197; 21 W R 29 Dist. **Sheikh Jaki v Dino Bandhu. 2 Ind Cas 367.**

Butwara Proceedings

1—Butwara proceedings of Collector-Finality.

The *butwara* proceedings of a Collector are final for the purpose of fixing proportionate area, and proportionate assessment of Government revenue, but they are not to preclude parties from coming into Court for the enforcement of their civil right under s. 1, Act VIII of 1859. **Kunj Behari Sing v Neru Sing. 6 B L R 663 note=15 W R 291.**

Notes:—Appl. 14 Cal 67 F B;2 C L J 351; Ref 6 B L R 658=15 W R 471.

Buying or disposing of any person as a slave.

See Abduction.

Bye-law.

See Cases under:—

See (1) Bengal Municipal Act, 1876, s. 313.
(2) Bombay Municipal Act, 1888. Case No. 23. **22 Bom 980.**
(3) Madras Harbour Trust Act, s. 70.
(4) N. W. P. and Oude Municipalities Act, s. 55.
(5) Limitation Act (IX of 1871). Sch. II Act 6.
(6) Calcutta Municipal Consolidation Act, s. 412.
(7) Calcutta Municipal Act, 1863.

Bye-law-*Concl'd.*

(8) Madras Towns Improvement Act-s. 165.

Bye—law of Bombay Port Trust.

See Sale of Goods.

Bye-transaction on the part of Agent.

See Principal & Agent.

Calcutta.

1—Slander—Defamation—Unchastity—Imputation of—Special damage—Common law of England, application of, in Calcutta—Charter of the Supreme Court, 1726. (1) No damages are recoverable for the mental distress caused by an insult. 26 Cal 653 Foll.; 2 Q B 57, 9 H. L. C. 594 ref. to. (2) Defamatory words imputing unchastity to a woman are not actionable within the limits of Calcutta without proof of special damages. (3) The Common Law of England, as it prevailed in 1826, applies to natives of India within the limits of Calcutta except in so far as it has been modified by the legislature, or where it is shown to be unsuitable to this country. 26 Cal 653 ref. to. An action for slander is only maintainable in Calcutta by virtue of the Common Law of England introduced by the charter of 1726. **Bhooni Money Dassee v Noto bar Biswas. 5 C W N 659=28 Cal 452.**

Notes.—Dist: 4 C L J 388; 390. Ref: 34 Cal 48—4 C L J 388; U B R (1905) Fort—Defamation. P. 1.

2—Widow's estate—Alienation by widow—Consent of reversioner—Attestation of deed, if amounts to consent—Indian Limitation Act (XV of 1877). Sch. 11, Art. 140—Ibid IX of 1871 and XIV of 1859—Ouster of a widow—Reversioner's right, if affected by—Onus of proof, on whom lies—Transfer of Property Act (IV of 1882), S. 51—"Belief in good faith"—Enquiry by purchaser, absence of, effect of—Immoveable property in Calcutta—Crown as landlord, effect of—Compensation for improvement—Damages.

Where there was no question of legal necessity, the only way in which a widow could have transferred an absolute estate was by a sale with the consent of the next reversioner. 10 Cal 1102.

Semble: Attestation by the next reversioner of a deed, by which the widow purported to convey an absolute estate, is not equivalent to a consent of the reversioner to the sale.

A widow sold a house in which she had a widow's interest on 29th October, 1857, and, after her death in 1906, the reversioner (plaintiff) sought to recover the same from the purchaser (defendant). The defendant contended that, under the Limitation Act (XIV of 1859), if the widow had been ousted, limitation would have run against the reversioner (plaintiff) from the date of her ouster, which there was just time for it to do before Limination Act(IX of 1871), and that, to make out his title, the plaintiff ought to show that she was not ousted.

Held, that the widow could not possibly be ousted after she had sold all her interest in the property, and that, if such an event occurred, under the circumstances, it would lie on the defendant to prove it.

Under Art. 140 of Sch. II of the Limitation Act (XV of 1877) no ouster of a widow would affect the right of reversioner, who can bring a suit within 12 years.

A "belief" in good faith under S.51 of the Transfer of Property Act (IV of 1882) means not only acting honestly and fairly, but includes due enquiry. So, where a person consciously avoids making an enquiry, though he may be said to have a belief on the matter, it would not be a belief in good faith.

The position of the Crown as landlord of all immoveable property in Calcutta ought not to prevent the application of S. 51 of the Transfer of Property Act (IV of 1882). 22 Bom 1; 4 C W N=27 Cal 570. **Abhoy Churn Ghose v Attarmoni Dassee. 13 C W N 931=3 Ind Cas 415.**

Calcutta Corporation.

1—Calcutta Municipal Act III, B C of 1899, Ss 9, 14, 95, 370, 371, 575, 377 and Sch. 17 :—Suit against corporation to stop demolition of building—Sanction of plans of masonry buildings—The Corporation—The General Committee—The Chairman—Duties of—Specific Relief Act I of 1877 S. 45—Non-suit:—

The Calcutta Municipal Act, 1899, confers the right to approve or reject plans of proposed buildings on the Chairman, from whose decision an appeal lies to the General Committee whose decision on the subject is final: the Corporation has no control over the general Committee with regard to matters specifically delegated by the Act to that body. A suit does not lie against the Corporation for an injunction restraining the same from causing portions of plaintiff's buildings to be demolished which has been erected without san-

Calcutta Corporation-*Concld.*

ction from the Chairman or the General Committee in alleged breach of the building regulations.

Bholarm Chowdry v. The Corporation of Calcutta. 13 C W N 740=6 M L T 251=36 Cal 671=3 Ind Cas 341.

See also cases under

Calcutta Municipal Act III of 1879.

Calcutta Municipal Acts (Bengal Act VI of 1883 and Bengal Act IV of 1876.)

1.—Obstruction—Bye-law 7—Conviction of owner of bazar for permitting obstruction.

It is necessary to show that the owner of a bazar in Calcutta actually permitted an obstruction in the paths of the bazar in order that a conviction may be sustained against him under Bengal Act VI of 1863, Bye-law 7. **Justices of the Peace for the Town of Calcutta v Hera lall Seal Bourke, O C 412**

2.—Construction of Act—Right of way.

In cases of obstruction the Court will hold that the words "lands, walks, gangways or other thoroughfares," must be restricted to mean those spaces over which the public, by consent or dedication of the owner, enjoy the right of passing and repassing for market purposes. **Justices of the Peace for the Town of Calcutta v Maharanee of Burdwan 1 Ind Jur N S 102**

—S 80.

See Mandamus. **2 Ind Jur N S 182.**

3.—Ss 151, 236, 229, and 230—Liability of Justices for compensation for damage in making sewers, etc.—Negligence—Amount of damages—Writ of mandamus.

By s 151 Bengal Act VI of 1863, the Justices are empowered in making any main or sewers for the drainage of Calcutta, "to carrry such sewers through, across, or under any street, or any place laid out as, or intended for, a street, or any cellar or vault which may be under any of the streets, and (after reasonable notice in writing in that behalf) into, through, or under any enclosed or other land whatsoever making full compensation for any damage done thereby; and if any dispute shall arise touching the amount or apportionment of such compensation, the same shall be

Calcutta Municipal Acts (Bengal Act VI of 1863)-*Contd.*

settled in the manner hereinafter provided for the settlement of disputes respecting damages and expenses." S 229 provides that "in all cases where any damages, costs, or expenses are by this Act directed to be paid, the amount of the same in case of dispute, shall be ascertained and determined by a Judge of the Calcutta Court of Small Causes". S 226 provides that a month's notice shall be given before any action is brought under the Act against the Justices. By Act V of 1857 the Oriental Gas Company was empowered to lay down pipes and execute other necessary works for the supply of gas to Calcutta. In an application by the Company for a writ of mandamus to compel the Justices to join with the Company in referring to a Judge of the Small Cause Court to ascertain the amount payable to the Company as compensation for damage alleged to have been occasioned to their pipes, etc by the drainage works of the Justices, an affidavit was filed in which the Company's manager stated specifically the loss that had been occasioned, and that he had on personal inspection, satisfied himself that the loss was occasioned by the negligent execution of the drainage works of the Justices. The affidavit on behalf of the Justices stated that "in carrying out such drainage works, the Justices, or their contractors, agents, or servants, have not damaged the pipes, etc, of the Company, and that the Justices deny that they are in any manner liable for the damage in respect of which compensation is sought by the Company, or that they have done or caused any damage to the Company." *Held*, (per Phear, J), on the facts that the Justices' works had caused damage to the Company's main and pipes. *Held*, also, that the compensation-clause of S 151, Bengal Act VI of 1863, makes the Justices liable to compensate owners of land, or of any interest in land through which the drainage works are authorized to be carried, for any damage caused by any proceedings in such works. It applies to cases where the works have been done with due care and skill and where but for the Act there would have been a right of action against the Justices. *Held*, also, that the denial of liability by the Justices was simply a general denial that any damage had been done to the Company; the question therefore between the parties resolved itself into a dispute as to the amount of damage which, by s 151, must be settled in the manner provided by s 229,

Calcutta Municipal Acts (Bengal Act VI of 1863)-*Contd.*

Hence the Company was entitled to a writ of mandamus *Held*, also, that s 226 applies to proceedings *dehors* the Act, and not to proceedings taken to enforce compliance with the provisions of the Act. **Justices of the Peace for Calcutta v Oriental Gas Company 8 B L R 433 =17 W R 364**

4-S.200-Warrant for search and seizure-Jurisdiction of Chairman of Justices and of Justices-Procedure.—

The Chairman of the Justices of Calcutta, on the complaint of the Health Officer, issued a warrant for the seizure of certain articles of food, and without notice to the owners or reducing the proceedings to writing, condemned them as unfit for use. In support of rule *nisi* for a *certiorari* for bringing up the order that it might be quashed, it was argued that the Chairman had not, as such, jurisdiction to make the order, and that it was invalid, as notice had not been given, and the proceedings had not been reduced to writing. Cause was shown that the description of the Chairman was immaterial, as he was also a Justice of the Peace, and that such summary proceedings were necessary for the public safety *Held* that the Act does not empower the Chairman of the Justices, as such, to issue a warrant under the 200th section: that such a warrant must show, on the face of it, that the Justice issuing it had jurisdiction, that the application under s 200 must be reduced to writing, that the evidence taken therefrom must be recorded; and that notice must be given to the party proceeded against. **Day & Co v Justices for The Town of Calcutta Bourke O C 232.**

5.—S 226—Suit against Justices for damage in repairing drains—Contractors—Negligence—Cause of action-Notice of action.

In a suit for alleged damage done to the plaintiff's premises by excavations for drainage purposes, which the Justices are authorized to make by Bengal Act VI of 1863, it being shown that the Justices had entrusted the execution of the work to skilled and competent contractors,-*Held* the Justices were not liable. In such a suit no cause of action will be allowed to be raised, except that disclosed in the notice of action required to be given to the Justices by s 226 of the Act. **Ullman v Justices of the Peace for the Town of Calcutta 8 B L R 265.**

Notes—Ref 34 Cal 257, 5 C L J 148: 17 Bom 307.

Calcutta Municipal Acts (Bengal Act VI of 1863)-*Concld.*

-Bengal Act IV of 1876.

See Right of way.

1.—Municipal Commissioner's Jurisdiction—Assessment—House rent-Annual value.

Per Wilson J.—'annual value' in s. 88 of the Municipal Act means annual letting value. **Nundo Lal Bose v Corporation for the town of Calcutta 11 Cal 275.**

Notes:— Ref: 7 C L J 631=35 Cal 859=12 C W N 709.

2.—S 104 and S 88—Construction of s. 104—

Per Wilson J.—*Quære*—Whether s. 104 of the Act is in the nature of an interpretation clause, or merely directory as containing instructions to the Commissioners how to proceed when exercising the jurisdiction conferred by s 88. **Nundo Lal Bose v Corporation for Town of Calcutta 11 Cal 275.**

Notes—Ref: 7 C L J 631=35 Cal 859=12 C W N 709.

—S. 117.—

See Certiorari, Case No. (7). **11 Cal 275.**

—Ss. 189, 191, 213, 252.

See Municipal Commissioners **10 Cal 445.**

—Ss. 280, 281, 282.

See Calcutta Municipal Consolidation Act, 1888, S. 2, Case No. (1). **21 Cal 528.**

3—Suit for damages—Accrual of right to sue—Limitation—Notice in writing.

Plaintiff sued the defendants in April 1888, for damages for injuries to his house. The notice

Calcutta Municipal Acts (Bengal Act IV of 1876)-*Concld.*

of action to the defendants was defective in form and the suit was dismissed on the 11th December 1888 with permission to the plaintiff to bring a fresh suit. He gave a notice on 15th December and instituted the present suit on 15th March 1889. It is found out that by the beginning of December 1888 the house was incapable of sustaining further damages. *Held*,—that the cause of action arose on the day when the damage was done by the subsidence arising from the defendant's acts; that the plaintiff had not shown that a right to sue on which the suit could be maintained, had accrued within 3 months before the institution of the suit and that the suit was barred. That as to whether under S. 357 damage arising out of a subsidence referred to in the notice, but arising after the date of the notice could be recovered without fresh notice and fresh suit, a liberal construction should be put upon S. 357 as to the requirements of the notice.

Dwarka Nath Gupto v. Corporation of Calcutta, 18 Cal 91.

Calcutta Municipal Act III of 1899.

1—Ss. 3, sub-sec. 37, 286, 336 and 341—Verandah having pillars sunk down in soil between street and drain—Fixture—Encroachment.

A varandah, adjoining a house, supported on pillars sunk down into the soil between the street and a drain running between the street and the house is a " fixture " and " an encroachment ", within the meaning of S. 341 of the Act.

Corporation of Calcutta v. Imadul Huq, 34 Cal 844.

2—Ss. 3 cl. (25) Ss. 351, 352, Sch. XVII art. 3—" Masonry building".—

A detached wall built of masonry is not a masonry building as defined by S. 3 cl. 25 of Act.

Corporation of Calcutta v. Jogeswar Laha, 8 C W N 487.

2A—Ss. 5, 9, 14, 370, 371, 375 and sch. 17—Suit against Corporation for injunction to restrain demolition of building—of S. 45 Specific Relief Act.

The Calcutta Municipal Act confers the right to approve or reject plans of proposed buildings

II C C. 68

Calcutta Municipal Act III of 1899 -*Contd.*

on the Chairman. Appeal lies to the General Committee and that body's decision is final. No appeal lies to the Corporation to compel them to approve the plans.

Therefore, a suit is not maintainable against the Corporation for declaration that the refusal to give sanction to make certain additions and alterations to the plaintiff's building has been illegal and for an injunction restraining the Corporation from demolishing certain portions of his buildings. The plaintiff's remedy is against the General Committee or Chairman, under section 45 of the Specific Relief Act.

Bhola Ram Chowdhry v. Corporation of Calcutta, 6 M L T 251=13 C W N 740=36 Cal 671=3 Ind Cas 341.

3—Calcutta Municipal Act (B C III of 1899) Ss 15, 63, 65—Chairman's power to appoint officers drawing less than Rs. 200-Annual sanction—If appointment for more than a year, ultra vires.—

S. 15 of the Calcutta Municipal Act does not apply to the appointment of Municipal officers and servants whose appointments are expressly provided for under Ch. VI of the Act. The power of appointing officers under S. 65 of the Act is vested in the Chairman, but such power is only co-extensive with the sanction of the General Committee and such sanction must be given annually, and any appointment which exceeds this sanction is *ultra vires*.

Kedar Nath Bhandary v. The Corporation of Calcutta, 11 C W N 801=34 Cal 863.

4—Municipal Act, Ss. 34, 37—Lease taken in favour of Municipality—Execution — Validity; —S. 34 of the Bengal Municipal Act should be read with S. 37 of that Act.

Where, therefore, a Municipality purported to take a lease of lands involving a value exceeding Rs. 500, but the kabuliyat was signed by the Chairman and was merely witnessed by two other Commissioners but not signed by them as contracting parties and further the document was not sealed with the Common Seal of the Commissioners :—*Held*, — That the lease was not binding on the Commissioners.

The Chairman of the Municipal Commissioners of South Barrackpur v. Amulya, 12 C W N 50=34 Cal 1030.

Calcutta Municipal Act III of 1899 -*Contd.*

5—S. 73—Provident Funds Act IX of 1897 and Act IV of 1903—Attachment of Provident Fund—Trustees of the fund—Suit—Application.

The Provident Fund established by the Corporation of Calcutta to which the provisions of the Provident Funds Act IX of 1897 (and consequently amending Act IV of 1903) were made applicable by the Local Government notification dated 8th July, 1902, is not liable to attachment.

Sett Munna Lal v. Frederick Gainsford, 12 C W N 633=35 Cal 641.

6—Ss. 88, 556—Agreement for lease-Contract—Calling of tenders, when obligatory-Covenant in a lease relating to the tenement—Mandamus—Matters of discretion.

Under S. 556 of the Calcutta Municipal Act, 1899, the Corporation of Calcutta has the power to lease any property vested in them on any terms they think fit, without calling for any tenders in that behalf.

Although a covenant in or in respect of a lease is a contract, yet, if the same relate to the demised premises and be not independent of them, then, in that case, the contract in the covenant does not come within the meaning of S.88 of the Calcutta Municipal Act so as to make it obligatory upon the Corporation to call for tenders. **Jogendra Nath Mukhuti, 13 C W N 129.**

7—S. 151, cl. (b)—"Building"—Compound or boundary wall, whether a building.

A compound or boundary wall is not a building within the meaning of S. 151, cl. (b) of the Act and is not liable as such to assessment for Municipal rates. **Corporation of Calcutta v. Binoy Krishna Bose, 7 Ind Cas 890.**

7A—S. 152—Calcutta Small Cause Court—Jurisdiction of, to set aside entire valuations—Valuations in force at the commencement of Act III of 1899—Assessments-Jurisdiction to declare old valuations to be still in force—High Court, jurisdiction of, to interfere — Civil Procedure Code (Act XIV of 1882), sec. 622 — Letters Patent, sec. 15.

In 1894, the Municipal Commissioners, acting under Act II of 1888, made valuations of certain properties. On these valuations assessments of rates were made for a period of six years expiring on various dates on or before the 31st March 1900. On the 1st April 1900, Act III of 1899 came into force. Shortly before that date the Commissioners made new valuations. These valuations were made under Act II of 1888, which was then in force, and were all completed prior to 1st April 1900. Objections to the valuations and assessments made therein was filed by the owners under Act II of 1888. The objections were disposed of by the Vice-Chairman and the owners appealed therefrom to the Small Cause Court. These appeals were filed after 1st April 1900 under the provisions of Act III of 1899. The Chief Judge held that the new valuations and assessments were not in force at the commencement of Act III of 1899, within the meaning of sec. 152 thereof and he set them aside. He further declared that the valuations in force at the commencement of Act III of 1899 were the previous valuations of 1894 and he directed these valuations to remain in force for the periods mentioned in Sch. VII, col. 2 of Act III of 1899: *Held*,—The Small Cause Court has jurisdiction to deal with the entire valuation and to set it aside, the only condition being that the procedure as to the filing of objections to the valuations laid down by sec. 135 of Act II of 1888 has been correctly followed. The procedure laid down by that section as to the form of the notice is directory only. The small Cause Court having jurisdiction to deal with the matter, the High Court cannot interfere either under s. 622, Civil Procedure Code, or sec. 15 of the Charter. The Small Cause Court had no jurisdiction to declare that the assessments under the previous valuations are still in operation and must remain in force for further periods of years.

The Corporation of Calcutta v I. J. Cohen. 6 C W N 480.

8—Ss. 153 cl. b, 159, 175 255—District—No presentation of bill or Notice of demand-Irregularity—Special Damages.

The plaintiff applied for separate assessment of a piece of Bustee land purchased by him. The Municipality issued a notice and served it on the plaintiff on the 5th October 1901 amending the assessment and directing the amendment to come into force for the 4th quarter of 1901, 15 days'

Calcutta Municipal Act III of 1899 -*Contd.*

time was given for objections. On similar notices being served on the owners of the remaining portions and objections being made by some of them it was determined by the Municipality without the knowledge of plaintiff that the new separate assessment should begin from the 1st quarter of 1902, the objections being disposed of on 28th November 1901. The plaintiff himself did not submit any objections in the notice served on him. The Municipality distrained the cattle etc., of the plaintiff for the whole assessment as was in force originally. Plaintiff brought this suit for damages. *Held*, that it was not in the power of the Corporation or of its officers to override the clear provisions of the Act 2. That having regard to S, 170, cl. 2 of the Act the new separate assessment can come into force only from the quarter next to that when the assessment was made. (3) That the next favourable computation is that the amendment can be deemed to have been made only on 20th October 1902, i. e. the date when the period allowed for his objections expired. (4) That he was liable to pay the old rate for the 4th quarter of 1901 in spite of the express notice of 30–9–01. The non-presentation of bill or notice of demand prior to distress is a mere irregularity and the distress is not on that account illegal ; and all that the plaintiff would be entitled to by reason of that irregularity would be such special damage as he can show he has actually sustained.

Bepin Chandra Biswas v The Corporation of Calcutta. 31 Cal 452.

9—Municipal (Calcutta) Act, Secs. 198, 466, 574—Schedules II, XVIII, Rules—Chapters XIV, XXXIII—Holder of a trading license, if required to take a separate license for the premises.

The purposes for which licenses under Sec. 198 and those under Sec. 466 of the Calcutta Municipal Act are granted are widely different. The fact that a person has taken a license under the former section does not exonerate him from taking one under the latter. **Bepin Behari Ghose v The Corporation of Calcutta. 34 Cal 913=6 C L J 183= 11 C W N 885.**

10—Ss. 247, 250, 427—Building—Sanction—Limitation—Damages:

The special limitation provided by s. 427 of Act II of (B C) 1888 does not apply to a withdrawal of a sanction to build once given, for such withdrawal cannot be considered as an act done or purporting to be done, within the meaning of that section.

On the Corporation's falling to pass orders within a fortnight on an application for sanction to build, the right of the applicant to build under s. 250 of the above Act becomes an absolute one.

The Corporation is bound by the acts of its officers. **Tullaram v The Corporation of Calcutta. 7 C W N 329=30 Cal 317.**

11—S. 341—Fixture, a projecting verandah supported by beams of the house if is.

A coping of a house which forms an integral part of it, being supported by the beams of the adjoining room, is not a fixture within the meaning of S. 341, Calcutta Municipal Act.

Barada Prasanno Roy Chowdhury v Corporation of Calcutta, 15 C W N 730

12—Calcutta Municipal Act, Secs. 372, 383, 499 (1)—Demolition of corrugated iron shed, order directing—Building, erected without sanction—Notice, if necessary—Inconvenience or obstruction to public.

A corrugated iron shed is a "building" as defined in the Calcutta Municipal Act. The issue of a notice under section 383 is not a condition precedent to a proceeding under section 449 (1) of the Act for the demolition of a building erected without sanction in contravention of the provisions of section 372. **Susarmoyee v The Corporation of Calcutta. 7 C L J 243.**

13—Calcutta Municipal Act (III of 1899 B C) Secs. 406 408, 409—Officers who should inspect bustee or submit report—General Committee, power of—Sub-Committee's power to sanction amendment of the original plan—Road, deflection of—scheme to effect necessary improvement—Notice—Owners, duty of.

Under section 406 of the Calcutta Municipal Act, an inspection of the *bustee* in which the premises belonging to the petitioner are situate, was made and a standard plan was prepared on a report of a Medical Officer, an officer of the

Calcutta Municipal Act III of 1899 -Contd.

Corporation and an Engineer who was not an officer.

Held, that the plan was not bad in law. The section does not require that Engineer should be a permanent Municipal Officer.

Under section 408 of the Calcutta Municipal Act, a notice was served upon all the owners of land of a *bustee*. One of the owners objected to a certain proposed road in the standard plan going in a certain direction, on which the sub-committee decided that the road be deflected and the standard plan thus modified was approved by the General Committee. The petitioner was then served with a notice under section 408 to carry out the improvements according to the standard plan so modified. but was prosecuted for non-compliance

Held, that the petitioner was not entitled to a fresh notice with regard to the deflection of the road in order to urge her objections to the deflection before the General Committee.

The law contemplates that all persons interested will be present before the sub-committee and will present not merely their own objections to the scheme but also any objection which they may have to any modification of the scheme on the objections raised by others.

The Calcutta Municipal Act gives the General Committee full discretion to proceed either under section 406 or under section 409.

It is not possible that the deflection of the road may be an improvement on the original plan but that in itself is not sufficient under the law to invalidate the proceedings of the General Committee if the whole scheme was one calculated to effect a necessary improvement in the land covered by the bustee.

The sub-committee has power under the Calcutta Municipal Act to sanction any amendment of the original plan even though it be merely to avoid expense and not for the purpose of improving the *bustee*. **Srimati Atarmani Dasi v The Corporation of Calcutta. 8 C L J 507 = 12 C W N 1116.**

13A—Ss. 408, 574 Notice—Directions to carry out improvements pending litigation not lawful notice—Disobedience no offence, S.449, Schedule 18, Rule 17—Demolition of building outside sanctioned plan and existing for a long time illegal:

What a Magistrate is empowered to direct to be demolished under S. 449 of the Calcutta Municipal Act is work which forms part of the plan sanctioned, and which contravenes some provision of the Act or of the bye-law in force with reference to the erection of buildings and not buildings outside such sanctioned plan and existing for a long time. **Hyam v The Calcutta Corporation. 3 C L J 571 : 10 C W N 100 - 33 Cal [illegible]**

13 B—Ss. 408, 574—Notice—Directions to carry out improvements pending litigation:

During the pendency of a litigation regarding property during which it was not open to the owners either individually or collectively to alter the property by carrying out the improvements they are called upon to make, any notice issued to them for the purpose is not a lawful notice and no offence can be said to be committed by the disobedience of the notice. **Poorna Chand Bural v Corporation of Calputta. 33 Cal 699.**

13C.— s. 408, 574, 646,—Discretion of the General Committee under S. 645—High Court's power to interfere with the exercise of the discretion—Owner of premises granting out lease for a long time—Liability to carry on improvements ordered by the Municipality:—

In cases where there is a gradation of owners or persons who may be regarded as owners of any premises or where there is a doubt as to the owner who is bound to carry out an improvement, the General Committee are vested under S. 645 of the Calcutta Muncipal Act with the discretion of determining which of such owners shall be required to carry out an improvement, and the High Court, in the exercise of its Revisional Criminal Jurisdiction, has no power to set aside or question their acts done in the exercise of that direction when those acts have otherwise been in accordance with the provisions of law. **Shamul Dhone Dutt v. The Corporation of Calcutta. 11 C W N 671; 34 Cal 30.**

Calcutta Municipal Act III of 1899 —Cont.

13D.—S. 449—Demolition of buildings, order for—Deviation from plan sanctioned—Assessment on deviation—Acquiescence—Order made long after notice—Order, if proper—Order, property of—High Court, Jurisdiction of, to revise such order—Cr P., C S 435—Revision, power of—Discretion of Magistrate.

The General Committee, if satisfied of the existence of the circumstances mentioned in S. 446 of the Calcutta Municipal Act, may or may not make an application to the Magistrate for demolition of a building or a portion of it erected in violation of or contrary to the plan sanctioned by the Municipality, but when such an application is made to the Magistrate, he also has a discretion either to make or to refuse the order under S. 449 of the Act. When a Magistrate has not properly exercised his discretion, the order is not a proper order and the High Court has power to set it aside. **Abdool Samad v. The Corporation of Calcutta. 3 C L J 90; 33 Cal 287.**

14.—Ss. 449, 628, 629—Order for condition—Municipal Magistrate, power of, to make—Power not limited according to value of building:—

The words "a Magistrate" in S. 449, Calcutta Municipal Act, mean any Magistrate, having jurisdiction in Calcutta and includes a Municapal Magistrate. An order for demolition made by the Municipal Magistrate, under s. 449 Calcutta Municipal Act, was upheld, 8 C W N 142 dist. A Magistrate is authorized by law to make an order for demolition under s. 442, Calcutta Municipal Act, without regard for the value of the building directed to be demolished. **Sew Prasad Poddar v Corporation of Calcutta 9 C W N 18.**

Notes.—Fol 28 All 207=2 A L J 831=(1905) W N 256; 28 All 209 Ft Note=(1905) W N 257 Ft Note.

15.—Ss. 449, 391, application to buildings commenced before the Act, but completed after it came into operation—Bengal General Clauses Act, s. 8—Saving, effect of—Calcutta Municipal Consolidation Act, Ss 236, 241.

The Calcutta Municipal Act III of 1899 B C relates only to acts done after the commencement of that Act, including acts done to complete a building commenced before the Act came into force—S. 449 (3) relates to things done in breach of S 391, which itself does not relate to the alteration of or addition to a building commenced before the Act came into operation. S 8 of the Bengal General Clauses Act saves the operation of all repealed Acts in such a case, where the building was commenced when the old Act was in force. The words "material alteration of the structure of any house" in s. 236 of Act II of 1888 B C contemplated the erection of anything on a site attached to, or detached from any building standing on it, so as to alter the structure of the house *i, e*, of the house with all buildings standing on that site. Sanction was necessary for such building, and failure to obtain the same entailed liability under s. 241 of that Act. Where, therefore a building detached from other houses but standing on the same site, was commenced before Act III of 1899 (B C) came into force, but was completed after that period:—*Held*, that Act II of 1888 (B C) applied and that sanction was necessary under s. 230 of the latter Act, and the liability under s. 241 of that Act continued. But an order of demolition passed thereon under s 449 (8) of Act III of 1899 (B C) was illegal.

Kesub Chandra Sen v Calcutta Municipal Corporation. 7 C W N 374.

16.—Ss. 449, 450, 452, 579—Demolition of building, order for—Discretion of Magistrate—Analogy to case to mandatory injunction—Difference—Waiver, acquiescence and delay, effect of—Danger to the public—Cumulative penalty—fine and demolition.

It is discretionary with the Municipal Magistrate to make, or not, an order of demolition under S. 449, of the Calcutta Municipal Act. This discretion is to be exercised after receiving evidence and hearing the defence. 10 C W N 182: s c 4 C L J (1905) approved. The Municipal Magistrate should exercise the discretion vested in him under Ss. 440, 450, 452 of the Calcutta Municipal Act with due regard to those rules which guide Courts of Equity in granting injunctions—with this difference, that he has also to consider whether or not a bulding ought to be demolished on the ground of its being a danger or obstruction to the public. It is the duty of the Municipal Corporation to procure the demolition of a building which is a danger or obstruc-

Calcutta Municipal Act III of 1899 *Contd.*

tion to the public In other respects the Corporation stands unless the law otherwise expressly directs, in practically the same position as a private individual wronged by a tortious act. Although the Municipal Act does not prescribe any period of limitation and sanction under S 449 or 450 of the Act, the Code in directing demolition should consider how far the delay in the institution of the proceedings has affected the action The fact that in respect of the same deviation from the sanctioned plan of a building the Municipal Corporation substituted two different proceedings at different times—viz for fine under s 579 and demolition under s 44 cannot deprive the Magistrate of his discretion under s 452 of the Act That section applies even when the two proceedings are not simultaneous

Chunilal Dutt v Corporation of Calcutta 11 C W N 30 33 Cal 341

17—Ss 449 (1) 451, and 474—Rule No 2 of Part II Sch 17 of the Act interpretation of—Height, limit of of building facing a street and an open platform—Angle of 45 degrees whence to be drawn —

On one side of a street was a bathing platform open to the sky On the opposite side a building was erected facing the street and the platform *Held*—In determining the height limit of the building in accordance with rule No 2 of Part II Sch 17, of the Calcutta Municipal Act (III B C of 1899) the angle of 45 degrees must be drawn from the street aligment on the side of the street and not from the side of the platform farthest from the street **Sheomall Goenka v The Corporation of Calcutta 13 C W N 74**

17A—Calcutta Municipal Act, Secs 466 574 Sch XVIII Cl 8 —Iron—Steel —

In Schedule XVIII Clause (8) of the Clacutta Municipal Act the term *iron* includes *steel*, so that a person who used premises for storing steel joints without a license granted under section 466 (1) was rightly convicted under section 574 **Ganga Narain Pal v. Corporation of Calcutta 10 C L J 486**

18—Ss 502, 505—Purchase of damaged rice intending to sell it as food for pigs- Order for its destruction.—

Calcutta Municipal Act III of 1899 *-Contd.*

Rice bought for being sold as food for pigs cannot be ordered to be distroyed under s 505 where it was not attempted to be sold as food for human beings

Chundra Coomar Biswas v Calcutta Corporation 30 Cal 421.

19—S 557 cl (d)—Presumption statutory—Land 'District and 'Re-assesment' meaning-of Valuation, time from which takes effect

The term land as used in S 577, cl (d) of the Calcutta Municipal Act (III of 1899) includes bustee land and is not restricted in its application to building land The term District as used in the proviso to S 557 cl (d) of the Act is equivalent to the term Ward and the two terms are synoymous The meaning of the term 'District as used in the Act cannot be ascertained by reference to an order issued subsequently by the Chairman of the Calcutta Corporation for administration purposes The term 'Re assessment as used in S 557 cl (d) of the Act is equivalent to re valuation (assessment signifying the official valuation of property for the purpose of taxation or the value assigned to property for the purpose) and not the re imposition of rate or tax The re valuation of bustee land must not be imagined to take place by operation of law from year to year The valuation does not mean merely the amount of the valuation, but covers the whole process or act of valuation when substantial part of the act of assessment or valuation is completed before the commencement of the Act of 1899 it cannot be reasonably maintained that there was a re assessment after the commencement of the Act, because some objection to the re assessment or re valuation might have been preferred or disposed of after that date 26 Cal 74 (77) referred to The presumption laid down in cl (d) of S 557 of the Calcutta Municipal Act (III of 1899) does not apply to a case where there has been no re assessment made after the commencement of the Act for the whole district or ward in which the land acquired is situated **The Secretary of State for India in Council v Belchambers 3 C L J 169=10 C W N 289=33 Cal 296.**

20—Cl (18) sections 559, 561 (b) 631,—Bye-Laws, section 1—Encroachment on a Public

Calcutta Municipal Act III of 1899 -Concld.

street, by raising pillars—Obstruction removal of, notice for—Notice, disobedience to the requisition of—Proceedings, institution of three months after the expiration of the period of the requisition—Limitation—Offence if continuous

A Bye law must conform with the provisions of the enactment under which it purports to be made.

Bye law, section 1 so far as it relates to obstruction comes within the provisions of clause (18) of section 559 of the Calcutta Municipal Act (III of 1899)

Section 561 (b) only authorises the penalty for the continuance of a breach here notice follows breach The penalty is attached to breach which only arises after the notice and there is no provision for any subsequent notice which could come within the provisions of section 561 requiring that there should be notice after breach

The Bye law purports to create a continuous breach which is outside of and fails to comply with the provisions of section 501 clause (b) under which alone it can claim vitality There is, therefore no provision for a continuing breach that could take the case outside the provision of section 631 of the Calcutta Municipal Act

Narain Chandra Chatterjee v Corporation of Calcutta. 10 C L J 623

21 —S 631, Sub S (1) S 449 S 631

Sub S (1) of the Calcutta Municipal Act has no application to proceedings taken under S 449 of that Act **Corporation of Calcutta v Keshu Chunder Sen 8 C W N 142**

Notes.—Dist 9 C W N 18

22 —Calcutta Municipal Act (III of 1899 B. C) S 634, Cl 2—'Accrual of the right to sue in cl 2, S 634, meaning of—Limitation

The words 'accrual of the right to sue' in cl 2, S 634, do not mean accrual of the cause of action, but have reference to the expiry of the month's notice under cl 1 of that section and the plaintiff will not be barred if he brings his action within three months from the date when the month's notice has expired **The Corporation of Calcutta v Shyama Charan Pal 9 C W N 217=32 Cal 277**

Calcutta Municipal Consolidation Act II of 1888.

1—S 2 and ss 253 256, 257, 265—Calcutta Municipal Act—Basti land—Urgency—Trespass—Suit for damages.

Bengal Act II of 1885 s 2 para 5 provides that the pending proceedings commenced under a law which is repealed, shall be deemed to have been commenced under the new Act, but they must be continued under the new provisions and can be used only to enforce rights and powers in existence at the time when it is sought to enforce them When the Act V of 1876 was in force the Calcutta Municipality took mersures to cleanse Basti land for purposes of sanitation Meanwhile Act II of 1888 was passed it provided totally different preliminaries and procedure for the purpose But inspite of the passing of Act II of 1888 the Municipality continued improvement under Act V of 1876 *Held*—that even if the proceedings could be considered under s 2 of Act II of 1888 to have been commenced under the new law, the action of the Municipality amounted to tresspass for which they were liable to the owner of the land to pay damages **Corporation of Calcutta v Jadu Lall Mullick 21 Cal 528=27 Cal 202**

—sec 3

See Bengal Tenancy Act Case No (16) **27 Cal 202**

2—Ss 31, 24, 25,—Municipal election—Joint family representation for voting—Chairman's direction as to the list of candidates-Franchise

S 31 of the Bengal Act II of 1858 places no duty on the chairman of the Municipality, of exercising any judicial discretion with regard to the list of candidates Therefore in such a case a rule granted on the application of one of the candidates, calling on the chairman to show cause why the name of another of the candidates who was merely a manager appointed to vote on behalf of the joint family under s. 24 and not qualified to be elected as a commissioner, should not be removed from the list of candidates, was discharged **Mutty Lall Ghose. 19 Cal 192.**

Notes—Ap 22 Cal 717

3—Ss 31, 11, and 12.

In 1882 a rule was granted calling on the

Calcutta Municipal Consolidation Act II of 1888-*Cont'd.*

Municipality to show cause why the name of a certain candidate should not be expunged from the list of candidates for election as Municipal Commissioners. He was merely a manager and trustee of certain property having no beneficial interest in the property and was as such ineligible for election as a commissioner, as not coming under ss. 11 and 12 of the Municipal Act. The chairman was directed to expunge the name from the list of candidates **Rajendra Lall Mitter. 19 Cal 195 note.**

Notes —Ref: 19 Cal 192.

4—Ss. 31, 8, 24, 25—A rule was granted to the chairman of the Municipality to show cause why he should not omit to count certain votes in favour of a particular candidate at the election the votes being votes of persons having no right to give votes, because they were merely agents appointed under Ss. 24 and 25 of the Act by joint families or firms to vote. *Held* that a Judge could not put an interpretation on an Act which would involve an addition to the Act of words which the legislature had left out and therefore the rule was discharged. **Municipal Commissioners for Ward No 10 Calcutta 19 Cal 198.**

5—Municipal election—List of voters—Jurisdiction of chairman—Jurisdiction of High Court—Rules of local Government-Neither the Municipal Act nor the rules published by the Local Government under section 19 of the Municipal act requires that the name of a candidate, or proposer or seconder or approver of candidate should be published in the revised list of voters. Ss 20 and 23 only lay down rules, applicable to voters and they have nothing to do with the qualifications of proposers, seconders and approvers.

The High Court has jurisdiction to restraint a person not duly elected from exercising the functions of a duly elected commissioner. The chairman has no discretion in preparing the list of candidates. 19 Cal 192 approved. S 31 requires every candidate to send his name to the chairman not less than 7 days before the day before for election together with the names of his proposers seconders and approvers. The chairman cannot waive this rule. When the provisions of s. 31 have been complied with, the chairman had no power to determine the status

Calcutta Municipal Consolidation Act II of 1888-*Cont'd.*

of the candidates. He can revise the original list under s. 22 or on applications made under s. 21 or under an order of the Presidency Magistrate under s. 23. The Act does not sanction the issuing of supplementary list of voters. S. 8 gives the definition of a voter. Although the name of a voter does not appear in the revised list, still he can give his vote if he comes under the definition of a voter given in s. 8. The only prohibition is given by the local Government rules under s. 19 of the Act. **Corkhill. 22 Cal 717.**

6—S 31, Rule 7 cl. (6)—License tax—Liability to tax of a company, carrying on business through agents in Calcutta and not having a registered place of business. A joint-stock company carried on the business of money-lending through its agents in Calcutta where it had no registrered place of business. The company is liable to pay the license tax under s 87 and Sch II of the Calcutta Municipal Act of 1888. 22 Cal 581 Dist. **Corporation of Calcutta v Eastern Mortgage Agency Company. 25 Cal 483. 2 C W N 328.**

—ss. 117 and 119.

See Small Cause Court, Mofussil—Jurisdiction—Municipal Tax.

7.—Ss 135, 157—Valuation——Liability of Revaluation made after hearing objections, Provincial Small Cause Courts Act (IX of 1887) C P. Code, s. 622—Superintendence of the High Court

Valuation in s 135 of the Calcutta Municipal Consolidation Act (Bengal Act II of 1888) means not the amount of valuation only but also the process or Act of valuation. Vice-president of the Municipality on the objection of the rate-payer to the former valuation, took evidence and fixed the valuation within 6 years from this valuation. The Municipality made a revaluation to which the rate-payer objected on the ground that the Municipality had no authority to make a revaluation within 6 years from the last valuation. On appeal to the Small Cause Court Judge the objection of the rate payer was allowed. *Held*—that inasmuch as the objection raised by the rate payer was an objection to the

Calcutta Municipal Consolidation Act II of 1888-*Contd.*

valuation, the judge of the Small Cause Court had jurisdiction to deal with it. That being so, it was not open to the High Court to interfere either under s. 25 of the Provincial Small Cause Courts Act or under s. 622 C. P. Code or under s. 15, of 24 and 25 Vict. Ch. 104.

Corporation of Calcutta v Bhupati Roy Chowdhry. 26 Cal 74=3 C W N 70.

Notes.—Fol: 6 C W N 480; 10 C W N 289=33 Cal 396=3 C L J 169. Ref: 13 C W N 1221; 36 Cal 994.

8.—Ss. 381, 382—Requisites of certificate or closing burial grounds.

When Municipal authorities issue a certificate, under s. 381 of the Calcutta Municipal Act (Bengal Act II of 1888) prohibiting the use of burial ground, they must definitely specify the point of time from which the period fixed by them is to run. **Lutfur Rahman Nuskur v Municipal Ward Inspector, Calcutta Municipal Corporation. 25 Cal 492=2 C W N 145.**

9.—Calcutta Municipal Consolidation Act, Ss. 236, 241.

The Calcutta Municipal Act III of 1889 B C relates only to acts done after the commencement of that Act, including acts done to complete a building commenced before the Act came into force—S. 449 (3) relates to things done in breach of S. 391, which itself does not relate to the alteration of or addition to a building commenced before the Act came into operation. S. 8 of the Bengal General Clauses Act saves the operation of all repealed Acts in such a case, where the building was commenced when the old Act was in force. The words "material alteration of the structure of any house" in s. 236 of Act II of 1888 B. C, contemplated the erection of anything on a site attached to, or detached from any building standing on it, so as to alter the structure of the house, *i. e.* of the house with all buildings standing on that site. Sanction was necessary for such building, and failure to obtain the same entitled liability under s.241 of that Act. Where. therefore a building detached from other houses but standing on the same site, was commenced before Act III of 1899 (B C) came into force, but was completed after that period:—*Held*, that Act II of 1888 (B C) applied and that sanction was necessary under s.236 of the latter Act, and the liability under s.241 of that Act continued. But an order of demolition passed thereon under s 449 (8) of Act III of 1899 (B C) was illegal. **Kesub Chandra Sen v Calcutta Municipal Corporation. 7 C W N 374.**

Calcutta Municipal Consolidation Act II of 1888-*Concld.*

10.—Ss. 247-250.—Sanction to build—Power of applicant to build on Commissioner's failing to pass orders within fortnight-Building in contravention of sec.247—Remedies of Corporation-Police prosecution—Corporation if bound by acts of its servants—Withdrawal of sanction if an act purported to be done under sec. 427 of Act II of 1888 (B. C.)—Damages.

There is no statutory provision enabling the Corporation to withdraw a sanction to build when once granted, even if such sanction be a conditional one. On the non-performance of the condition by the grantee, the Corporation has legal remedies in a Civil Court by injunction or otherwise for enforcement of the condition. The special limitation provided for by sec. 427 of Act II of (B C) 1888 does not apply to a withdrawal of a sanction to build once given, for such withdrawal cannot be considered as an act done or purporting to be done, within the meaning of that section. On the Corporation's failing to pass orders within a fortnight of an application for sanction to build, the right of the applicant for sanction to build under sec.250 of the above Act becomes an absolute one. The Corporation is bound by the acts of its officers. **Tullarm and Rajendra Nath Sanyal v The Corporation of Calcutta. 7 C W N 329.**

Calcutta Small Cause Court Jurisdiction of.

1.—Amending Act, VI of 1906—Effect of—Jurisdiction to enquire into question of title in tiled hut cases.

The presidency Small Cause Court has jurisdiction to enquire into questions of title in tiled hut cases by reason of the amending Act IV of 1906. This jurisdiction is possessed by it not only in execution proceedings connected with its own decrees but also in the execution of decrees of other Courts transferred to it.

Ganputhy Roy Agarwalla v Thakurdye Thakurani, 34 Cal 823.

Calendar.

See Cases under:—
Limitation Act s. 25.

Calingula.

1.—Flow of water—Continuing injury.

The flow of water over another's land is a continuing injury and S. 24 applies to such a case. 7 M H C R 60 and 16 Mad 343, Refd to. 13 Q B D 131, Refd. to.; 2 Ex. D. 1, Dist.; L R 4 H L at p. 215 and 1902 A C at p 230. Refd to. 27 Bom 344 and L R 3 A C 430, Ref to. 6 Cal 394; 6 Bom 20 and 1 Mad 335 Refd to.

Sankaravadivelu Pillai v Secretary of State for India. 15 M L J 32=28 Mad 72.

Camp.

1.—Of Magistrate-Adjournment of case.

Per Jenkins, C. J.—We earnestly hope that those judicial officers whose official movements may leave them open to this charge (that is, of wilfully compelling the defendant to follow the movements of his camp) will strive to exercise their powers with such consideration to those who appear before them as will secure them from any imputation of misconduct in this respect.

Girjashankar v Gopalji. 7 Bom L R 951=30 Bom 241.

Notes—Ref: 35 Cal 756. P. B.=7 C L J 666 =12 C W N 682.

Camp-Followers.

See Small Cause Court, Mofussil-Jurisdiction—Military Men. **2 B L R S N 7.**

Canal.

1.—Hajiwah Canal in Multan District—Rights of Excavators and Government.

The plaintiffs instituted this suit against Government claiming proprietary right in the Hajiwah Canal in the District of Multan, which was supplied with water from Sutlej river. The Canal was excavated by the plaintiff's ancestors with the sanction of Government in the year 1861 at a cost of about nine lakhs of rupees. It passed through lands owned by persons not parties to this suit, whose consent plaintiffs' ancestors had obtained under agreement to supply them with water. In the Settlement Records

Canal-*Contd.*

the Canal was entered as the property of the plaintiffs' father. The Government waste lands of over 60,000 acres, which were farmed by plaintiffs and others, were incapable of cultivation for want of water The Government sanctioned in proprietary right a grant of this land to plaintiffs' father. Upon the death of plaintiffs' father disputes arose among his sons, and owing to such quarrel Government took over possession and management of the Canal. The Government denied the plaintiff's right to the Canal outside the 60,000 acres grant and relied on the 8th clause of an agreement executed by the parties. The clause was as follows:—The canal dug by the grantee and known as the Hajiwah shall for the present remain under the management of the said grantee: Provided always that in consideration of the promises that the said grantor, his successor and assigns shall at all times hereafter, whenever he or they shall think necessary be entitled without the consent of, or permission from the said grantee, his heirs, legal representatives and assigns, to take into his or their own hands and control the management and distribution of the water of the said canal without payment of any compensation whatsoever, and further to clear the said canal and recover the cost of clearance and management by a canal rate to be levied on the area irrigated. *Held*, that the ancestors of the plaintiffs acquired a proprietary interest in so much of the Government lands taken for the purpose of the canal as required for its construction and maintenance, and also a right to have the waters of the Sutlej River admitted into the canal so long as the canal was used for the purpose for which it was originally designed. The principles applicable to such cases are, "If a man under a verbal agreement with a landlord for a certain interest in land or, what amounts to the same thing, under an expectation created and encouraged by the landlord that he shall have a certain interest, takes possession of such land with the consent of the landlord, and upon the faith of such promise or expectation with the knowledge of the landlord and without objection by him lays out money upon the land, a Court of Equity will compel the landlord to give effect to such promise or expectation, I E. and I, Ap. 129 at p.170, 1865. *Held*, also that the Governmext were entitled under the agreement to hold possession and control of the land so long as they considered it neces-

Canal-*Concld.*

sary. **Ahmad Yar Khan v The Secretary Of State For India In Council.**
99 P L R 1901=38 P R 1902.

2.—Diversion of water channel.

A water channel should not be diverted so as to damage the land of another. **Ghanaram v Nanha Jaggu,** **3 C P L R 143.**

See also cases under:—

Landlord and tenant—nature of tenancy. **28 Cal 693**

Canara Forest Rules, 7, 12. And 23.

See.—Madras Forest Act, s. 26.

Cancellation of Bond.

——Suit for on ground of failure of consideration.

See. Specific Relief Act (1 of 1877), Ss. 39, 40.

Cancellation of Contracts.

1-A Court of Equity will not set aside a contract merely because it flows from moral,not legal obligations,unless it is proved that the defendant was forced,trickled or misled into it by the plaintiff by means of fraud;using that word not merely in the strictest sense of actual deceit but in the larger sense of an unconscientious use of power arising out of certain circumstances and conditions and showing the defendant being victimised by the plaintiff's unfair and improper conduct was unable to understand what he was doing. **Ganesh v. Vishnu. 9 Bom L R 1164=32 Bom 37.**

Cancellation of Deed.

See (1) Bond.

(2) Contract Act (IX of 1872) S. 27.

(3) Court fees' Act S. 7 Cl. IV (c).

(4) Custom, Alienation.

(4) Jurisdiction of Small Cause Court.

(5) Vendor and purchaser.

(6) Specific Relief Act ss. 39, 40

1.-Cancellation—Of Deeds of sale and hypothecation for equitable conditions.

Upon the cancellation of instruments of hypothecation and sale on proof of fraud and collusion between the grantee, who had advanced money, and the manager of the grantor's estate the grantor having been unduly influenced in the transaction, *held* that the condition of cancellation should be, not the repayment of all money received by the manager, but only of sums shown to have been paid to the grantor personally, and of such sums received by the manager as he would have been justified in borrowing in the course of a prudent management of the estate. **Ajit Singh v Bijai Bahadur Singh. 11 Cal 61=11 I A 211.**

Cancellation of deed-*Concld.*

2.--Equity—Conditions under which it will grant relief against deeds deliberately executed.

A Court of Equity will not grant relief and set aside deeds (release deeds, for instance,) executed by a person, where the proceedings were entirely started by him and deliberately carried through by executing and registering several deeds and by delivering possession, whereby he secured a provision of maintenance for himself, to which he would not otherwise be entitled. 23 Cal 15 (P C), Ref. **Bhagat Ram v Gokal Chand, 150 P R 1908.**

Cancellation of document.

1.—Cancellation of document.

Where the plaintiff sued for the cancellation of a *pattah* on the ground that it was forgery the question whether the document is invalid as regards the plaintiff's share, does not arise.

Dwarika Nath Chatterjee v Jiban Ali. 1 Ind Cas 657.

See also cases under:—

(1) Bond
(2) Specific Relief Act ss. 39, 40
(3) Cancellation of deed.

Cancellation of Instruments

1—Apprehension of injury—Discretion of Court.

In a suit under s. 39 of Act I of 1877,the plaintiff, in the lower appellate Court,receded from the position taken up by him in the first court to the effect that the instrument in suit was a forgery, and only contended that it was of no avail, for non-compliance with s. 17 of Act III of 1877, The lower appellate Court dismissed the suit. *Held*

Cancellation of Instrument-*Concld.*

that the exercise of the discretion of the Court under s. 39 of Act 1 of 1877 ought not to be interfered with, except on strong grounds, that the plaintiff had failed to show grounds for any reasonable apprehension of serious injury within the meaning of the section, and that it was not for a Court acting under the section to go into the question whether the instrument required registration, or would be admissible in evidence. 1 All., 622 referred to. **Bhawar Rai v Jahandar Khan. 9 W N 147.**

2—Conveyance—Onus in a suit to set aside a deed—Voluntary deed—Power of revocation—Indian Trusts Act (II of 1882) Sec 53—Trustee—Equity in favour of a person paying off subsisting charges on property.

The plaintiff and the defendant, the former being mother-in-law of the latter and both of them being Mahomedans, passed a document whereby they relinquished their shares in certain property in favour of the two sons of the defendant.

Held, that the transaction was not a mere voluntary settlement, but was supported by valuable consideration because the relinquishment by one was consideration for relinquishment by the other. (29 Bom 333; 7 Bom L R 477 Fol.). **Ashidbai v Abdulla. 8 Bom L R 652=31 Bom 271.**

3—Cancellation of instruments—Limitation—Onus.

When a plaintiff sues for concellation of an instrument and when he alleges that he knew the facts entitling him to get the cancellation, at a certain time it is for the defendant, who pleads limitation, to allege and prove a knowledge prior to the period from which time begins to run. If no evidence were given on either side, the plea of limitation would fail. **Tants v Gajadhar. 2 N L R 98.**

Cancellation of lease.

See Cases under:—

(1) Landlord & Tenant
(2) Lease.
(3) Public Charity.

Cancellation of Sale-deeds.

1—Declaration—Consequential relief—Cancellation of a document—Specific Relief Act (I of 1877), S. 39.

A suit for cancellation of a document under S 39 of the Specific Relief Act (I of 1877) is a suit for a declaration and a consequential relief to which S. 7, cl. 4 of the Court-Fees Act applies. **Parvatibai v Vishwanath. 6 Bom L R 1125=29 Bom 207.**

Cancellation of Stamp.

1—Act I of 1879, Sec 11—Stamp—Cancellation—Receipt stamp.

The mere drawing of two parallel lines over a receipt stamp, affixed to an instrument, does not amount to its cancellation either under s. 11 of the Stamp Act of 1879, or s. 12 (3) of the Stamp Act of 1899. **Virabhadrapa v Bhimaji. 6 Bom L R 436=28 Bom 432.**

See other Cases under:—

Stamp Act s 12.

Cancelment and Recall of certificate.

See:—Certificate of Administration.

Candidate.

1—Order calling upon a public body to entertain and consider an application. See for a case where the court ordered the Board of Examination for Pleadership candidates to receive and consider an application by a candidate. **Ruda Narain Roy. 28 Cal 479.**

Candidate for Degree at University.

See Bombay University Act. Case No (1). **23 Bom 405.**

Canning's Proclamation of 15th March, 1858.

—Nazal land in Oudh, suit for possession of—Burden of proof—Effect of—Power-of-attorney signed by Deputy Collector for Deputy Commissioner, presumption as to—**See** Possession—Suits for possession. **7 O C 65.**

Canongoe.

Canongoe—Obstruction to canongoe appointed by settlement officer—**See** Beng. Survey Act V of 1875, ss. 4, 5 Case No. (5). **6 C W N 120.**

Canongoe Papers.

See Kanungoe Papers.

Cantonment (1-12).

(1) Grant of land for building purposes. 1
(2) Grant of land by military authorities for building purposes 2
(3) Cantonment, land & building in 3
(4) Resumption of, with buildings thereon 4
(5) Right of military authorities to quarter troops in house belonging to private individuals in cantonments 5
(6) Cantonment land, alienation of native state 6
(7) Adverse possession 7—8
(8) Sanction of Chief Court for sale of certain property in land 9
(9) Damages for injuries caused from non-repair 10
(10) Lease of house for period exceeding one month 11
(11) Right of pre-emption 12

Cantonment.

(1) Grant of land for building purposes.

1—Rent Act—Suit for assessment of rent by Government.

Certain ground situate within the limits of a cantonment was granted for building purposes by the military authorities to the appellant in 1802. In June, 1873, such cantonment was abandoned and the ground comprised therein was made over to the Collector of the district in which it was situate. The Government subsequently sued the appellant claiming among other reliefs that the appellant should be directed to pay rent for such ground and the alluvial accretions to such ground and that if she refused to pay the rents fixed she might be ejected and the Government put in possession. *Held* that the Civil Courts had no jurisdiction in the matter of assessing rent on such alluvial accretions which were outside the original grant. **Paterson v The Secretary of State for India. 3 All 669, 1 W N 45.**

Cantonment-*Contd.*

(2) Grant of land by military authorities for building purposes.

2—By Military authorities for building purposes—Resumption of land by civil authorities—Cantonment—Assignment of profits of land to Municipal Committee—Liability to grantee to pay ground-rent—Suit for declaration of title and assessment of rent—Cause of action—Jurisdiction—Right of grantee to compensation in case of ejectment.

Certain land situate within the limits of a contonment was granted free of rent for building purposes by the military authorities Under the Military Regulations relating to such grants such a grant could not be resumed by the Government without a month's notice and without the payment of the value of such buildings which might have been authorised to be erected. The land was subsequently resumed by the civil authorities, and the land being within Municipal limits, the ground-rents on it were assigned to the Municipality. The Municipal Committee having demanded ground-rent in respect of the buildings erected on such land under such grant, from the representative in title of the original grantee, and the latter having refused to pay the same or to vacate the land, the Secretary of State for India in Council sued him in the Civil Court for a declaration of proprietary right to the land, for its assessment to ground-rent, and, in the event of the refusal of the defendant to pay such rent, when fixed, for his ejectment therefrom, and for mesne profits of the land for six years. The cause of action was stated in the plaint to be the refusal of the defendant to pay ground-rent or to accept a lease or to surrender the land, after a notice to that effect had been issued to him by the Municipal Committee as the plaintiff's agents.

Held that the Municipal Committee were the plaintiff's duly authorised agents to lease and obtain rent for the land occupied by the defendant's buildings with their compounds; that such notice was properly issued in that character on behalf of the plaintiff; and that the defendant's subsequent refusal, to pay rent, or to accept a lease or evacuate the premises, amounted to a sufficient denial of the plaintiff's title to afford him a good cause of action; that, assuming that no agreement to pay rent existed, the plaintiff was entitled to demand and recover reasonable compensation for the use and occupation of

Cantonment-*Contd.*

(2) Grant of land by military authorities for building purposes-*Concld.*

the land by the defendant; that the suit was maintainable in the Civil Court, and it had power to grant the plaintiff the relief sought; that by the conditions of the grant by the military authorities the plaintiff was not disqualified from demanding ground-rent for the land before he had paid the defendant the value of the buildings, but that looking to those conditions, it would not be fair or equitable to grant the plaintiff a decree, pure and simple for the ejectment of the defendant, but he should be put under the condition that, if, in case of the defendant's refusal to pay the rent fixed, he desired to eject him, the value of the buildings as cantonment residences must first be determined, and, when determined, must be tendered to the defendant, and if the latter refused to accept it, the plaintiff would then be entitled to eject him.

The Secretary of State for India in Council v Jagan Prasad. 6 All 148.

Notes,—Dist: 30 Bom 137=7 Bom L R 735.

(3) Cantonment, land & building in.

3—Cantonment, land and building in—Tenants if owners or licensees—Permission to build, effect of—Long possession—Presumption of ownership if arises—Resumption by Government—Compensation.

On the question whether the Appellant's house situated within the Poona Cantonment was held by the appellants in proprietary right or under the military or cantonment tenure, so as to be resumable by the Government at their pleasure subject to the payment of compensation for buildings erected by the tenant.

Held, that, assuming that the house existed at or before the time the cantonment was formed there was, under the circumstances of the case, a strong probability that the owner was duly compensated along with other proprietors for the change in his position as owner to that of licensee :

That permission to build bungalows, though frequently given did not carry with it any sort of proprietary right, and the buildings were liable to expropriation at a price to be fixed by the authorities.

Cantonment-*Contd.*

(3) Cantonment, land & building in-*Concld.*

That, in the circumstances, mere possession or occupation of the bungalow on the site raised no presumption that the appellants or their predecessors-in-title were owners in fee:

That the appellants were mere licensees and the land in question had been lawfully resumed by Government. **Kaikhusru Aderji Ghaswala v The Secretary of State for India in Council. 15 C W N 909 (P C)= 10 M L T 97=14 C L J 268= 13 Bom L R 788=8 A L J 1219= (1911) 2 M W N 23.**

(4) Resumption of, with buildings thereon.

4—Resumption of, with buildings thereon—Notice—Payment of compensation—Land in Cantonment—Resumption—Government.

In 1862, E, the predecessor-in title of the defendants, obtained from the Government the land in dispute under the General order of the 31st July 1865. The General order provided among other things : 'Permission to occupy such ground in a Military cantonment confers no proprietary right, it continues the property of state. It is resumable at the pleasure of Government, but in all practicable cases one month's notice of resumption will be given and the value of the buildings which may have been erected thereon, as estimated by a committee, will be paid to the owner." E erected a bungalow on the land and in 1874 he sold the bungalow and all his interest in the land to H, whose interest devolved at his death on his executors the defendants. On the 19th October, 1903, a notice was given on behalf of the Bombay Government to the first defendant that he should on the 1st December, 1903, quit the possession of premises and deliver them to the Cantonment Magistrate of Poona : and that the Government was prepared to pay to him Rs. 15,500. The defendants having declined to comply with the notice, the Secretary of State for India in Council filed a suit to recover possession of the property from the defendants. The defendants in answer contended that one month's notice to the remaining two executors (defendants 2 and 3) was not given and that the value of the buildings had not been estimated or tendered. *Held* (1) that the giving of notice was not a condition precedent, the provision about it being nothing more than a statement of what will be

Cantonment-*Contd.*

(4) Resumption of, with buildings thereon —*Concld.*

done where praticable for the purpose of saving the occupant from such inconvenience as an immediate resumption might involve. That even if it be assumed that a notice was a condition precedent to the right of resumption, it was clear that the three executors on their own showing were joint occupants and notice given to one of them satisfied the provision. That payment was not made a condition precedent to resumption, though no doubt the right to that payment would arise on resumption. **Secretary of State v Vamanrao. 7 Bom L R 735=30 Bom 137.**

(5) Right of military authorities to quarter troops in house belonging to private individuals in cantonment.

5—Military Regulations.

The military authorities have no right to appropriate, to their own uses, houses the property of private individuals in cantonments, except, subject to the conditions prescribed by the Military Regulations, on the faith of which the houses were built or purchased. *Held* by the appellate Court that when a person was in the occupation of a house in cantonments, he could not be ejected without due notice. **Carey v Robinson. 1 Ind Jur N S 88 : Bourke O C 399.**

(6) Cantonment land, alienation of Native State.

6—Cantonment land, alienation of native State—East India Company—Rights of alienation and management and Control of the same in the absence of any treaty.

The Hyderabad subsidiary force, which had its Head quarters in the Secunderabad Cantonment, was a force, in the employment of the East India Company, and commanded by the Company's Officers, but maintained, by agreement in Hyderabad Territory for the protection of the Nizam. It appears that there never was in existence any treaty prescribing the limits of the powers of the Nizam's officers on the one hand, and the Military Commander commanding the Hyderabad subsidiary force on the other, with respect to the management, control, and disposition of the Cantonment and the land comprised in it. When the Nizam's Government admitted

Cantonment-*Contd.*

(6) Cantonment land, alienation of Native State—*Concld.*

a British force within its territory and allotted to it the Secunderabad Cantonment as its Headquarters, it, no doubt, by necessary implication, conveyed to the military authority all powers of jurisdiction, control and management incident to maintaining the efficiency and the discipline of the troops and the peace and good order and convenient use of the Cantonment. But it would be going a long way beyond this to hold that the officer commanding the troops could be held empowered to alienate in perpetuity, land forming part of the Cantonment, and undoubtedly Hyderabad territory, for a purpose wholly unconnected with military requirements. **Pestonji v Edulji. 10 Bom L R 287=12 C W N 465=4 N L R 65=7 C L J 401=3 M L T 339=18 M L J 199=14 Bur L R 102=35 Cal 478, P C=35 I A 79.**

(7) Adverse possession.

7—8—Cantonment, land in—Presumption in respect of such land—Adverse possession-Limitation.

In the beginning of the 19th Century, one Lieutenant Young, having built a house to quarter his regiment, also appropriated a piece of land adjoining the same, situated within Cantonment limits and subject to Cantonment rules until 1874, when it was made over by the Military authorities to the Civil authorities. Sixty years had not elapsed since the acquisition of the land by the defendant. *Held* that the suit was not barred by limitation.

A party who builds a house in Cantonments must be taken to have derived his title to occupy the land from the Military authorities, and their power to make a grant of it can only be co-extensive with their own tenure of the property and no assignment by them can subsist beyond the period the land might remain subject to Cantonment regulations. 6 All 148 Ref. **Bank of Upper India v The Secretary of State for India in Council. 2 A L J 1194.**

(8) Sanction of Chief Court for sale of certain property in land.

9—Act VIII of 1859, Section 205—Government Notification No 1225, September 26th, 1866—Sanction of Chief Court for sale of certain property in land. House in cantonment not "property in land."

Cantonment-*Contd.*

(8) Sanction of Chief Court for sale of certain property in land—*Concld.*

By Punjab Government Notification No 1225, September 26th, 1866, hereditary or joint-acquired property in land cannot be sold in execution under Section 205, Civil Procedure Code, without the previous sanction of the Chief Court.—*Held*, that a house in cantonments is not "property in land" within the meaning of the notification ; that "land" means immoveale property for the time being subject to a settlement of land revenue. **Mootsuddee Mull v Abdoola Khan P R 26 of 1870.**

(9) Damages for injuries caused from non-repair

10.—Landlord and tenant—House in cantonments—Liability of landlord to repair—Damages for injuries caused from non repair.

On 15th November, 1875, plaintiff, Dr. Tandy, rented from defendant a house situate in the Cantonment of Peshawar, without any agreement in writing and without any special terms. On 13th December 1875, an earthquake took place in the Peshawer valley, which injured and shook the house.

Shortly after the earthquake defendant was shown over the house and requested to repair it. The defendant's attention was drawn to the cracked walls, but not to the roof, which was concealed from view by a ceiling. Repairs were executed by the defendant, but not to the roof, which neither he nor Dr. Tandy believed to be unsafe On 13th March 1876, the roof of the house gave way, and falling in, seriously injured Mrs. Tandy. By Para 1873 of the Bengal Army Regulations the landlord of a house is bound, and can be compelled, to repair a house in cantonments.

The cause of the roof falling in was the great weight of mud on the beams and supports, which were unfit for the heavy load upon them; and also the fact that the wood-work or a great portion of it, was unsound.

In a suit by Dr. and Mrs. Tandy for damages, *held*, that the defendant, as owner of a house in cantonments, was liable to keep the same in repair. and having failed in his obligation was liable to an action for damages sustained by the falling-in of the roof through the want of proper repair.

Cantonment-*Concld.*

(9) Damages for injuries caused from non-repair—*Concld.*

In assessing damages in such a case a Court should not take into consideration the remote consequences that may follow, but the expense, pain and loss, *immediately* connected with the accident. **Ramji Mal v Tandy. P R 38 of 1877,**

(10) Lease of house for period exceeding one month

11.—Lease of house for period exceeding one month—Validity of such lease—Bengal Army Regulations, para. 24.—

Where the defendant agreed with plaintiff to take a lease of her house, situated within the Amballa Cantonment, for the period of one year, *held*, that such agreement was not void or inoperative by reason of para 24 of the Bengal Army Regulations; which prescribes that houses in Cantonments can only, according to those Regulations, be let by the month. assuming that the plaintiff was bound by the provisions of those Regulations. P R 71 of 1873 cited. **Hodgkinson v. Fitzherbert P R 115 of 1882.**

(11) Right of pre-emption

12.—Right of pre-emption as to property in— **3 P L R 1911=9 P R 1911=9 Ind Cas 388 =30 P W R 1911.**

Cantonment Accommodation Act. (Punjab.)

1.—s. 4 (2)—Power of Government to define the limits of any cantonment so as to extend them—General Clauses Act s. 14.—

Under s 4 (2) of the Cantonment Act the power of the Local Government to define the limits of a cantonment includes the power to extend the limits of a cantonment, by the inclusion of areas clearly outside the limits already defined.

Such power may, under s. 14 of the General Clauses Act, be exercised from time to time.

The word "define" must be interpreted to mean "define by way of extension, as well as by way of retrenchment. **Sheik Fazal Ilahi, v. The Secretary of State. 24 P R 1910, 37 P W R 1910=5 Ind Cas 905. 209 P L R 10.**

Cantonment Code (Act II of 1902)

1.—Ss 19 (1), 22—Landlord and tenant—Repairs of house—Colour-washing and kankering-Repairs decided by tenant to be necessary and executed by himself—Deduction of costs from rent.

Held, that a tenant occupying house within the limits of the cantonment is not entitled to deduct from the rent of the house the costs of repairs decided by him to be necessary and executed by himself in express violation of the provisions of Act II of 1902, **Debi Prasad v E A C Mathews 8 A L J 1060=11 Ind Cas 471.**

Cantonment Committee

—Is a public servant-Notice of claim necessary —**See** Civil Pro. Code (1908) ss 2 (17), 80. **12 B L R 615.**

1.—Contract by executive officer of Cantonment Committee—Act XIII of 1889 Sec 23 Chap. II Rules 4, 11, 12 and 24 Chap IV Rules 2 and 8.

The executive officer of the Poona Cantonment Committee ordered the plaintiffs to construct some carts for the conservancy purposes of the Committee. The plaintiffs sued the Committee for their price, on their refusing to take delivery.

Held, that the contract was binding on and not outside of the duties of the Cantonment Committee, but expressly within them under Rules 11 and 12 of the Cantonment Act XIII of 1889 and the expense was clearly one that may be charged on the Cantonment Fund without special sanction. **Cantonment Committee v Suleman Valjee. P J 1895 p 218**

Cantonment Magistrate.

1—A plaintiff not carrying on business or resident within a Military Cantonment may sue in the Court of the Cantonment Magistrate. A defendant can be sued equally in the Small Cause Court unless amenable to the Articles of War. **Sundardas Jagjivandas v Mohandas Ticumdas P J (1884) 79=9 Bom 454.**

2.—Where two Small Cause Courts, one with jurisdiction extending to Rs 200, the other to Rs 500, had jurisdiction: *held*, that the former was the Court of lower grade. **Mohanlal Raichand v Vira Punja 1887, P J 292=12 Bom 169.**

Notes:—Fol: 16 Bom 702.

II C. C. 70

Cantonment Rules.

1—Rule 24.—*Held* that the word 'work' in rule 24 of the Cantonment Rule does not refer to construction of carts, &c. required for conservancy purposes, but refers to such things as drainage, paving, etc. **The Cantonment Committee, Poona, v Suleiman Valji 1895 P J 218.**

Cantonments.

1.—Landlord and Tenant—Bengal Military Regulations of 1836, Promulgation of, in the Punjab-Commanding a trespass—Invasion of proprietary right by convening committee under the Regulations—Act XVIII 1850.

By order of the Governor-General in Council, of the 12th September 1836, which was to take effect from the date of its promulgation at the different stations of the Bengal Army, applications for unoccupied ground for the purpose (*inter alia*) of being built upon, such ground being within the limits of a Military Cantonment, were to be made in the first instance to the commanding officer of the station, to be forwarded and submitted for the orders of Government; the applications were to be written in a form annexed to the Governor-General's Order; and the grantee was to subscribe to certain conditions, one of which was the following, *viz*, that all houses in a military cantonment being the property of persons not belonging to the army, which might be deemed by the commanding officer of the station suitable for the accommodation of officers, should be claimable for purchase or hire at the option of the owner, in the former case at a valuation, in the latter at a rent, to be fixed (in case of the parties disagreeing) by a committee of arbitration constituted in manner provided by the Governor-General's Order. This condition was subsequently modified by several G. G O's until by No.1,001 of 8th December 1864, the condition was stated to be that the owner of any house in a military cantonment not occupied by a person belonging to the army on duty at the station, might be required to rent the house to any Military Officer belonging to the station who might require it to reside in, if the officer commanding the station were satisfied that there was no other suitable house available; that in every such case, if the owner should offer to sell, rather than let, the house to the officer who had so obtained the house, and if the offer were not accepted, the officer should at any time be required to vacate the

Cantonments-*Contd.*

house within a week of his receiving notice that the house had been sold to another Military Officer on duty at the station who required it for his own residence: and that the rent to be paid in such cases, or the price of the house when the officer consented to purchase it, should be fixed (if the parties disagreed as to the amount) by a committee of arbitration. None of these Regulations were formally promulgated at Rawalpindi.

Plaintiff in 1850 made a verbal application to the Officer Commanding the station through Captain Y, of the 4th Regiment N. I., for permission to occupy certain land at Rawalpindi, and to build a dwelling house thereon. After a time, plaintiff was informed by Captain Y that the permission was granted Plaintiff did not subscribe to any conditions, but the land was marked out; and plaintiff built upon it, and from that time, he remained in undisturbed possession until October 1870. In that month, Captain W wished to occupy the house built by the plaintiff on this land, as a monthly tenant, at a rent of Rs 80, but as Captain P was willing to take the house for a year certain at the same rent, plaintiff refused to let it to Captain W, for any time less than a year, and accepted the offer of Captain P. The defendant, Major General M, commanding the Rawalpindi Division on the application of Captain W ordered a committee of arbitration to be assembled; this application was made before the house was actually let to Captain P. The committee though only convened to assess the rent, found that Captain W had a prior right to occupy the house as a monthly tenant, and that the rent (Rs 80) was reasonable. The defendant approved of this finding; and his approval was communicated to Captains W and P the latter being informed that the house was not available for him. Captain W made a forcible entry, and after occupying the house for a few months during which time plaintiff treated him as a trespasser he vacated it.

Plaintiff sued the defendant for damages for procuring or commanding this trespass on the part of Captain W, and for an invasion of his (plaintiff's) proprietary rights in convening and confirming the finding of the committee of arbitration contending that the Regulations above-mentioned did not apply to him, *first*, because when the Regulations were issued, the Punjab was not subject to the Bengal Military Regulations, nor was it even a Province of the Crown, and that they had not after it was conquered been formally promulgated at Rawalpindi, and *secondly* because plaintiff had not subscribed to the conditions.

Cantonments-*Contd.*

Held, that a formal promulgation of the Regulations in question at the different stations was only intended for existing cantonments, which were governed by the earlier orders, and not for cantonments that might afterwards be established inasmuch as the latter would as a matter of course be governed by the same Regulations as the former; and that plaintiff held the land subject to the Regulations.

Held, *also*, that plaintiff was not justified in refusing to let the house to Captain W, as a monthly tenant (or unless it was taken for a year) and in letting it to Captain P.

Held, *also*, that defendant had not ordered Captain W, to take possession of the house, but had merely expressed an opinion that he was entitled to possession, and that even if what the defendant did, amounted to an order to Captain W, which the latter was bound to obey, that order would only justify Captain W.'s taking possession in a legal manner, and the defendant was not responsible for Captain W's forcible or illegal entry into the house.

Held, *also*, that defendant had not invaded plaintiff's proprietary rights in convening the committee of arbitration, as the rent for a *monthly* tenancy had to be fixed, plaintiff having only consented to take a certain rent for a *yearly* tenancy.

Held, *also*, that the plaintiff had no cause of action in respect of defendant's approval of the committee's finding that Captain W had a prior right, for *first*, inasmuch as in convening the committee to assess the rent, the defendant admitted the priority of Captain W to the occupation of the house, the committee's expression of opinion on the point approved of by the defendant was immaterial; and *secondly*, in confirming the decision of the committee, which was final, the defendant only unnecessarily expressed an opinion even if he had exceeded his duty as General of the Division in expressing it.

Held, *also*, that there was not want of due care and caution on the part of the defendant in convening the committee; and that unless he act-

Cantonments-*Concld.*

ed maliciously, he was not responsible, as in convening the committee and confirming their finding he acted quasi-judicially. *Semble*, if he did not act quasi-judicially, but called the committee under a mistake. he was not answerable unless he acted maliciously.

Held, also, that defendant was not a " person acting judicially " within the meaning of Act XVIII of 1850. **Poley v Mc Murdo P R 71 of 1873.**

2—Landlord and Tenant—Hire of house by prostitute in Mooltan Cantonment—Agreement to pay rent at specified rate—Subsequent refusal to pay at higher rate than that fixed by Cantonment Committee when permitting landlord to build—Act IX of 1872, Chapter II—Undue influence—Coercion.—

Plaintiffs, who were the owners of certain houses in the prostitutes' quarters in the Mooltan Cantonment, sued for arrears of rent alleged to be due by defendant, who was a prostitute occupying one of the said houses, under an agreement in writing to pay rent at the rate of Rs. 2 *per mensem*. Defendant pleaded that she executed the written agreement under protest, and under the exercise of undue influence by the plaintiffs. The lower Court gave effect to this plea, relying on the fact that the plaintiffs had obtained permission to build the houses in question from the Cantonment Committee on certain conditions, one of which was that they should not charge a higher rate of rent than Rs. 1-8-0 *per mensem* for a house of the description of that for which rent at Rs. 2 *per mensem* was claimed in the present case.

Held, that the above facts furnished no valid answer to the plaintiffs' claim; that the present suit not being one between the plaintiffs and the Cantonment Committee, but between the plaintiffs and a third party, it was not open to such party to take advantage of the agreement alleged to have been entered into between the plaintiffs and the Cantonment Committee for the purpose of avoiding performance of a contract entered into between her and the plaintiffs; and as that contract was not in itself illegal, or open to objection on any of the grounds specified in Chapter II of the Contract Act, the defendant was bound by it. **Mohan Lal v. Mussammat Begam, P R 72 of 1883.**

Cantonments Act (Bom Act III of 1876).

See Plaint—Form and contents of plaint—Defendants. **14 Bom 286.**

Cantonments Act (III of 1880).

See Cantonments Act (XIII of 1889).

Cantonments Act, (XIII of 1889).

1—Cantonment Court of Small Cause, Act XIII of 1889, Sec. 2 cls. 2 and 10—Jurisdiction—Pecuniary limits of the cantonment court—Cantonment Act III of 1880—Repeal of.—

Under Sec. 10 of the Cantonment Act XIII of 1889, the Cantonment Judge has jurisdiction up to Rs. 500 only in the absence of any order of the local Government to the contrary. In a suit filed in the First Class Subordinate Judge at Belgaum, in its small cause jurisdiction, to recover Rs. 172 as arrears of rent, a question having arisen whether the court pecuniary limit of whose jurisdiction as the Court of Small Causes was Rs. 500, or the Court of Belgaum Cantonment Magistrate invested with small cause powers, had jurisdiction to entertain the suit.

Held, that the Cantonment Court alone had jurisdiction. By notification No. 2505, published at page 314 of the Bombay Government Gazettee for 1887, the pecuniary limit of the Belgaum-Cantonment Court is declared to be Rs. 200; and the declaration, which was made under Act III of 1880 (which is an Act repealed by the Cantonments Act XIII of 1889) is kept alive by Sec. 2 cl. 2 of the Cantonment Act, and it is, therefore, such an order of the Local Government as is contemplated by Sec. 10 of Act XIII of 1889.

Gulabchand v. Captain George, P J 1891, p 352=16 Bom 702.

2.—S 4 (2)—Power of Government to define the limits of any cantonment so as to extend them—"Define the limits" meaning of the term—Power exercised from time to time—General Clauses Act s 44.

Under s 4 (2) of the Cantonment Act, the power of the Local Government to define the limits of a cantonment includes the power to extend the limits of a cantonment, by the inclusion of areas clearly outside the limits already

Cantonments Act-*Concld.*

defined. Such power may under S 14 of the General Clauses Act, be exercised from time to time. The ward "define" must be interpreted to mean "define by way of extension, as well as by way of retrenchment." **Shaik Fazal Ilahi v. The Secretary of State for India In Council, 24 P R 1910=37 P W R 1910=5 Ind Cas 905=209 P L R 10.**

Care-taker.

1—Bound to give up possession to owner.

Held, that mere care-takers or managers of a house were bound to give up possession to the owner. **Amin Veheribhai v. Shivram, 1896 P J 688.**

See Cases under:—

Interpleader suit.

2—Caretaker—Act of—Bona fide acts—Lien of caretaker— **15 M L J 233.**

Carriage.

1—Public Conveyance — Sealed pattern—Police Commissioner — License — Refusal to grant license.

The Commissioner of Police has no power to refuse a license to a public conveyance on the ground that the pattern on which it is built is obsolete or open to objection unless the Commissioner is able to say that in the particular instances before him he has satisfied himself that the defects appearing in the pattern have been reproduced in the conveyance in question, which renders the same unfit for the conveyance of the public. Confirming on appeal. 4 Bom L R 768. **Gell v. Taja Noora 5 Bom L R 132=27 Bom 307.**

Notes:—Ref: 28 Bom 25.

Carriers (1-33).

(1) Misdiscription (1).
(2) Time for delivery of goods (2).
(3) Measure of damages (3).
(4) Delivery of goods to carrier at consignor's risk (4).

Carriers (1-33)-*Contd.*

(5) Delivery of goods carried by sea (5).
(6) Dack—Carriage proprietor (6-7).
(7) Conveyance of goods by Government bullock-train. (8)
(8) Bailee, gratuitous liability of (9).
(9) Suit for negligence (10)
(10) Passenger's luggage loss of (11).
(11) Special contract (12).
(12) Common carriers. (13-17).
(13) Carriers nature of action (18).
(14) Liability of Steamer Company for loss during transmission by rail (18A).
(15) Owners of sea—going merchant-ship, how far carriers (19).
(16) Carriers—Common Carriers Law applicable to (20).
(17) Nature of obligation of common carriers—Origin of the liability (21).
(18) Negligence—Liability for damages to goods (18-27).
(19) Carriers in inland waters (28).
(20) Contract to carry partly by river and partly by train (29-30).
(21) Carriers of goods-Measure of damages. (31).
(22) Declaration of value & liability for loss (32).
(23) Carriage of goods for no hire whether a Carrier (33).

Carriers.

See Cases under:—

(1) Bill of Lading.
(2) Maritime Law.
(3) Negligence.
(4) Railway Acts.
(5) Railway Company.
(6) Carriers Act.
(7) Limitation Act. 1877 Sch. II art. 31.

(1) Misdescription.

1—Loss of goods.—

Misdescription of the nature of goods entrusted to a common carrier disentitles the sender to recover for their loss, although the goods would not be subject to any extra rates had they been properly described. **Roheemoollah v. Palmer, Cor 133.**

S. C. in Court below. **Cor 24.**

(2) Time for delivery of goods.

2—Lien for carriage of goods.—

Although a carrier may not be bound to deliver goods on any specific day or within any specific time, he is bound to deliver them within

Carriers-*Contd.*

(2) Time for delivery of goods-*Concld.*

reasonable time, and what constitutes reasonable time must be determined upon the consideration of all the circumstances of the case. A carrier is entitled to his freight and charges, and he is entitled to retain the goods in satisfaction of his lien upon them. **Buldeo Dass v. Nathoomul. 2 Agra 132.**

(3) Measure of damages.

3—Carrier.

The measure of damages in a suit against a carrier for delay in delivery is the difference in price on the dates on which the goods should have been delivered and in which they were delivered. **Buldeo Das v. Natthu Mul, 2 Agra 132.**

(4) Delivery of goods to carrier at consignor's risk.

4—Risk—Delivery to consignee.

So long as goods, though delivered to a common carrier appointed by the consignee, remain at the risk of the consignor, they are not delivered to the consignee. **Winter v Way. 1 M H C R 200.**

Notes.—Ref: 3 M H C R 384.

(5) Delivery of goods carried by sea.

5—Landing goods—Custom of port of Bombay—Possession of goods.—

A carrier by sea is obliged to make an actual delivery of goods carried by him to the consignee, but such *prima facie* obligation may be affected by the custom of the port where the goods are to be delivered. Neither by the custom of the port of Bombay nor by the provisions of the Customs Act is the master of a ship bound to wait fifteen days before commencing to land his cargo; but within a reasonable time after the arrival of his ship—48 hours in the case of a sailing vessel, and somewhat less in the case of a steamer—he is at liberty to land goods if the consignee has not sent boats for them; and such landing is not unlawful, nor a breach of contract as carrier on the part of the master. The landing of the goods under the above circumstances and setting them apart for the consignee do not constitute a delivery of them to the consignee; but such goods, after being so landed, continue in the possession of the master as carrier. Course of legislation with reference

Carriers-*Contd.*

(5) Delivery of goods carried by sea-*Concld.*

to the landing of goods on the custom-house wharf reviewed. *Quære*—Whether, under the special circumstances of this case, the goods, when so landed, remained in the custody of the master in his capacity of common carrier or as a warehouseman. **Hongkong and Shanghai. Banking Corporation v Baker. 6 B H C R O C 71; 7 B H C R O C 186.**

(6) Dack—Carriage proprietor.

6—Bailee for hire—Negligence-Onus of proof.

A person carrying on the ordinary business of a proprietor of dak-carriages does not come within the term "common carrier" as that term is understood in the English law. Such a person is bound to exercise reasonable and ordinary care in respect of baggage entrusted to him, but is not responsible for any loss which may not arise from the negligence or default of himself or his servants, he not being a common carrier bound to ensure the safe conveyance of the baggage against all risk, save the act of God or the Queen's enemies. He is to be regarded as a bailee for hire, and the fact that he does not deliver the baggage at the end of the journey should be accepted as *prima facie* proof that the loss has been occasioned by negligence for which he is responsible, and consequently the onus of proof lies on him that reasonable care was exercised by him. **Todal Singh v Thompson. 2 N W 237.**

7—Carrier of passengers—

A Dak Company having engaged to convey plaintiff a certain distance for a stipulated sum, which was paid in advance, and having conveyed him only a part of that distance, leaving plaintiff to make his own arrangements for the rest of the journey at additional expense; *held*, that this was a breach of contract and of the legal obligation imposed on the Company to carry in the usual and reasonable course of a carrier's business, for which plaintiff was entitled to damages, in the assessment of which a latitude is allowed to the Courts to have regard to injury to health and feelings as well as to the actual outlay incurred. **Ross v The Punjab Horse Dak Co. P R 77 of 1867.**

(7) Conveyance of goods by Government bullock train.

8—Post Office Act XIV of 1866—Bailee for hire—Negligence—Condition.—

Carriers-*Contd.*

(7) Conveyance of goods by Government bullock train-*Concld.*

Goods conveyed by Government bullock train are not entrusted to the Post Office for conveyance within the meaning of Act XIV of 1866. In respect of the Government bullock train, Government must be regarded as an ordinary bailee for hire, and not as a common carrier. As such bailee, apart from any special condition limiting its liability, it is bound to take ordinary care of goods entrusted to it for conveyance; and if goods are stolen through the negligence of its servants, it is liable to make good the loss to the consignor. But it may, as may any other bailee for hire, limit its liability by conditions, provided those conditions are not repugnant to public policy or positive law. A condition that it will not be responsible for loss occasioned by the negligence of its servants is certainly not repugnant to positive law, nor a condition repugnant to public policy.

Postmaster of Bareilly v Earle, 3 N W 195.

(8) Bailee, gratuitous, liability of.

9—A bailee who acts without reward from mere friendship is only liable for loss of goods when very gross negligence is proved by the plaintiff.

Hira Lal v Hidayat Ali. Old Oudh S C 13.

(9) Suit for negligence.

10—Onus probandi.—

In an action to recover damages for injury caused to the goods by the negligence of the defendant as a common carrier, it is not necessary for the plaintiff to give evidence of such negligence unless the defendant has shown that the injury was occasioned by a cause which was within the exceptions. Then the plaintiff would be at liberty to show that there was negligence so as to deprive the defendant of the benefit of the exceptions.

Shetliff v Scott. 22 W R 39.

Notes:—Apl: 19 All 253 F B; Dist: 11 C L R 352. Ref: 1 C W N 24; 6 C L J 362.

(10) Passenger's luggage, loss of.

11—Contract Act (IX of 1872), section 151 steamship Company—Foreign Company carrying on business in India—Postage-ticket-Conditions —Onus of proof—Negligence—Common Carriers —Notice.—

Carriers-*Contd.*

(10) Passenger's luggage, loss of-*Concld.*

Plaintiff, who was a passenger by a steamer, which belonged to the M Co, a French Company carrying on business in Calcutta, and which was wrecked, sued the Company for the loss of his luggage. It was found that the wreck and subsequent loss of the luggage in question was the result of the negligence of the Company's servants.

The plaintiff, who did not understand the French language, after taking and paying for his passage, it appeared, had been furnished with a passage—ticket in the French language.

The Company relied upon certain conditions printed on the ticket, exempting the Company from liability for damage to luggage unregistered. It was also a condition that the ticket should not be available unless signed, and that the passenger accepting it should be bound by all the conditions printed thereon. The plaintiff did not sign the ticket, nor did he register his luggage. It did not, however, appear that any facilities for registration were afforded by the company. *Held*, that the defendant Company being a foreign Company were not a common carrier, that the plaintiff was bound by the conditions on the ticket, but that the condition could not relieve the Company from the consequences of their own negligence. *Held*, further, that in order to establish a defence upon the ground that the plaintiff's luggage was not registered, it was necessary for the defendant company to prove that it was ready and willing to register the plaintiff's luggage, and that plaintiff did not in fact register it.

Held, also, that inasmuch as the contract had been made in Calcutta, the defendant company was bound by the provisions of section 151 of the Contract Act,

Mackillican v Compagnie Des Messegeries Maritimes De France. 6 Cal 227=7 C L R 49.

Notes:—Not Fol: 28 Mad 400. Ref: 18 M L J 497; 32 Mad 95.

(11) Special contract.

12—Railways—Liability of—Act IV of 1879, Sections 2 and 10 — Negligence of servants of Railway Co.—Special Contract by Railway Co.—Common Carriers — Contract Act, IX of 1872, Sections 157 and 161.

Carriers-*Contd.*

(11) Special contract—*Concld.*

The consignor of goods by the East Indian Railway signed a risk note, the terms of which were as follows:—"I hold the Railway Company harmless and free from all responsibility in regard to any loss, destruction or deterioration of or damage to the consignment from any cause whatever before, during and after transit over the said Railway or other Railway lines working in connection there-with". The form of the risk note was approved of by the Governor General in Council under Section 10 of Act IV of 1879. During the transit a tin part of the consignment was cut open and portion of the goods abstracted. *Held*, that the Railway Company were not liable to account to the consignee for any loss from any cause whatever during the whole time the goods were in their charge. **Moheswar Das v. Carter, 10 Cal 210=12 C L R 122.**

Notes:—Ref: 17 Bom 417; 30 Cal 257; 14 M L J 396.

(12) Common Carriers.

13—Liability of—Contract Act IX of 1872 Ss. 167, 152, and 161—Carriers Act III of 1865—Indian Railway Act IV of 1879 s. 10.

The Contract Act IX of 1872 has not relieved Common Carriers from their liability under the English Common Law as to the resposibility of common Carriers, which law is still in force in this Country. See Contra 3 Bom 109.

Mothoora Kant Shaw v India General Steam Navigation Company. 10 Cal 166= 13 C L R 342.

Notes:—Ap: 18 Cal 620 P C. Ref: 18 Cal 427; 19 Cal 544 F B; 19 Bom 165; 18 M L J 497; 32 Mad 95.

14—Carriers Act Ss. 6, 8—Negligence—Loss by accident—Special contract—

Plaintiff's goods were lost by accident which could not have been obviated by the plaintiffs and forwarding note signed by the plaintiff protected the defendants from liability against accidents of certain kind and from loss arising from their negligence. *Held*, that the loss was not due to the negligence of the defendants, that the forwarding note is a special contract, that the clause protecting the defendants from negligence was bad as it was in contravention of the Carriers Act

Carriers-*Contd.*

(12) Common Carriers-*Contd.*

but that the contract was not wholly void therefore but was divisible being good so far as it provided that the defendants were not liable for loss by accident, but bad so far as it provided that they should not be liable for negligence.

India General Steam Navigation Co. v. Joykristo Shaha. 17 Cal 39.

15—Liability of Railway Company—Railway Act (IV of 1879) s. 210—Loss by negligence—Insurer—Act of God.

Carriers by Railway are liable as insurers of goods entrusted to them and not merely for loss occasioned by negligence under the Railway Act.

Chogemul v Commissioners for the Improvement of the Port of Calcutta. 18 Cal 427.

Notes—Dist. 17 Bom 417. Ref: 19 Bom 165.

16 Contract Act Ss. 148, 151, 152—Carriers Act III of 1865—Insurers—Railway Act—Bailees.

The carriers Act XII of 1865 recognises that the principles of English law govern the duties and liabilities of common carriers in India. His liability is not due to the contract but is cast upon him by his exercising this public employment for reward. His liability as an insurer is an incident of his contract with the owner. The Railway act 1879 and 1880 reduced the responsibility of carriers by Railway to that of bailees under the Contract Act. A common carrier's responsibility is not governed by the contract Act. 10 Cal 166 Approved 3 Bom 109 Not Supported.

Irrawaddy Flotilla Co. v. Bhugwandas. 18 Cal 620=L R 18 I A 121.

Notes—Ap: 19 Bom 165. Ref: 17 Bom 417; 723; 8 C W N 349; 18 M L J 497; 32 Mad 95; 11 Bom L R 335.

17—Railway Act s. 11—Company's liability—Carrying gold and silver-Increased charge for insurance.

Plaintiffs handed over a box of coins to the servants of the Railway Company with notice of the contents of the box. Railway Company made no demand for the increased payment for

Carriers-*Contd.*

(12) Common Carriers-*Concld.*

insurance. The box was miscarried. *Held*—On the authority of 7 H and N 950 that the Railway Company were liable for the loss.

Secretary of State for India v Budhu Nath Poddar. 19 Cal 538.

Notes—Diss: 19 Bom 165. Ref 17 Bom 723.

(13) Carriers—Nature of action.

18—Action against carrier—Tort or Contract. —An action for loss of or injury to goods by a carrier, may be an action for a wrong or a breach of contract. **Sahi Ram v Golab Singh.** P R 56 of 1868.

(14) Liability of Steamer Company for loss during transmission by rail.

18 A—Through booking of goods by steamer and rail—Liability of Steamer Company for loss during transmission by rail—Railways Act (IX of 1890)S. 75:

The plaintiffs consigned a parcel of silk articles through the Indian General Steam Navigation and Railway Company, Ld, for delivery at Khagra, knowing that the articles would be carried in the first instance by the defendant company, then by the Eastern Bengal State Railway, and then by the East India Railway Company. They did not declare the value of the articles which exceeded Rs. 100 nor disclose the contents of the parcel. It was found that the goods were lost after they had been made over to the Eastern Bengal State Railway. *Held*—That the agreement was in substance with both the Steam Navigation Company and the Railway Companies and the former could not be held responsible for the loss. 11 C. W. N. 1071 foll. **Gokul Chandra Das v India Central Steam Navigation and Railway Company, Limited.** 11 C W N 1076.

(15) Owners of sea-going merchant ship, how far carriers.

19—Carriers—Owners of sea-going merchant ships, how far carriers.

Owners of sea-going merchant ships are carriers, though not as defined by Act III of 1865, 3 Mad. 107 foll. **Haje Ajam v B & P S N Co.** 4 Bom L R 447= 26 Bom 562.

Notes.—Fol: 13 C W N 851.

Carriers-*Contd.*

(16) Carriers—Common Carriers Law applicable to.

20—Carriers—Common carriers—Carriers by sea—Law applicable to—Non-liability for loss —Misfeasance and negligence.

Carriers by sea for hire between certain "termini" on a certain route are common carriers. The law applicable to them is the *lex loci contractus*; and where the contract is made in Calcutta, the *lex loci* is the law of England. A common carrier may enter into any contract so as to protect himself, but he can only do so by clear, definite and unambiguous words. Loss incurred by the carriers delivering goods in rainy weather instead of waiting to deliver till the weather was fine is loss occasioned by negligence and not by misfeasance and was covered by the exemption clause in the plaint contract. 6 Cal. 227 dist. **Reference under Small Cause Courts Act, S. 69** 28 Mad 400,

Notes:—Ref: 32 mad. 95=18 M L J 497 =4 M L T 110.

(17) Nature of obligation of common carriers-Origin of the liability.

21—Nature of obligation of common carriers —Origin of the liability—Shipowner.

The obligation imposed by Law on common carriers has nothing to do with contract in its origin, but it is duty cast upon common carriers by reason of their exercising a public employment for reward, and a breach of such duty is a breach of the Law and for this breach an action lies, founded on the Common Law, which action wants not the aid of a contract to support it. *Held*, that the Common Law liability of a carrier in the position of the defendant rests on the same foundation as the liability of a common carrier.

Held, that a carrier by water impliedly engages that his vessel shall be water-tight. *Held*, also that, under Sub-S. (2) of S. 13 of the Burma Laws Act, all questions arising in Civil cases in the Courts of Rangoon shall be dealt with and determined according to the Law for the time being administered by the High Court of Judicature at Fort William in Bengal, in the exercise of its ordinary original civil jurisdiction; that the

Carriers-*Contd.*

(17) Nature of obligation of common Carriers-Origin of the liability-*Concld.*

common Law of England is part of the law administered by such Court in cases which arise in Calcutta; that if such common Law would be applied in a case of the same description as the present arising in Calcutta, it should be applied by this Court to the present case. (18 Cal 620, Fol: East 428, cited 1 C P C 423, Fol; P. R. 9 of 1872, P. R. 13 of 1898). **Maladi Sathalingam v. Ramjam Lallju Sajan. 14 Bur L R 77.**

(18) Negligence—Liability for damages to goods.

22——Negligence——Liability for damages—Indian laws providing no remedy—Laws of civilized countries referred to.

In cases for which native law does not provide, reference may be made to the laws of civilized countries A carrier of passengers by land is liable to passengers for injuries caused by the slightest negligence on the part of his servant, whether the servant be ordinarily fit or not. He is only excused when an accident is absolutely inevitable, and such as the utmost care and diligence could not avoid. **Lieut Beville v. Choona Mull. Oudh S C. 4.**

23—Liability of, for negligence damage to goods—Bill of lading—Provision to exemption from liability, effect of.

The appellant's goods, some bags of rice, were shipped in Rangoon in a steamer belonging to the defendant company, for delivery to his agents at Tuticorin. On arrival there the goods were landed by the Company's servents during heavy rains and allowed to remain on the foreshore in a wet condition. Consequently the bags became damaged and were destroyed on the orders of the Municipal authorities as being unfit for consumption Plaintiff sued the company for damages.

The bill of lading ran thus:—

The company were not liable as to accidents loss or damage from any act, neglect or default whatsoever of the servants of the company &c. &c. 'In all cases and under all circumstances, the liability of the Company shall absolutely cease, when the goods are free of ship's tackle, and, thereupon, the goods shall be, for all purposes and in every respect, at the risk of the shipper or consignee.

II C. C. 71

Carriers-*Contd.*

(18) Negligence-Liability for damages to goods—*Contd.*

Held, per Subrahmania Aiyar, J—The Company, in landing the goods as they did without precautions to prevent damage to them, failed to take the same care of the plaintiff's goods as a prudent person would, in similar circumstances have taken of like goods of his own, and the damage was, therefore, the result of the Company's negligence for which they were liable. The terms of the Bill of lading put an end to the Company's liability as carriers, when the goods leave the ship's tackle, but constitutes their subsequent possession, until delivery, as that of bailees. 10 Q B 256, Fol; 26 L T 704, Cons; 22 Bom 184, Ref: 13 Bom 571, 10 Cal 489, Compd. 22 Bom 184, Compd. 10 Cal 489, 13 Bom 571, Fol, 32 L J Q B 77 Appl. **K V S Sheik Mahamed Ravuthar v The B I S N Company. 1 M L T 387=16 M L J 573 =30 Mad 79.**

24.—Perishable goods shipped—Destruction of decayed goods at port by order of Municipal authorities—Obliteration of marks—Portion of goods not identified—Rest delivered—Claim for short delivery - Negligence—Liability of carrying steamship Company.

In July 1907, 2,035 baskets of onions were shipped from Madras to Moulmein by the B, I. S, N. Co. They travelled to Rangoon by a certain steamship and were there transhipped to two other steamships and conveyed to Moulmein in three different voyages. Three of the consignees of these onions were A, E, and P, and to them were consigned 100, 100 and 150 baskets respectively. A pleaded that he only received 70 baskets, and so he sued the Company for short delivery of 30 baskets. Under similar circumstances, E and P respectively sued the Company for short delivery of 25 and 54 baskets. The Company denied their liability by reason of the clauses of their bills of lading, and they especially relied on the endorsement on the bills: "Onion bags and baskets frail. Carried at shippers' risk. Steamer not responsible for condition or outturn of contents." On the merits of the case, they pleaded that the 2,035 baskets were shipped to 17 consignees in Moulmein and arrived in Rangoon on the 21st July (a Sunday, when no transhipment is done), and that the consignment was re shipped to Moulmein as per account stated by them. The Company stated

Carriers *Cotnd.*

(18) Negligence-Liability for damages to goods—*Contd.*

that, by order of the Municipality, 176 baskets and 11 bags, containing 50 baskets, were destroyed in Moulmein, owing to the deterioration of their contents and that, after delivery, 32 Baskets still remained in the godown, and they urged that, owing to the barkets being frail and their contents having become bad and the consequent obliteration and destruction of all marks, it was impossible to say to whom any portion of the 258 baskets were consigned. The plaintiffs A, E, and P were invited to bear a rateable proportion of the loss. The plaintiffs had also been offered a portion of the 32 baskets in the godown, which they refused to accept with result that, on the 30th August the whole 32 baskets were destroyed as rotten. These baskets bore no marks. The plaintiffs did not urge that the onions had been damaged owing to the negligence of the defendant Company, but contended that the defendant Company had to show what had become of each cargo consigned to them. The company, however, did account for the whole 2,035 baskets consigned to them.

Held, that, having regard to the perishable nature of the goods, the frail packing, and the terms on which the Company undertook to carry in the absence of any proof of negligence on the part of the carriers, the Company could not be held liable for all the baskets destroyed by order of the Municipality and that the loss should fall on the owners of the goods; and that with respect to the baskets bearing no marks and, hence, undelivered, the several owners of the consignments became tenants in common of the baskets in proportion to the quantities which should have been delivered to them respectively, and the plaintiffs, who refused to take shares though offered could not hold the defendant Company responsible, (L R 3 C P 427, and L R A C (1894) 494, 505, 507, Fol:) **The British India Steam Navigation Co. v. A H Dadabhoy, 4 L B R 334.**

25.—Liability of, for negligence and damage to goods—Bill of lading—Provision as to exemption from liability, effect of—English, American and Indian Law—Contraction against liability—Public policy—Contract Act ss, 23 and 151.

The goods (rice bags) belonging to the plaintiff were shipped in a steamer belonging to the defendant company, for delivery to the plaintiff's

Carriers-*Contd.*

(18) Negligence-Liability for damages to goods—*Contd.*

agent at another port, and on arrival at that port were placed by the company on the foreshore, where, however, they were destroyed under the orders of the Municipal authorities, on the ground that they had become damaged by rain and unfit for consumption. The condition in the bill of lading ran thus:—"In all cases and under all circumstances, the liability of the Company shall absolutely cease, when the goods are free of ship's tackle, and thereupon, the goods shall be, for all purposes and in every respect, at the risk of the shipper or consignee." In a suit by the plaintiff for recovery of the value of the rice so damaged. *Held, per White C J and Sankaran Nair, J*—The contract was not terminated by the deposit of the goods on the foreshore, and it was for the defendants to show that the plaintiff's goods were ready for delivery at the time they were damaged and not for plaintiffs to show they were not ready; and as there is no evidence to show that the bags were ever ready for delivery by being separated from the rest, the defendants were negligent. *Per Wallis, J.*—The plaintiff's claim is not so much for non-delivery of the bags, as for failure to deliver them in good order and condition, and the plaintiffs failed to prove that the condition of the bags, when put at their disposal, justified them in refusing to take delivery. *Held, also per White C J; and Sankaran Nair J. (Wallis, J. contra)*,—A ship-owner is not exempted from liability for negligence, unless the contract which exempts him is both clear and express; and as the contract in this case, though clear, is not express, the defendants are not protected by their bill of lading (*b*). *Per White C J and Wallis, J*,—The law of the United States of America, forbids a carrier to exempt himself by contract from liability for negligence, while the law of England does not. On a question of this character the Courts in India ought to follow the law of England. (10 Cal 489, 28 Mad 400 Ref.). *Per Sankaran Nair J.*—The question of liability is not concluded by authority in India. A rule of English Common Law ought not to be followed, when it is opposed to the principles followed and acted upon by the Indian Legislature. A contract exempting a ship-owner from liability for the negligence of himself or his servants in not taking the care required by s. 151, Contract Act, is contrary to public policy and therefore, void under S. 23 of that Act. Such an exemption clause is clearly

Carriers-*Contd.*

(18) Negligence-Liability for damages to goods.—*Concld.*

against the interests of the mercantile community and not necessary in the interest of the ship owners of the English and American rules on the subject considered. **K V S. Sheik Mahamad Ravuthar v the British India Steam Navigation Co Ltd. 4 M L T 110 F B=32 Mad 95 =18 M L J 497=1 Ind. Cas 977.**

26—27—Negligence—Attempting to board a tramcar in motion—Injury to passenger-Damages—Liability of the Tramway Company.

The plaintiff, in attempting to board a tramcar of the defendant Company which was in motion, set his foot on foot-board but failed to get a firm grip of hand bar; and before he could raise himself into the car he slipped and fell, and had his toes injured by the wheels of the car. He sued to recover from the Tramway Company damages for injury, alleging that the foot-board was loose and not properly fixed and the Company was therefore liable for negligence.

Held, that the plaintiff was not entitled to recover damages, as he himself was negligent in trying to get into a car while in motion.

If a passenger chooses to attempt to enter or leave a moving car, he does so at his own risk. It is not what a prudent or a reasonable man should or would do, and if he does it and sustains injury while in the act of doing so, it would be an accident or a misfortune, for which the Company could in no event be held liable. **Temulji Jamsetji Joshi v. The Bombay Electric Supply and Tramway Company Limited, 13 Bom L R 345=11 Ind Cas 362.**

(19) Carriers in inland waters.

28—Carriers in inland waters—Mate's receipt, not a bill of lading and not a negotiable instrument—Notice of lien not binding on such carriers.

Certain paddy was shipped to Rangoon by the plaintiffs in the 1st defedant's name in the boats of the 2nd defendant Company. The 1st defendant sold the cargoes to a firm of millers, and obtained delivery of the paddy from the 2nd defendant Company without producing the mate's receipts which its agents had given for the paddy. The plaintiffs sued the 2nd defendant for damages to

Carriers-*Contd.*

(19) Carriers in inland waters—*Concld.*

the amount of the debt due from the 1st defendant:

Held, that the 2nd defendant Company was not liable, and the document relied on in the suit was not a mate's receipt.

Mate's receipts are not bills of lading, though they are sometimes referred to as such. A bill of lading is a mercantile document in use in connection with carriage of goods in a seagoing vessel. To no document, given by an officer of an inland waters carrier, could the term and the law relating to mate's receipts as known to mercantile law be properly applied.

Where an instrument is by the custom of trade transferable like cash by delivery and is capable of being sued on by the person holding it *pro tempore*, it is entitled to the name of at negotiable instrument, and the property in it passes to a *bona fide* transferee for value. The 2nd defendant Company's receipt in this case could not be held to fulfil these conditions:

Held, further, that the Rate Circular and its wording did not put the Company under any legal obligation or duty to any one except the persons with whom it contracted, and that consequently the plaintiffs had no right of action against it.

Held, also that, even if the plaintiffs had given notice of their claim to the paddy, the so-called mate's receipt not being a negotiable instrument, the Company would not have been bound to deliver them. **The Irrawaddy Flotila Co v T S Nachiappa Chetty. 9 Ind Cas 465.**

(20) Contract to Carry partly by river & partly by train.

29—Contract to carry partly by river and partly by train:

The plaintiff consigned through a Steamer Company some silk-endi cloth. The Steamer Company had to carry it to a distance and the Railway Company to the remainder of the distance so as to reach the destination. He did not declare the value or the description of the goods as required by the Carriers Act or the Railway Act. The goods were lost. *Held*, that the Steamer Company and the

Carriers-*Contd.*

(20) Contract to Carry partly by river & partly by train—*Concld.*

Railway Company were equally protected from liability for damages to the plaintiff by the failure of the plaintiff to declare their value and description as required by the respective Acts.

Narang Rai Agrawalla v. River Steam Navigation Co, Ltd.
11 C W N 1071: 34 Cal 419.

30.—Common carrier—Contract to carry—No rule fixed—Convenient route to be followed—Cartage.

In a contract to carry a load from one place to another there was no mention by which route the load was to be carried. There were two routes, one shorter and the other longer. The longer route was more convenient to carry the load.

Held, that the cartage should be calculated on the distance of the longer route as that was the ony convenient route. **Agent of B N W Railway v. Ram Sunder. 11 Ind Cas 43.**

(21) Carriers of goods—Measure of damage.

31.—Carrier of goods—Loss of goods delivered—Measure of damages—Head office at one place and branch at another—Jurisdiction of the Small Cause Court at the branch place to certain suits

The measure of damages in the case of goods delivered to a carrier at one place to be conveyed to another and lost in route, held to be the market-value of the goods at the place of delivery. Where the carrier had his head office at Calcutta and a branch at Amritsar and the goods, which were lost by the carrier on the way, were delivered at Amritsar to be carried to Peshawar. *Held* that the Small Cause Court at Amritsar had jurisdiction. **Arratoon v Bhagoo 10 P R 1866**

(22) Declaration of value & liability for loss

32.—Uninsured goods—Declaration of value—Railway Company when liable for loss—S 10, Act XVIII of 1854.—

Under s 10, Act XVIII of 1854 the consignor of goods is bound to declare thier value unless he is prevented from doing so by the defendants

Carriers-*Concld.*

(22) Declaration of value & Liability for loss—*Concld.*

voluntarily or unvoluntarily leading him to believe that such a declaration is unnecessary and that he is protected from loss without making it. In the absence of any such thing the Railway Company is not liable for any loss.

S P and D Railway Company v Rustom Khan 29 P R 1872

(23) Carriage of goods for no hire whether a carriar.

33.—Carrier—Carriage of goods for no hire or reward—Not acting as carrier. Act VI of 1886. **(Karachi Port Trust.) 4 S L R 236.**

Carriers Act. (III of 1865).

See (1) Bill of Lading
(2) Carriers
(3) Railway Company.
(4) Railway Act S 70
(5) Negligence.

Notes.—Amended by Act X of 1899.

Carriers Act III of 1865 Ss. 3, 8, 9.

1.—Through-booking of goods by steamer and rail—Liability of Steamer Company for loss during transmission by rail—Railways Act (IV of 1890), S. 75.

The plaintiff consigned a parcel of silk articles through the Indian General Steam Navigation and Railway Company Ld, for delivery at Khagra, knowing that the articles would be carried in the first instance by the defendant Company, then by the Eastern Bengal State Railway and then by the East Indian Railway Company. They did not declare the value of the articles which exceeded Rs 100, not disclosing the contents of the parcel. It was found that the goods were lost, after they had been made over to the Eastern Bengal State Railway.

Held, that the agreement was in substance with both the Steam Navigation Company and the Railway Companies, and the former could not be held responsible for the loss. (11 C W N 1071 Fol:) **Gokul Chandra Das v. Indian General Steam Navigation and Railway Co. Ld. 11 C W N 1076.**

2.—Carriers Act (III of 1865), secs. 3, 8 and 9—Goods handed over to Steamer Company for 'through' transmission by steamer and rail—

Carriers Act III of 1865-*Contd.*

Loss of goods during transmission by rail-Liability of Steamer Company-Contract, divisible or not—Railway Company whether agent of Steamer Company-Railways Act (IX of 1890) sec. 75, protection of.

Goods were made over to the Agent of the River Steam Navigation Company at Gauhati for transmission to Calcutta Via Goalundo. It was known to both parties when the goods were handed over and received that they would be carried by the Steamer Company by their steamer as far as Goalundo and thence by the Estern Bengal State Railway by rail to Calcutta. When delivery was taken at calcutta some of the goods were missing. It was proved that the goods were received by the Railway Company in good order at Goalundo.

Quære—Whether the Railway Company were the agents of the Steamer Company for the transmission of the goods by land so as to make the Steamer Company responsible for loss during transmission by rail.

Held, assuming such agency, that the Steamer Company was entitled,in respect of the journey by river,to the protection of the Carrier's Act,and in respect of journey by land to the protection of the Railways Act, the contract being a divisible and, the consignor having failed to comply with the provisions of sec.3 of the Carrier's Act on the one hand and of sec.75 of the Railways Act on the other.

That even if the Contract were indivisible, the Steamer Company would not be liable as the consignor had wilfully withheld from the Steamer Company information which would have enabled the Steamer Company to comply with the provisions of Sec.75 of the Railways Act. 1 Q B 54; 38 L J Q B 137; 18 C B 226 Ref.

Narang Rai Agarwala v River Steam Navigation. 11 C W N 1071=34 Cal 419.

3.—Ss. 6 & 8—Negligence, loss by accident—Special contract suit for damages.

Plaintiff's goods were carried by the defendants on a special contract to the effect that the company would not be under any liability for damages to goods &c except such liability as the land in force for the time being or any other contract with the shipper may force upon them.

Carriers Act III of 1865-*Contd.*

Plaintiff's goods were distroyed by fire. *Held*—that the circumstances disclosed prove negligence and that the defendants had not proved want of negligence. 24 Cal 787 note, explained

Held that the words under any law for the time being in force refer to the Common Carriers Act and that unless the liability was enlarged by any express contract the defendant company were liable only for loss or damage occasioned by this negligence or the criminal acts of themselves, their servants or agents. **Choutmull Doogur v River Steam Navigation Company. 24 Cal 786. 1 C W N 200.**

Notes.—Ref: 26 Cal 465. Affirm: 26 Cal 398 P C.

4.—Ss.6,8,9-Common carriers, liability of-The Carriers Act (III of 1865)-How related to English Carriers Act (II of Geo. IV and I Will. IV., C.68) —Effect of special contract between carrier and owner of goods—Two-fold risks of carriers—Exemption clauses, construction of—Insurer who has paid owner for loss of goods due to carrier's negligince, position of—Subrogation—Right of suit of owner—Damages recoverable by owner and equity in his hands in favour of insurer—Insurance policy containing stipulation, "warranted no recourse against carriers"—Damages not proved at hearing-Failure if to lead to dismissal of suit.

The relative rights and liabilities of common carriers and those for whom they carry are outside the Indian Contract Act and are governed by the principle of the English Common Law as modified by the Carriers Act of 1865. A common carrier therefore in India is subject to two distinct classes of liability, the one for the losses for which he is liable as an insurer, the other for losses for which he is liable under his obligation to carry safely. Speaking generally the first of these are insurable risks from which the element of default is absent,the second are risks of conveyance in which that element is present. The Carriers Act of 1865 has in some degree modified this position.

The effect of Ss.6,8 and 9 of the Carriers Act of 1865 is that the liability of a common carrier for the loss of goods, not being of the description

Carriers Act III of 1865-*Contd.*

contained in the schedule to the Act may be limited by special contract signed by the owner, save where such loss shall have arisen from the negligence or criminal act of the carrier or any of his agents or servants

The Ganges Manufacturing Co Ltd, had entered into an agreement with a number of Steamer Companies, the defendant carrying Company amongst them, to have all their jute carried from certain ports by one or other of the Steamer Companies for a term of 5 years Cl 10 of the agreement provided that the 'Jute Company undertakes to hold the Steamer Companies harmless and indemnified from and against all claims which can be insured against and covered by an ordinary F P A Policy, that is to say, against claims for actual or constructive total loss only of the goods insured, and not against claims for partial loss and damage unless the vessel be stranded, sunk or burnt and the Steamer Companies agree that they shall have no right to claim on the cargo for general average' a consignment of 1,000 bales of jute was shipped by one G. R. Chakravarty on the defendants Company's flat "Lemro" for delivery at the Jute Company's Mill, the bill of lading being endorsed to the said Jute Company, it being stated on the back thereof, amongst other conditions, that the Company will not be liable for the loss of or damage to any property delivered to them to be carried, unless such loss or damage shall have arisen from the negligence or criminal act of their servants or agents '

Held, on a construction of the agreement, that the exemption of cl 10 did not extend to loss arising from the negligence or criminal act of the carrying company.

It has been the policy of the English Courts, in dealing with exemption clauses to recognise the distinction between the insurance risks and the carrying risks of a common carrier, and to construe them as not extending to carrying risks in the absence of clear words to that effect. In India where there is a statutory prohibition against exempting a carrier from loss arising from negligence or criminal acts, there is perhaps an even stronger reason for adopting this canon of construction, at any rate, within the limits implied by this prohibition.

Carriers Act III of 1865-*Contd.*

The above rule is not limited in its application to bills of lading

The flat carrying jute having caught fire so that it had to be scuttled, under S 9 of the Carriers Act, it was held (in the absence of evidence to the contrary), that the loss was due to the negligence or criminal act of the carrying company or its agents or servants.

A policy of insurance in respect of the lost jute issued by plaintiff, Insurance Company, contained a stipulation, warranted no recourse against carriers'

Held that the stipulation in the policy of insurance did not amount to a relinquishment by the Insurance Company in respect of risks not exempted Claims in respect of losses which had arisen from the negligence of the carrying company its agents or servants were therefore not relinquished under the clause

The Insurance Company in the present case claiming against the carrying company by way of subrogation and not of assignment had no right to sue in their own name, and the suit could only be brought in the name of the Jute Company.

Held that substantially the present suit was by the Jute Company to recover damages from the carrying company and any matter that could be pleaded against the Jute Company would be an effective answer though in truth the purpose of the suit was to benefit the Insurance Company

Plaintiffs ought to have proved the amount of damages at the hearing but it would not in the circumstances be right to visit their default in this regard with the penalty of a dismissal of the suit. (L R (1903), 1 K B 750 and on appeal L R (1904) 1 K B 412, L R (1907) 1 K B 769, Ref 8 M & W 443 (1841), L R 9 C P 325 (1874), L R 3 Ex 9 (1863), Ref L R 3 C P 14 (1867), Relied on L R (1908) 2 K B 626 Explained; 23 L J C P 75 at p 82 (1854), Relied on, L R 7 A C 333 at p 339 (1882), Ref, 3 A C 279 (1877) Ref.).

British and Foreign Marine Insurance Co. v India General Navigation and Railway Co Ltd. 15 C W N 226=38 Cal 28=9 Ind Cas 364.

Carriers Act III of 1865-*Concld.*

Carriers Act Ss 8 9

See Carriers Act S 3 **11 C W N 1076, 34 Cal 419**

5—Carriers Act (III of 1865) s 9.

The defendants had provided no sufficient means to extinguish a fire on board and the watch was insufficient Thefore the defendants had not made themselves free from the burden of proving want of negligence **Rivers Steam Navigation Co v Choutmull Doogar 26 Cal 398, 26 I A 1 3 C W N 145**

6—Act III of 1865—Onus probandi.

The claim was for goods lost the goods were silk above Rs 100 in value, and therefore should have been declared under Act III of 1865. *Held*, that the goods not having been declared, the carrier was not liable for their loss The only ground on which he could be held liable was that of negligence or criminal act on the part of himself or his agents, under section 8 of the Act Although by section 9, it is not necessary for the plaintiffs to prove this negligence or criminal act, yet it is necessary that such negligence or criminal act should in the case of loss of or damage to articles included in the list either appear or be necessarily inferred, when there has been no declaration **Assa Nund v The Indian Carrying Co. P R 13 of 1866.**

7—S 10—Steam Ship Company and Railway Company—Notice before suit.

S. 10 of the Common Carriers Act as amended by Act X of 1899 placed a Steamship Company in the same position as a railway, and made it obligatory upon a person wanting to sue a Steamer Company to give a notice of such suit within the time mentioned in the section. **River Steam Navigation Co Ld v Kashi Prasad 8 C L J 192**

Carrying on Business.

See Cases under —

(1) Jurisdiction—Causes of Jurisdiction —Dwelling—Carrying on Business, etc.

(2) C P C Ss. 15, 16.

Case Law, binding effect of.

1—Case law, binding effect of

The Courts must always hesitate to overrule decisions which are not manifestly erroneous and mischievous, which have stood for many years unchallenged and which from their nature may reasonably be supposed to have affected the conduct of a large portion of the community in matters relating to rights of property 4 Macqueen 314 (345) foll Acting on this principle the Court in the case refused to dissent from 18 Cal 333, 28 Cal 90. **Kedar Nath Hazra v Maharaja Manindra Chandra Nandi. (1907) 5 Ind Cas 309=11 C L J 106.**

See also Cases under —

(1) Practice.
(2) Stare decisis
(3) Unanimity of Decision.

Cash Allowance.

1—Certificate from Collector—Suit based on agreement to receive maintenance out of cash allowance Suit relating to a pension or grant of money.

Under an agreement between the plaintiff and the defendants, the former was entitled to an annual payment of Rs. 52 for her maintenance, out of a cash allowence, which was received by the defendants from Government She brought this suit to enforce her right under the agreement, but did not produce the certificate from the Collector required by S 4 of the Pensions Act.

Held, that the certificate was necessary The words of the section are wide enough to include any suit to enforce such a claim, and provided it relates to a pension or grant of money or of land revenue, it is immaterial whether the claim is based on an agreement between the parties, or arises out of any other legal right or liability, and whether it is a claim for a share by way of partition or maintenance or otherwise. **Damodar Vamanbowa v Satyabhamabai. 9 Bom L R 889=31 Bom 512.**

See also Cases under —

(1) Maintenance.
(2) Hindu Law—Maintenance.
(3) Hindu Law—Alienatation.
(4) T P Act s. 3
(5) Registration Act s. 3
(6) Hereditory office.
(7) Heriditory Offices Act.

Case stated.

1—Resident at Aden—Statement of case to the High Court of Bombay—Presidency Small Cause Court Act (XV of 1882) S. 69.

A party requiring a case to be stated by the Resident at Aden to the High Court of Bombay, under S. 8 of the Aden Courts Act, 1864, should make an unconditional application to him before delivery of judgment (15 Bom 376; 16 Bom 818 Appl.)

S. 9 of the Aden Courts, Act 1864, gives the Resident the same option of either reserving his judgment or delivering it contigent on the opinion of the High Court, as S. 69 of the Presidency Court of Small Causes Act 1882, gives to the Presidency Small Cause Court. **Bhagvandas Dharamsi v A Besse Frenchman. 11 Bom L R 830=33 Bom 718.**

See also Cases under.—

Aden Courts Act.

Cashier.

See (1) Stamp duty payable—Security for due fulfilment of duties as cashier.
(2) Stamp Act 1899 S. 26, sch II arts. 57 (b), 62 (c)- **27 Mad 71.**

Cash and grain rates.

See (1) Jaghirs and Mafi Estates.
(2) Occupancy Rights.
(3) Punjab Tenancy Act, S. 16.

"Cash on Delivery," Meaning of.

See Contract—Construction of Contracts. **16 Cal 417.**

Caste.

See (1) Custom.
(2) Defamation.
(3) Hindu Law—Custom—Caste.
(4) Hindu Law—Custom—Immoral Customs.
(5) Jurisdiction of Civil Court—Caste.
(6) Right of Suit—Caste Questions
(7) Right of Suit—Interest to support Right.
(8) Right of Way,

—Authority of, to declare marriage void.

See Bigamy.

Caste-*Contd.*

—Loss of—

See Hindu Law—Guardian—Right of Guardianship.

—Marriage between persons of different castes.

See (1) Hindu Law—Marriage—Validity or otherwise of marriage.
(2) Hindu Law—Inheritance—Divesting of, Exclusion from, etc.—Outcastes.
(3) Hindu Law—Maintenance—Right to Maintenance—Widow.
(4) Hindu Law—Marriage—Restraint on or Dissolution of Marriage.

See:—also cases under.

(1) C P C S 9.
(2) Jurisdiction of civil courts.

1—Caste, determination of—Off-spring between a Hindu and a Christian woman,—Religious rites applicable to the offspring.

An offspring of a union between a Hindu and a Christian woman is not a Hindu by religion, as the rights applicable to mixed offsprings under the Hindu Law are those prescribed for the mother's estate. 12 Mad 72 at p. 80 referred to. **Lingappa Goundan v Esudasan 27 Mad 13.**

2—Caste—Account books—Rights of member to inspect them fully and freely—Questions going to root should be raised in pleadings—Question of jurisdiction can be raised by defendant at the earliest opportunity——Practice—Cutchi Memons-Corporation.

The right to inspect account books kept in connection with caste funds and properties is not in any sense a caste privilege. It is a legal right. It is preliminary to a right to assert a claim to property, and is incidental to the right to recover property which may be lost to the caste by misuse or misappropriation.

A suit brought by plaintiffs on be-half of themselves and others as members of the Cutchi Memon Jamat, to have full and free inspection of the books of account kept by the defendants in their capacity as trustees of caste fund and properties, is maintainable in Civil Courts. It is the assertion of a pure legal right and it is no

Caste-*Concld.*

way affects the "internal autonomy of the caste" or "its social relations."

There is no analogy whatever between a Corporation as known to English Law and an Indian caste. The principles governing the rights of members of caste to inspection of accounts of caste properties must be governed by considerations very different from those governing the rights of members of Corporation seeking inspection of the documents of such Corporation.

Questions which go to the very root of a suit ought as a rule to be raised in the pleadings.

A defendant can be permitted to raise a question of jurisdiction, not specifically pleaded only if he does so at the earliest possible opportunity; he ought not, in any event, to be allowed to raise it after the plaintiff has closed his case.
Haroon Haji Vahedina v Haji Adam Haji Oosman Nurani. 11 Bom L R 126 = 4 Ind Cas 108.

3—Yajman vritti—Whether the officiator can be removed by the case—Jurisdiction.—
13 Bom L R 1171.

4—Meaning of the term—Hindu Law—Marriage. **7 M L T 17=20 M L J 49= 5 Ind Cas 42=33 Mad 342.**

5—Caste offence—Punishment—Jurisdiction—Effect of words implying that plaintiff is an out-caste—Defamation. **6 M L T 290= 33 Mad 67=19 M L J 714=3 Ind Cas 955.**

6—Exclusion from—Owing to defendants imputations—Damages—Privilege—Defamation.
140 P R 1882.

7—Re-admission of out-caste person by portion of caste—Publication of defamatory matter by member of other portion—Absence of good faith—Exceeding privilege—Defamation.
2 M L J 127=15 Mad 214.

—Caste.

See Restitution of conjugal rights.

Caste Disabilities Removal Act.

1—Guardian and Wards Act (No VIII of 1890), section 17- Mother—Application by—For appointment—Objection by grandfather—Charging mother with immorality—Out caste.

Caste Disabilities Removal Act-*Contd.*

A Court in appointing a guardion of the minor is to be guided by what appears to be for the welfare of the minor and for that purpose regard must be had to the nearness of kin. A mother of an infant is on a higher footing than the paternal grandfather, as regards the nearness of kin. She is, therefore, a fit person to be the guardian for the welfare of the minor, and the fact that she was out-casted, need not be considered. (1 All 549 Fol.) **Kaulesra v Jorai Kasaundhan. 2 A L J 663=A W N (1905), 205= 28 All 233.**

2—Suit by Mahomedan, born as such, as reversioner in a Hindu family.

The provisions of the Act clearly mean that nobody will be prejudiced in his right of inheritance by a change in his religion or exclusion from caste. It is not necessary that he himself should have been a convert or excluded from caste and it is all the same whether he or his ancestor (father or grandfather) changed their religon or were excluded from caste The son of a Hindu who had turned Mahomedan, and who was himself a Mahomedan. was, therefore, *held* entitled to succeed as heir to his Hindu uncle, after the death of that uncle's widow. **Bhagwant Singh v Kallu. 11 All 100=A W N 1888, 288.**

Notes.-Ref. 104 P R 1902, 23 P L R 1903, 77 P W R 1907 ; Dist, 32 Cal 871=9 C W N 1005=2 C L J 97, 52 P W R 1907=36 P R 1909.

3—Convert to Mahomedanism can authorise the adoption of his Hindu son—Guardianship, right of, preserved to a Hindu father who has renounced his religion.

The plaintiff (a rajput), whose natural father had become a convert to Mahomedanism and whose natural mother was dead, was given in adoption by his uncle, whom the Mahomedan father had authorised in that behalf. The lower appellate Court held that the adoption was invalid for the natural father could not then delegate authority, as he had, by becoming a Mahomedan, ceased to be governed by Hindu Law, and that therefore, he could not give, and consequently could not authorise the giving.

Caste Disabilities Removal Act-*Concld.*

Held, that the adoption was valid, for the Mahomedan father could authorise the giving in adoption of his son, as he was not civilly dead but was the guardian of his son under Act II of 1850.

Adoption may be regarded as a civil transaction as well as a religious ceremonial If civilly the father is competent to give he is equally competent to sanction the giving.

Semble—Where the parties Brahmins and the *datta homa* essential, then possibly the father after becoming a Mahomedan could not sanction his brother to be present at the giving during the *datta homa*. Shamsing v Santabai.
3 Bom L R 89=25 Bom 551

Notes.—Fol. 30 Cal 999, 7 C W N 781 821.

4—S. 1—Effect of conversion on the rights of the descendants of the convert.

There is nothing in the language of s 1 of Act XXI of 1850 which debars Courts from extending its beneficial provisions to the heirs of a convert no less than to the convert himself. The conversion of a Hindu to Muhammadanism does not entail the forfeiture of any rights to the ancestral property which his descendants may otherwise possess. Mahna v Chand
23 P L R 1903=104 P R 1902.

Caste questions.

See (1) Right of suit
(2) C P C (1 05) Ss 1,9
(3) Jurisdiction of Civil Courts
(4) Multifariousness,
(5) Defamation.
(6) Hindu Law Marriage.

1.—Caste question—Reg II of 1827, s 21—Estoppel—Punchayet.

While the Courts have generally accepted decisions of properly constituted *punchayets* on questions of caste, they have accepted them subject to the qualification that the decision of the *punchayet* does not estop the Courts from enquiring into the civil rights of any member of the caste, and securing to him the enjoyment of such rights, if he be found not to be precluded from the enjoyment of them by the *Shastras* or the particular usages of his caste. Bisheshur v Mata Gholam
2 N W P 300.

Caste questions-*Concld.*

2.—Gaoki Hak-Quantity of rice—Recovery of caste—Question.—

A claim to recover a quantity of rice which should by right of "Gaoki Hak" have been received by plaintiffs at a festival in a Hindu Temple, but was received by defendants, *is not a caste question* as it does not involve "any interference with the autonomy of any caste" nor is it a suit for the vindication of a mere dignity as the claim is for property of however small a value. Venkaji Krisina v Janardan Govind
P J 1891 P 65.

3—Jurisdiction of Civil Courts.

It was resolved by the members of a certain caste that the plaintiff, a priestess, should be dismissed from all the offices connected with the caste and that the same should be performed by the defendant and the plaintiff, thereupon, filed a suit to obtain an injunction restraining the defendant from carrying the said office and from receiving the fees and income thereof —

Held, that it was not competent to a Civil Court to question the decision of the caste in the matter

The following principle appears to be the sound one, viz would the taking cognizance of the matter in dispute be an interference with the autonomy of the caste? And applying the principle, it would be equally clear, whether the question turns upon the obligation of the members of the caste to accord to the holder of the office certain privileges and honours or to pay him fees in virtue of his office In either case it is one which, if a caste is to be considered in any sense a self-governing body, as is contemplated by the Regulation II of 1827, should be left to be decided and dealt with by the caste according to its customary mode of procedure Kala v Juganath
1 Bom L R 711.

Catalogue.

—Illustrations in, copyright—See Copyright
12 C W N 753=35 Cal 463.

Cattle.

1.—Right of tenant to graze cattle on waste land.

Cattle-*Concld.*

A provision in the Wajibularz of a village that the cultivators shall have the right to graze their cattle on waste land does not empower cultivator to keep a large number of cattle for purposes not connected with agriculture. He is entitled to graze on the village waste land a reasonable number of cattle kept by him for the purpose of his holding in the village, and not excluding the number which would ordinarily be kept for the purposes of good husbandry, and in connection with a similar holding **Ramkrishna v Balasahib &c** **1 C P L R 158.**

Cattle pounds.

—Maintenance of private pounds—Legality **16 C W N 362**

Cattle Trespass Acts (III of 1857 & 1 of 1871).

—III of 1857.

See Damages—Suits for damages—Torts.

—I of 1871.

See Right of suit—Compensation. **16 Cal 549.**

1—Section 20—Suit for damages for wrongful seizure of cattle—Jurisdiction of Civil Court—

Sec 20 of Act I of 1871 was intended merely to give a summary remedy for recovery of damages and expenses, and release of cattle illegally seized The remedy there given is cumulative, and does not deprive the person injured of the right he otherwise has to recover damages by a civil suit. *Held*, therefore, that the Civil Courts had jurisdiction to entertain a suit for damages for wrongful seizure of cattle—

Surjan v. Bhowani Sahai. P R 92 of 1877.

Cause List.

See Practice—Civil Cases—Cause List.

Cause of Action (1 68).

(1) Definition of Cause of Action (1 9).
(2) Decree of a foreign Court, whether a Cause of action (10).
(3) Undertaking—Forbearing to sue — No Cause of action (11).

Cause of Action-*Contd.*

(4) Claim to damages for improper search —No Cause of action (12).
(5) Signature on creditor's account (13).
(6) Suit on decree, no new Cause of action (14)
(7) Cause of action how arises (15–16).
(8) Allegation of cause of action, manner of (17)
(9) Objection as to non-existence of cause of action (18).
(10) Cause of action survival of, to benefit of the heirs (19).
(11) Accrual of cause of action during minority (20-21)
(12) Accruing to an infant widow — Limitation (22).
(13) Appropriation of debt due to minor (23).
(14) Arising on performance (24).
(15) Cause of action when arises (25).
(16) Reversal of decree (26).
(17) Declaratory suits (27).
(18) Existence of cause of action (28).
(19) Suit for maintenance (29).
(20) Disclosure of cause of action when deemed sufficient (30).
(21) Continuing cause of action — Damages after decree, award of (31).
(22) Recurring cause of action. (32).
(23) Suit for possession (33).
(24) Where a promissory note is the sole cause of action. (34)
(25) Accrues before actual execution of decree (35).
(26) Service dispensed with by Government which gives cause of action. (36).
(27) Joinder of causes of action — Mutifariousness (37-38).
(28) Jurisdiction—Cause of action (40).
(29) Pleadings—Relief (41).
(30) Different causes of action in different suits (42–43)
(31) Misjoinder of causes of action (44–47).
(32) Misjoinder of parties (48).
(33) Attorney & Client (49).
(34) Agreement not to appeal whether gives a cause of action (50).
(35) Dower, suit for (51).
(36) Defamation (52–55).
(37) False imprisonment (56).
(38) Husband & wife — Special damage—Unchastity imputation of (57–59).
(39) Instalment bond—Default — Waiver—Cause of action (60).

Cause of Action-*Contd.*

(40) Place of payment—Pakky-adat— Agency (61).
(41) Slander of title—Cause of action (62).
(42) Suit on original cause of action not maintainable (63-64).
(43) Suit to set aside decree based on award (65).
(44) Vendee stranger at date of sale—Subsequent acquisition of share by Vendee—Cause of action (66).
(45) Wajib-ul-arz—Cause of action (67).
(46) Arises only, where money is made, expressly or impliedly, payable (68).

See also cases under:—

(1) Adverse possession.
(2) Appellate Court — Objections taken for the first time in Appeal — Right of Suit.
(3) Bond.
(4) C P C O 2 r 2; C P C (1908), Ss. 16, 18, 21, 17, 20 & 99. C P C (1908), S. 80. C P C (1908),S. 99. C P C (1908) O 1 rr 3, 4 (b) O 11 rr 6, 7, O 6 r 17; O 7 r 2. C P C (1908) O 1 r 9; O 2 rr 3, 6. C P C (1908), O 21 rr 16, 63.
(5) Company's Act, S. 58.
(6) Declaratory Decree, Suit for.
(7) Jurisdiction—Causes of jurisdiction —Cause of action.
(8) Limitation Act, Ss. 7, 14, 23.
(9) Limitation Act, Ss. 20 & 22.
(10) Limitation Act Arts. 49, 57, 75, 96, 97, 118, 120, 141, 142 and 144.
(11) Misjoinder.
(12) Possession—Adverse possession.
(13) Possession—Nature of possession.
(14) Relinquishment or omission to sue for, portion of claim.
(15) Resjudicata—Causes of Action.
(16) Right of Suit.

(1) Definition of Cause of action.

1- The " expression Cause of action " means the bundle of facts, which it is nece sary for the plaintiff to prove before he can succeed in his suit. It does not include irrelevant or immaterial facts, but embraces material facts without which the plaintiff must fail. **Motilal v. Suraj Mal, 6 Bom L R 1038=30 Bom 167.**

Notes:—Not Fol. 9 Bom L R 903. Ref: 31 Mad 223; 33 Bom 364.

Cause of Action-*Contd.*

(1) Definition of Cause of Action—*Contd.*

2—Cause of Action Definition of.—

Cause of action held to mean every fact which it is material to be proved to enable the plaintiff to succeed. Every thing which, if not proved, gives the defendant an immediate right to judgment, must be part of the cause of action.

Deep Narain Singh v. Dietert, 31 Cal 274=8 C W N 207.

3—Cause of action, definition.

Cause of action means the bundle of essential facts which it is necessary for the plaintiff to prove before he can succeed in the case.

Musa Yakub v Manilal, 7 Bom L R 20=29 Bom 368.

Notes:—Ref: 30 All 525.

4—Definition of—Civil Procedure Code, Ss. 21,54:

A plaintiff's cause of action is every fact which a plaintiff must prove to support his case. A cause of action arises when a legal right is infringed. 22 Q. B. D. 128: 16 All. 165. 170 foll. The circumstances under which the plaintiff's alleged right was infringed are essential ingredients which cannot be dissociated from their connection with the right claimed by the plaintiff. It is the right combined with all the particulars that go to make the infringement which constitutes the cause of action. **Ram Prosad v S M Sache Dassi. 6 C W N 585 at 588.**

Notes:—Ref: 8 C L J 196.

5—Meaning of.—

Cause of action is the entire set of facts which give rise to an enforceable claim. It comprises every fact, which, a plaintiff must, if traversed, prove in order to obtain judgment. It has no relation whatsoever to the defence, which may be set up by the defendant, nor does it depend upon the character of the relief prayed for by the plaintiff. (16 Cal 98=15 I A 156, P C, Fol:).

Dulichand Chaudhri v. Lallah Kurmi, 1 N L R 4.

Notes:—Obs: 3 N L R 94.

6—Meaning of the term—Endorsement whether part of the cause of action—Jurisdiction.

11 Ind Cas 851.

Cause of Action-*Contd.*

(1) Definition of Cause of Action—*Concld.*

7—Meaning of.

Cause of action means 'that bundle of facts which it is essential for the plaintiff to prove before he can succeed in a suit' or 'rather that bundle of necessary facts, in the absence of which plaintiff must necessarily fail. **Shaw Wallace and Co. v. Gordhandas 8 Bom L R 67.**

8—Meaning of—Joint suit by reversioners—Place of suing.

When immoveable properties are situate in several districts, a suit regarding the whole can be brought in any one of the districts—it is legal on the part of reversioners to bring a joint suit for the possession of the properties on the death of the widow as the right, title and property of the plaintiffs, though divisible, were undivided. Even supposing that the term "cause of action" means the facts constituting the infringement of a right, and not the right itself, if the wrongful act by which several rights were infringed be the same a joint suit is not unsustainable. A suit for the possession of a house which could not, owing to the widow's existence be included in the previous declaratory suit by the reversioner to set aside her alienations, was held not barred under S. 43 of the old code (O II r. 2), (14 Cal 661 Fol:) **Asa Singh v Indar Singh. 91 P R 1898.**

Notes.—Cited 38 P R 1903=87 P L R 1903.

9—Civil Pro. Code Act XIV of 1882, S. 424—Cause of action—Construction.—

The words "*cause of action*" in S. 424 of the Civil Pro. Code should not be too strictly construed. **Bachchu Singh v. The Secretary of State for India in Council, 25 All 187.**

Notes:—Ref: 8 C W N 913; 34 Cal 305=5 C L J 270.

(2) Decree of a foreign Court, whether a cause of action.

10—A decree of a Foreign Court (*e. g.*, of Faridkot), *held*, to be a cause of action in a Court of British India.—

Kheta Mull v Jowahir Mull. P R 4 of 1874.

Cause of Action-*Contd.*

(3) Undertaking—Forbearing to sue, no cause of action.

11—S, 12—English Arbitration Act (53 & 54 Vic., c. 49), sec. 32—Award of arbitrators—Order in High Court, England, that the award be enforced as judgment, if amounting to foreign judgment—Suit in High Court, Original Side, to recover amount directed in award—Defendant not resident nor carrying on business in Calcutta—Defendant's undertaking to pay to Plaintiff's attorney in Calcutta, if latter forbore from suit, if amounting to "cause of action" within the meaning of cl. 12 of the Letters Patent—Jurisdiction.

An award was made by arbitrators in England directing Defendant to pay Plaintiffs a certain sum. The award was by an order of the 1st March 1902 of the High Court, Q. B. D., England, directed to be enforced in the same manner as a judgment. Defendant left England and left the sum unpaid. Plaintiffs instituted suit in the Original Side of the High Court of Calcutta to recover the said sum but at the time of the institution of the suit Defendant neither dwelt nor carried on business nor personally worked for gain within the limits of its original jurisdiction. Plaintiffs' solicitor, however, at an interview in Calcutta with Defendant had given an undertaking to Defendant not to sue him until he heard from Plaintiffs in cosideration of Defendant's undertaking to pay £500 immediately in part payment: *Held*—That, the Defendant's undertaking in consideration of Plaintiffs' attorney for-bearing to sue was not a '*cause of action*' within the meaning of cl. 12 of the Charter, and the High Court had no jurisdiction to entertain the suit *Obiter per* Maclean, C. J.—That the order of the 1st of March 1900 is not such a judgment as to entitle the Plaintiffs to sue upon it. **Deep Narain Singh v Minnie Dietert. 8 C W N 207.**

(4) Claim to damages for improper search—No cause of action.

12—Claim for damages for improper search by a judicial officer as such—No cause of action against the Secretary of State for India—Addition or substitution of defendant—Civ. Pro. Code, s. 32 Act XVIII of 1850. **59 P W R 1908.**

(5) Signature on creditor's account.

13—No new cause of action—

Cause of Action-*Contd.*

(5) Signature on Creditor's account-*Concld*

The signature of a debtor on the account in the creditor's books does not constitute a new cause of action **Vittal Shanesha v Sheodin. 2 C P L R 40**

(6) Suit on decree no new cause of action

14—The final judgment of a competent Court does not constitute a new cause of action. 14 P R 1869, 50 P R 1867 Overruled **Jeewun v Jez Ram, 108 P R 1808**

(7) Cause of action, how arises

15—Execution of a decree Decree absolute for foreclosure.—

A first cause of action arises when a judgment debtor remains in Khas possession in spite of symbolical possession having been delivered to his decree holder in execution of a decree absolute for foreclosure. (22 Bom 667, 25 Bom 358, 24 Cal 715, 20 Bom 351, 30 Cal 710 7 Cal 418, 19 All 499, 21 All 269, 9 W R 454; 10 W R 396, 12 W R 285 **Bapu Rao v Govind Rao 16 C P L R 107.**

16—Before suit—Co sharers—Denial by one co-sharer of another's title- Denial for the first time in the written statement.

An assertion or denial of a right in a written statement does not give rise to a cause of action A cause of action must be antecedent to any allegation made in the pleadings **Madan Mohun Shaha v Rajab Ali 8 C W N 415= 9 C W N 928=28 Cal 223=2 C L J 383.**

Notes.—Dist 10 C L J 103, 33 Cal 1201= 9 C W N 87. Ref 4 C L J 198, 13 C W N 949, 18 M L J 153=5 M L T 265 appr 11 C W N 143, 4 N L L R 120.

(8) Allegation of cause of action, manner of

17—S 50 C P C (1882)—

The plaintiff, when he files his suit, must allege the cause of action in the manner prescribed in s. 50 of the C P C (1882) and must prove necessary allegations in so far as they are not admitted by the defendant. **Gano v Shri Dev Sidheshwar 4 Bom L R 58= 26 Bom 360.**

Cause of Action-*Contd.*

(9) Objection as to non existence of cause of action.

18—Objection as to non existence of, when to be taken—Cause of action when superseded. **2 P L R 1911.**

(10) Cause of action, survival of, to benefit of the heirs

19—Cause of action—Suit for loss caused by misrepresentation made by defendant to plaintiff, a Hindu Death of plaintiff pending suit—Right of heir to continue suit—Survival of cause of action to benefit of the heir.

Where K, a Hindu, the plaintiff in a suit, sued to recover the loss he alleged to have sustained by acting on certain misrepresentations made by the defendant, and died pending the suit, and where K's representatives ought to continue the suit

Held that, the cause of action survives to the benefit of the Hindu heir and that he can continue the suit (4 C P D 40 Ref) **Raja Kishen Bahadur v Rajah Sir S Ramasawmy Mudaliar 11 M L T 240**

(11) Accrual of cause of action during minority

20—Accrual of cause of action during minority—Limitation Act, 1908, s 7, **10 Bom 241.**

21—Alienation by widow—Adoption by her after alienation—Adopted son a minor at adoption—His inaction for more than twelve years after attaining majority—Suit by reversioners of adopted son after death of the latter and his widow **Limitation-Limitation Act, 1908, Art 141. 32 Cal 165.**

(12) Accruing to an infant Hindu widow —Limitation.

22—Accruing to an infant Hindu widow—Adoption by her during minority—Suit by adopted son **9 C W N 795=2 C L J 87.**

(13) Appropriation of debt due to minor,

23—Appropriation of debt due to minor by third party —

Whether there is any, as against such third party **147 P L R 1906.**

Cause of Action-*Contd.*

(14) Arising on performance.

24—Arising where performance is to be completed. 4 S L R 20=7 Ind Cas 593.

(15) Cause of action when arises

25—A suit for pre emption in the case of a mortgage by conditional sale, arises at the time of the execution of the deed as well as at the time when the mortgage is foreclosed Bahadur Singh v Ram Singh 27 All 12=A W N 1904, 149=1 A L J 353

(16) Reversal of decree

26—Dispossession caused by a reversal of a decree, whether would give a fresh cause of action so as to give a fresh starting point for limitation Narayan Chetty v Kannamai Achi 28 Mad 338

(17) Declaratory suit.

27—Entry of defendant's name in 1895 in revenue papers—Application for correction of such papers—Denial of plaintiff's title and assertion of his own by defendant—Refusal to have the entry corrected. Limitation Act, 1908, art 120, 5 A L J 637=A W N 1908, 259=4 M L T 444=31 All 9=1 Ind Cas 557

(18) Existence of cause of action.

28—Existence of-How determined—

Res judicata-Adjudications,

7 M L T 87=33 Mad 162=5 Ind Cas 758.

(19) Suit for maintenance

29—For suit for maintenance-Alternative prayers—Maintenance

4 Ind Cas 35=7 M L T 113.

(20) Disclosure of cause of action when deemed sufficient.

30—Plaint, disclosure of cause of action in, when deemed sufficient 25 Mad 50

(21) Continuing cause of action—Damages after decree, award of

31—Power of High Court to award damages in respect of, accruing after the date of decree-Contract Act 1872 s 27.

7 Bom L R 107=29 Bom 107.

Cause of Action-*Contd.*

(22) Recurring cause of action.

32—Suit by mortgagee for possession of mortgaged property—Default in payment of instalment.

8 O C 286.

See also cases under Limitation Act S. 23.

(23) Suit for possession.

33—Failure of—Decree to be made 7 C L J 44 P C=10 Bom L R 9=12 C W N 227=17 M L J 626=2 M L T 509=35 Cal 189=14 Bur L R 101=35 I A 38.

(24) Where a promissory note is the sole cause of action.

34—Whether liability independent of note could form basis of suit 9 O C 315.

(25) Accrues before actual execution of decree.

35—Whether—for a suit by judgment debtor to recover money paid to the decree holder under an agreement, accrues before actual execution has been taken out in spite of the agreement—

Right of suit 16 M L J 54.

(26) Service dispensed with by Government whether gives cause of action.

36—Ghatwali tenure—Service dispensed with by Government—Suit by son of former holder of tenant seeking settlement of lands appurtenant thereto. 9 C W N 663.

(27) Joinder of Causes of action—Multifariousness

37—Civil Procedure Code.

There is no provision in the Code of Civil Procedure which authorises different causes of action being joined in one suit against parties when each of those parties has a distinct and separate interest (11 Mad. 106, 8 W R 15 and 64; 18 W. R 288. 14 Cal. 681, 5 All 163, 6 All 106, 16 All 279, 8 Mad 75, 7 Bom 289, referred to.)

Lalji Bhimraj v Manna minor 9 C P L R 125

38—Beng. Tenancy Act Ss.30 and 52-Joinder of causes of action.

There is nothing in the law which prevents one suit being brought for enhancement under s. 30 and for alteration of rent under s. 52 of the Bengal Tenancy Act. The two causes of action may be joined in one suit. Sarada Charan Chatterji v Iswar Samli. 11 C W N 1154.

Cause of Action-*Contd.*

(27) Joinder of Causes of Action—Multifariousness—*Concld.*

39—C P C—O. 1 rr. 3, 4; O. 2 rr. 3, 6 (1882 Ss. 28, 45) Possession of land, suit for *causes of action, joinder of*—Parties, joinder of.

Where a purchaser of lands, from Defendant No. 2 being dispossessed by Defendant No. 1, who also claimed by purchase from Defendant No. 2, sued Defendant No 1 for possession and an alternative claim for refund of purchase money against Defendant No. 2.

Held, that there was only one cause of action viz. dispossession of plainttff from the land.

Held, also—That Defendant No, 2 was a necessary party to suit. (19 Cal 123; 8 Cal 963 fol. 23 Cal 831 Dist:) **Serajul Huq Khan v Dinabundhu Sen. 6 C W N 300=29 Cal 257**

Notes.—Dist: 6 C W N 585. Ref: 31 Mad 252 =18 M L J 238.

Note:—whether joinder of different causes of action is a mere trregularity:—See cases under C P C (1908) S 99

& also 7 A L J 149 at p 153. P C.

(28) Jurisdiction—Cause of action.

40—Civil Procedure Code, Section 17.

Held, that the term "Cause of action" as used in section 17 of the Civil Procedure Code does not necessarily mean the whole of the cause of action, but a suit to which section 17 applies may be instituted where some material portion of the cause of action arises.

Banke Behari Lal v. Pokhe Ram. 25 All 48.

(29) Pleadings—Relief.

41—Civil Procedure Code (XIV of 1882), S 244—Misconceived suit.—

Where the cause of action set forth in the plaint is found never to have accrued, the suit fails and should be dismissed.

A general prayer for "any other relief" in the plaint must be taken to mean some relief arising out of the cause of action set forth therein.

A suit, the virtual object of which is to have a previous decree amended or to have some order made in execution thereof set aside, misconceived and not maintainable. **Basawan Kurmi v. Naskehhedi Pande, 1 A L J 628= 27 All 174=1904 A W N 207.**

Cause of Action-*Contd.*

(30) Different causes of action in different suits.

42—C P C O 2 r 2 (1882 s. 43)—Cause of action—Account stated—Mortgage transaction.

The defendant traded in Zanzibar as the agent of one Khimji, who owned five shops within the German jurisdiction. To release from attachment these shops, the defendant obtained from the plaintiff a sum of Rs. 7,000 out of which he applied Rs. 5,869 in discharge of the attachment, and returned the balance to the plaintiff. As a security for the repayment of Rs. 5,869, the defendant became personally responsible for the amount, and as part of the same transaction, he got a mortgage in his own favour from Khimji of the five shops and in turn sub mortgaged them to the plaintiff. As a result of these transactions, the plaintiff debited Rs. 2,753 in the general account which was in the name of the defendant. The plaintiff then brought Suit No. 193 of 1899 against the defendant to recover the balance due on this general account; and a few days later he brought another Suit No. 196 of 1899 for the purpose of enforcing certain rights under the submortgage. The first suit was decided in the plaintiff's favour; but the second was thrown out on the ground that it was barred under S. 43 of the Civil Procedure Code.

Held, that the second suit was not barred by s. 43 of the Civil Procedure Code, since the two claims were not in respect of the same cause of action. The cause of action in the earlier suit was an adjusted account, in respect of the transaction arising out of the mortgage; and the mortgage constituted a cause of action in itself in the second.

An account stated respecting a debt constitutes a new and distinct cause of action, the consideration being the ascertaining of the previously uncertain state of the transaction between the parties, while a promise to pay is implied by the admission of the balance. **Hansraj v. Lalji, 6 Bom L R 454=28 Bom 447.**

43—Suits in respect of different parcels of land—Different causes of action — Alternative claim common to all different suits—Mortgage—Redemption. **10 C L J 83=3 Ind Cas 395.**

(31) Misjoinder of causes of action.

44—Cause of action, one-Suit against several defendants upon—Bad as against one—Main-

Cause of Action-*Contd.*

(31) Misjoinder of cause of Action—*Concld.*

tainability as against others. **21 P R 1909= 32 P L R 1909=27 P W R 1909= 1 Ind Cas 604.**

45—Suit to establish a right to share in property against co-sharers in possession thereof—Necessary parties—Misjoinder. **6 O C 379.**

46—Meaning of—Misjoinder—Of causes of action. **1 P R 1905=83 P L R 1905.**

47—Letters Patent, High Court, 1865—Bombay. **12 Bom L R 988=34 Bom 564= 8 Ind Cas 648.**

(32) Misjoinder of parties.

48—C P C O I rr. 3, 4—Suit for possession of lands—Possession with many defendants from the same alienor—Lands in different villages—If venue for trial the same—Trial of issues—Interlocutory judgments on issues—Practice—English practice followed:—

It is competent to a plaintiff to join in one suit for possession of land alienees of different portions of the same estate claiming under the same alienor. Even where the lands are situated in several different villages, provided the venue of the trial is the same, the right of the plaintiff to have his claim tried in one suit is the same as if the different holdings were all in the same village. No objection can be taken to the suit on the ground of misjoinder of parties under S. 18 of the Civil Procedure Code, 1882. In cases like these any difficulties arising from variety of defences can be cured by the successive trial of the issues separately affecting different defendants. Following the English practice interlocutory judgments may, if the plaintiff succeeds, be given against different defendants as their cases are disposed of, final judgment for possession of the whole property being reserved till the conclusion of the trial of the whole case.-**Umabai v Vithal, 11 Bom L R 34=33 Bom 293.**

(33) Attorney and Client.

49—Attorney's Retainer, how revocable—Suit by attorney—Limitation:—

The authority of an attorney cannot be revoked by a mere letter. It can only be revoked with leave of the court by a writing signed by the client and filed in court. An attorney's cause of action for remuneration arises where his work is

Cause of Action-*Contd.*

(33) Attorney & Client—*Concld.*

completed. His work does not necessarily cease with the delivery of the judgment. *Held*, in the case before his Lordship that the authority did continue after judgment and covered the taxation of costs, as the decree directed that certain parties should personally pay other's costs of the appeal to be taxed on scale No. 2.—
Atul Chunder Ghose v Lakshman Chunder, 36 Cal 609.

(34) Agreement not to appeal, whether gives a cause of action.

50—Appeal—Agreement not to appeal whether cause of action. **3 C L R 574.**

(35) Dower, suit for.

51—C P C S. 20, 1882 S. 17, Expl: III (a). cl. (c), Proviso Cause of action:—

The cause of action in a suit for dower on divorce arises in the place where the divorce takes place. So where both the marriage and divorce took place at Saran: — *Held*, that the court at Saran had jurisdiction to try the suit for dower, even though the defendant was a resident at Calcutta. **Zamiran v. Fateh Ali, 32 Cal 146.**

Notes:—Fol: 8 C L J 308.

(36) Defamation.

52—Defamation—Unchastity—Imputation of—Special damage—Common Law of England, application of, in Calcutta-Charter of the Supreme Court, 1726.

(1) No damages are recoverable for the mental distress caused by an insult. 26 Cal 653 foll.; 2 Q B 57, 9 H L C 594 ref. to. **(2)** Defamatory words imputing unchastity to a woman are not actionable within the limits of Calcutta without proof of special damages. **(3)** The Common Law of England, as it prevailed in 1826, applies to natives of India within the limits of Calcutta except in so far as it has been modified by the legislature, or where it is shown to be unsuitable to this country. 26 Cal 653 ref. to. An action for slander is only maintainable in Calcutta by virtue of the Common Law of England introduced by the charter of 1726.
Bhooni Money Dassee v. Notobar Biswas, 5 C W N 659=28 Cal 452.

Cause of Action-*Contd.*

(36) Defamation—*Concld.*

Notes:—Dist: 4 C L J 388; 390. Ref: 34 Cal 48=4 C L J 388; U B R (1905) Fort—Defamation P. 1.

53—In action for libel the cause of action is not the writing but the publication. **6 Bom L R 84**

54—Words imputing unchastity to wife afford, to husband without proof of special damage. **4 C L J 388=34 Cal 48.**

55—Imputation of sorcery against wife affords no cause of action to husband for defamation. **4 C L J 390.**

(37) False imprisonment.

56—"Prosecutor"—Institution of proceedings by information to Police.

The only person who can be sued for malicious prosecution is the person who prosecutes. Where the defendant merely gave information to the Police and the Police after investigation thought it advisable to prosecute, no suit can be maintained against the informant either for malicious prosecution or for false imprisonment. 26 Mad 362 foll. **Balbhaddar Pande v Basdeo Pande 1906 A W N 263; 3 A L J 650; 29 All 44.**

(38) Husband & Wife—Special damage—Unchastity, imputation of.

57—*A* used words which imputed unchastity to the wife of X. *Held* (1) that the words constituted defamation not only of the wife of *X* but also of *X* himself and X was therefore entitled to maintain an action on his own account; (2) that the words were actionable without proof of special damage. **Sukhan Teli v Bipal Teli. 4 C L J 388, 34 Cal 48 See also 28 Cal 452=5 C W N 659.**

58—In action of libel, the cause of action is not the writing but the publication. **6 Bom L R 684.**

59—Imputation of sorcery against wife affords no cause of action to husband for defamation. **4 C L J 390.**

(39) Instalment bond—Default—Waiver—Cause of action.

60—In the case of instalment bonds with the stipulation of the whole debt becoming due on the failure of payment of a certain instalment,

Cause of Action-*Contd.*

(39) Instalment bond-Default-Waiver-Cause of action—*Concld.*

limitation runs from the date of the non-payment of that instalment unless there has been a waiver by the payee or the obligee by the acceptance or overdue instalment: 11 C W N 903 not foll. An unregistered instalment bond was executed in favour of a Hindu widow. It stipulated for payment of money in certain instalments falling due on certain dates and in the event of default in payment of two consecutive instalments the creditor should be at liberty to recover the entire amount due on the bond. Default was made and there was no payment. Shortly after the default the widow adopted the plaintiff, who while still a minor, instituted a suit for the recovery of the amount of instalments other than the first two, more than 9 years after the first two instalments became due.—*Held*—That as the cause of action arose on the failure of the first two instalments and as, under S 9 of the Limitation Act, no subsequent disability or inability could arrest the running of limitation, the suit was barred under the three years rule of limitation under Art. 75 of Second schedule of the Limitation Act. A mere abstinence on the part of the plaintiff from bringing a suit for the recovery of the whole amount due on the failure of payment of the first two instalments does not amount to waiver. 7 W R 21, B L R Sup Vol 618 foll. **Girindra Mohan Roy Chowdhry v Bacha Das, 9 C L J 226: 36 Cal 394; 13 C W N 1004.**

See also.—

Limitation Act Art 75 & Sec 9.

(40) Place of payment-Pakky-adat Agency.

61.—S. 20—1882—S. 17—Jurisdiction.

In the case of pakky-adat agency the place of payment is the place where the constituent resides unless he has chosen to fix another place by express direction. **Kedarmal v Surajmal. 10 Bom L R 1230.**

(41) Slander of title—Cause of action.

62—Damages - Counterfeiting trade-mark—Allegation to the Collector of Customs-Detention of goods in consequence by the Collector-Action of Collector, whether a judicial proceeding—Merchandise Marks Act (IV of 1889.).

There were allegations in the plaint (a), that the defendants were interested in putting a stop

Cause of Action-*Contd.*

(41) Slander of title-Cause of action-*Concld.*

to the sale of goods imported by the plaintiff;(b), that, when the same were in the Calcutta Customs House, the defendants, with intent to injure the plaintiff, had falsely alleged to the Collector of Customs that the marks on those goods were an imitation of some body else's (c) that the defendants had thereby induced the Collector to detain the goods in the Customs House and had also persuaded and induced the Collector to make an *ex-parte* order that the plaintiff's marks were a fraudulent imitation, and (d). that in consequence the plaintiff had suffered special damage.

Held, that the plaint did disclose a cause of action and should not have been rejected. L R. (1892), 2 Q. B. 524 and L. R. (1895), A. C. 154, Ref.

Maclean, C. J.—This was virtually a case of slander of title, and in order to succeed, the plaintiff had to show that the statements of the defendants were false, malicious and that they had suffered special damage. Here, though malice had not been specifically pleaded, it was undoubtedly to be implied from the allegations (a) and (b). In any case, the suit should have not been dismissed on this account, but the plaintiff ought to have been allowed to plead damage.

Sale, J.—No question arose in this case as to the legality of the Collector's action. Moreover, the finding of the Collector was not a judicial act, and the plaintiff was entitled to disregard it, so far as his right to sue in the Civil Court was concerned, and he was not bound to move the higher executive authorities to have the finding set aside.
Nemi Chand v C W Wallace. 10 C W N 107

(42) Suit on original cause of action not maintainable.

63—S. 13—Directly and substantially in issue—Suit on a surety bond against a Cash-Keeper and the surety for defalcation—Dismissal of the suit on preliminary points—Suit on the cause of action on the debt due—Bar:—
Where A was employed by B as his cashkeeper and his father R executed a bond to B as surety for the proper delivery of moneys received by A for B,and B afterwards took two others as partners, and on defalcation by A after the two partners came in, B and his partners sued A and R on their surety bond and the suit was dismissed because under S. 260 of the Contract Act the surety bond was dis-

Cause of Action-*Contd.*

(42) Suit on original cause of action not maintainable—*Concld.*

charged:*Held*, such dismissal could not affect any cause of action based on the debt against A & R.
Neel Comul Mookerjee v Bipro Dass Mookerjee. 28 Cal 597.

64—Suit upon original cause of action not maintainable—Inadmissibility in evidence—Cause of action—Note best evidence of loan—Evidence Act, Ss. 22, 63 and 91—

Where money is lent on terms contained in a promissory note given at the time of the loan, the lender suing to recover the money so lent must prove those terms only by the promissory note. If, for any reason such as the want of proper stamp, the promissory note is not admissible in evidence, the plaintiff is not entitled to set up a case independent of the note by reason of Ss. 22, 65 and 61 of the Evidence Act,23 Cal 851 diss. from. But where a cause of action for money is once complete in itself whether,for goods sold, or for money lent, &c., and the debtor *then* gives a bill or note which is not paid at maturity,as a rule,he can sue for the original consideration provided he has not endorsed or lost or parted with the bill or note under such circumstance as to make the debtor liable on it.7 Cal 256; and 8 Cal 721 foll. **Parsotam Narain v Taley Singh. 1903 A W N 217=26 All 178.**

(43) Suit to set aside decree based on award.

65.—Suit to set aside decree based on award —Fraud—Act XV of 1877. Sch. II. Art,158,power of Court to extend time prescribed by—Power of Court to give relief where defendant has fraudulently prevented plaintiff applying within prescribed period.

Held, that a suit will not lie to set aside a decree passed in accordance with an award of arbitrators, merely on the ground that such decree has been obtained by fraud.

Semble, *per* Barkley, J.—Such suit would lie if it could be shown that the judgment and decree in question were a nullity.

Held, further, *per* Brandreth, J., that if the parties to an award accept such award and do not file any objection within the period allowed (see Act XV of 1877, Sch. II., Art. 158), an objection even on the ground of fraud, cannot legally be heard afterwards.

But *held* also, *per* Brandreth, J., that if a

Cause of Action-*Contd.*

(43) Suit to set aside decree based on award—*Concld.*

the above case the plaintiff succeeded in proving that the defendant by deceiving plaintiff's agent had fraudulently induced him not to make any application within the prescribed period, the Court would be justified in giving relief from such fraud and allowing a fresh period for the plaintiff himself to make the application.

Mehta Kashi Ram v Dadabhoy P R 124 of 1880.

(4) Vendee stranger at date of sale—Subsequent acquisition of share by vendee—Cause of action.

66.—In a suit for pre-emption the crucial date for a pre-emptor to succeed is the date of the institution of the suit and that if he is able at that time to fulfil the conditions necessary to entitle him to a decree, a decree ought to be made in his favour. Hence, where a suit for pre-emption was dismissed for deficiency of court fees in both the Courts below, which decree was subsequently reversed by the High Court and the case remanded, and the vendee in the meantime acquired the status of a co-sharer, *held* that the suit could not be dismissed, the pre-emptor having been entitled to a decree at the date of the institution of the suit. *Held* further that even if the date of a decree be looked to, that date must be when the decree ought to have been made in the plaintiff's favour and not a later date.

Rohan Singh v Bhau Lal. 6 A L J 699.

(45) Wajibularz--Cause of action.

67.—Acquisition by defendants to a pre-emption suit of a title as co-sharers—Suit dismissed.

After an alleged cause of action for pre-emption had arisen, but before suit brought, the defendants vendees acquired by the dismissal of another suit for pre-emption brought against them by two of the plaintiffs on a different cause of action, a title as co sharers in the village in which the property sought to be pre-empted lay. *Held*, that the title so acquired was a good answer to the subsequent suit for pre-emption. 21 All 374 and 21 All 441 foll.

Ram Hit Singh v Narain Rai. 1904 A W N 68=1 A L J 209= 26 All 389.

Notes.—Ref 31 All 530; 6 A L J 699.

Cause of Action-*Concld.*

(46) Arises only, where money is made, expressly or impliedly, payable.

68.—Arises only where money is made, expressly or impliedly, payable by the parties under their contract-General rule of law as to payment has no application. **31 Mad 223= 4 M L T 97.**

Cause Papers.

1.—Attorney's lien on. **29 Cal 63= 6 C W N 215.**

Causing death by rash and negligent act.

See Rash and Negligent Act.

Caveat.

See (1) Letters of Administration.
(2) Cases under Probate—Opposition to, and Revocation of, Grant.
(3) Probate and Administration Act 1881.
(4) Probate—Will.

Caveat emptor.

See (1) Vendor and Purchaser.
(2) Sale in execution of decree.

1.—Principle of—Application to sales in execution. **A W N 1905,99=2 A L J 244= 27 All 537.**

2.—C.P.C.O 21. rr.91,93 (1882 ss.313,315)—Suit for purchase money-Sale set-aside-Maintainability of suit—Civil Procedure Code, (Act XIV of 1882), sec. 315—Caveat Emptor-Limitation-Limitation Act (XV of 1877), sch. II, Art.62.

In execution of a rent-decree a certain jote was put up for sale as the property of the judgment-debtor and purchased by R, subsequently another person brought a suit for declaration that the jote belonged not to the judgment-debtor in the previous decree but to himself, and obtained a decree. R now sued for recovery of the money paid for his purchase.

Held, the suit was maintainable. Under the Code of 1882, the doctrine of *caveat emptor* does not apply to execution sales. (3 Cal 806; 12 W R F B 8 Dist.).

Nor is the plaintiff's right limited to application under section 315. (5 C W N 240; 7 C W N 105, 17 Mad 228 not Fol.).

Caveat emptor-*Contd.*

Where the alleged judgment-debtor had no right to the property and in consequence there was no delivery of possession, there was no consideration for the purchase money and the suit for its recovery would be governed by Art.62 (19 Cal 123 Fol.) **Ram Kumar Shaha Poddar v Ram Gour Shaha Chaudhury 10 C L J 558=13 C W N 1080=2 Ind Cas 559=37 Cal 67.**

3.—Caveat emptor doctrine of—Inapplicability to Court sales. **21 M L J 969.**

4—Lease of Government village on condition that if certain stipulations entered into by the lessee were fulfilled proprietary rights in the village would be conferred on him—Power of such lessee to alienate his rights without sanction of Government—Sections 20 and 65,Contract Act, 1872—Caveat emptor.

The village of Rupnagar in the Ferozepore district, the property of Government, was leased on certain conditions to four persons, of whom, owing to death and desertion, Hanwanta, son of Peman alone after a while represented the original lessees In 1882 the terms of the lease not having been fulfilled, one M was put in possession as farmer of half the village, the other half, or ten *biswas* remaining with H, for a further term of five years, conditional upon the unfulfilled terms of the original grant being carried out within that period. In June 1886, H, sold to one K. S. for Rs. 8 000 all his rights in a five-*biswas* share of the village, and the purchaser was put in possession of the land and began to cultivate it. In November 1886 the Deputy Commissioner passed an order disallowing the above alienation as having been made in contravention of the term of H's lease, and finally,on 29th April 1887,it was resolved that a ten-*biswas* share of the village should be granted in proprietary right to M., a five-*biswas* share to H ,and that the remaining five-*biswas* share which represented the share alienated to K. S should be resumed by Government Early in 1890, at which time *K.* S was dispossessed of his rights, lease of the five *biswas* share resumed by Government was granted to one R. R., and in 1891 the present plaintiff,son of K S. (deceased),filed a suit against H demanding either possession of a five-*biswas* share of the village under the terms of the deed of sale, or a refund of the purchase-money, Rs. 8000. The deed of sale contained no covenant for title by the vendor and

Caveat emptor-*Concld.*

the plaintiff failed to establish his allegation of fraud and misrepresentation against the vendor. The plaintiff, however, contended that there had been a material mistake as to a matter of fact between the parties, and that either the contract was void under Section 20 of the Contract Act, 1872. or that there had been a breach thereof for which compensation was due under Section 55 of that Act:

Held (1) that the plaintiff's suit for possession of the five *biswas* share sold to K. S. must fail, because the share in question had been resumed by Government and assigned to a third person who was in possession thereof;

(2)that no material mistake of fact had been proved which would under Section 20 of the Contract Act be applicable, nor any breach of a contract, nor had contract become void within the meaning of Section 65 of the Act, and that the doctrine of *caveat emptor* was applicable to the case.—**Kashmira Singh v Hanwanta 62 P R of 1893.**

Cemetry.

1—Muhammadan Law—Religious endowment—Place used as cemetry—Form of suit—Permission of Court under s. 30, Civ. Pro. Code, 1882. **A W N 1885, 219**

See also

Burial ground.

2—Dedication, implied—Dedication to public use as burial ground-Title to land, no necessity for passing—Abandonment of user by public—Reversion to owner.

An implied dedication arises by operation of law from the acts of the owner and is really founded upon the principle of estoppel: it proceeds not upon the principle that a grant has actually been made but rather on the principle that the owner having allowed the public to enjoy the same for any particular purpose is estopped from denying the right of the public to the enjoyment of such use. Exclusive and continuous user by the public with the owner's knowledge and acquiescence for the prescriptive period will raise the presumption of a grant and

Cemetry-*Concld.*

dedication to the public. It is one of the essential elements of a good declaration that it be made to the public, that it be irrevocable, and that the land be for ever dedicated for the designated public use. 8 C B N S. 848; 42 Calif 541, ref. to. An owner may appropriate land to public use and yet retain in himself all such rights in the soil as are compatible with the full exercise and enjoyment of the public use to which the property has been devoted. It is not essential to constitute a valid dedication that the legal title should pass from the owner ; nor is it inconsistent with an effectual dedication that the owner should continue to make any and all uses of the land which do not interefere with the uses for which it is dedicated, *See* 79 Bom 47 ; 9 Cal 75. But after a valid dedication has been made, if the use for which the property is dedicated becomes impossible of execution,or if the object of the use wholly fails, there is an abandonment in consequence of which the rights of the public therein fail and a reversion takes place as the dedication has spent its force when the use ceases. If land is dedicated for cremating or burial purposes, and there is subsequently an abandonment, the property reverts to the dedication or his heirs. 24 I A 177 dist. **Chairman, Howrah Municipality v Khetra Krishna Mitter. 10 C W N 1044=4 C L J 343= 33 Cal 1290.**

Central Provinces.

1—Status of Zamindars of—**Zamindars. 16 C W N 362.**

Central Provinces Additional Rates Act X of 1878.

Notes.—Rep Act IV of 1907 (except in the Sambalpur District) ; Obsolete in the Sambalpur District.

1—Payment of additional rates.

Under Act X of 1878 every estate is liable to the payment of additional rates. whether the land revenue has or has not been released. **Daryao Singh v Seth Jhasiram. 13 C P L R 96.**

Central Pro. Civil Courts.

1——Central Provinces—Deputy Commissioner alone entitled to entertain applications under Act XIX of 1841.

Central Pro. Civil Courts-*Concld.*

Under s. 8 of Act XVI of 1885 the officer to whom applications under Act XIX of 1841 are to be made in the Central Provinces is the Deputy Commissioner. **Kanhoji Rao Mohite v Mt Gangabai Sahib Mohite. 9 C P L R 19.**

Notes.—Ref: 15 C P L R 54.

Central Pro. Court of Wards Act XXIV of 1899, s. 31.

See Contract Act 1872 S. 68.

Central Provinces Courts Act (XIV of 1865.)

1—Saving of powers conferred under the Act.

The powers conferred under Central Pro. Courts Act of 1865 are specially saved by s. 2 of the C P Civil Courts Act of 1885. **Amirali v Wajidi Begam. 4 C P L R 75.**

Central Provinces Courts Act (II of 1904).

See (1) Central Pro. Judicial Commissioner Case No (2) **6 C L J 233.**

(2) Jurisdiction—General. **34 Cal 636=5 A L J 550.**

Central Provinces Government Wards Act (XVIII of 1885).

1—S. 23—Mortgage by ward without court's sanction—Validity of.

As S. 23 of the Act imposed a personal disqualification a mortgage entered into by a Government ward without the sanction of the court was null and void and could not be enforced as against the property of the ward (25 Cal 909 ; 30 Cal 539 Fol.) **Babu Jiwan Lal Pleader v Raja Seth Gokuldas. 17 C P L R 13.**

Central Pro. Judicial Commissioner.

1—Central Pro. Judicial Commissioner—Divisional Judge—High Court—Civil Procedure Code (Act XIV of 1882), Sec. 584—General Clauses Act (X of 1897), Sec. 3 cl. (24)—Central Provinces Courts Act (II of 1904)—Bengal and Assam Laws Act (VII of 1905).

Central Pro.Judicial Commissioner -*Contd.*

If an appeal lay from the decision of a Divisional Judge to the Judicial Commissioner of the Central Provinces, it will, under Act VII of 1905, after the 16th October 1905, lie to the High Court of Bengal.

Though under the provisions of Act II of 1904, no second appeal lies expressly from the decision of the Divisional Judge to the Judicial Commissioner, yet such an appeal lies under the provisions of section 584 of the Code of Civil Procedure.

Under section 3, cl. (24) of the General Clauses Act the Court of the Judicial Commissioner comes within the expression "High Court" in section 584 of the Code of Civil Procedure. As the Court of a Divisional Judge was subordinate to the Court of the Judicial Commissioner, and since the passing of Act VII of 1905 it is subordinate to the High Court, both before and since the passing of Act VII of 1905, second appeals lie from the decisions of the Divisional Judge, formerly to the Judicial Commissioner and now to the High Court of Bengal.

An appeal was preferred on the 21st December 1905 to the High Court from the decree of the Divisional Judge of Raipur, at a time when Act II of 1904 was in force.

Held, that the provisions of Act II of 1904 and of the Code of Civil Procedure would govern the case and a second appeal lies to the High Court under section 584 of the Civil Procedure Code. **Balbhadra Nilmadhub v Mussammat Bhowani.** **6 C L J 233.**

Notes:—Ref: 34 Cal 941 F B.

2—Central Pro. Judicial Commissoner—Transfer of District—Jurisdiction—Proclamation No. 2833 of 1905—Act VII of 1905—Act II of 1904—Act XII of 1887—Act I of 1868-Act X of 1897—Pending proceeding—Appeal—High Court-Judicial Commissioner—Central Provinces.

A suit was decided by the Subordinate Judge of Sambalpur on the 8th September 1905. The appeal was preferred to the District Judge on the 17th October 1905. Meanwhile the Proclamation by which Sambalpur was transferred from the Central Provinces to Bengal came into force on the 16th October 1905.

Central Pro.Judicial Commissioner -*Concld.*

Held, that whether the suit be deemed as a pending proceeding on the 16th October 1905 or not, the appeal from the decree of the District Judge lay to the Calcutta High Court and not to the Court of the Judicial Commissoner of the Central Provinces. **Mussamat Harabati v. Satyabadi Behara.** **5 C L J 550.**

Central Provinces Land Revenue Act (XVIII of 1881.)

1.—Malik makbusa—Malguzar—Whether two estates can be held by same person—Merger.—

The same person may simultaneously possess two distinct estates under different forms of ownership, in the same *mahal*.

The estates of *Malik makhuza* and *Malguzar*, in the same *mahal*, are distinct from, and independant of one another. And the possession of both by the same person does not produce a merger of these estates.

Transfer of either one of these estates has no effect upon the ownership of, and legal rights and liabilites appertaining to the other estates. **Mt Munkoo v. Mt Kuksoo.** **4 N L R 2.**

2—S. 4 (3)—Suit for enforcement of begar of Small Cause nature—Second appeal—S, 102, C P C 1908—Wajib-ul-arz.

Held,—that a suit for arrears of *begar* due by a tenant, as such, on account of the use or occupation of land let to him, is not a suit of a nature of Small Cause and that therefore second appeal lies.

Where a *wajib ul-arz*, made under S, 79 Land Revenue Act, recognizes *begar* in the area to which it applies, and also specifies the terms and the persons by and from whom it may be levied. Such *begar* becomes a "village cess" within the meaning of S. 4 (3), of the Act.

A claim for such a cess when disputed, raises a question of title in land, where it is imposed as an incident of land tenure.

Every cess paid or delivered by a tenant, on account of the use or occupation of the land let to him, is certainly "rent" within the meaning of the terms of the Central Provinces Land Revenue and Tenancy Acts. 9 All 591 Appl, **Ramchandra v Chindhoo,** **6 N L R 117= 8 Ind Cas 276.**

Central Pro. Land Revenue Act XVIII of 1881-*Contd.*

3.—Central Provinces Land Revenue Act, Secs 4 (8a). 152—Gochur and common lands-Gaontia a proprietor—Ejectment, suit for.

Gochur lands cannot be classed in the same category as common lands.

A *Gaontia* of a Government village in the Sambalpore District is a proprietor and is entitled to bring an action in ejectment. **Purkhit Panda v. Ananda Gaontia 8 C L J 116= 12 C W N 1036.**

4.—Sections 50, 51 and 65A—Land Revenue Act, 1881—Conferral of inferior proprietary rights—Protected Thekadar.

The land Revenue Act, 1881, does not empower a Settlement officer to confer inferior proprietary rights. His power to fix the *jama* payable by a *Thekadar* of proprietary rights is limited to the case where he requested to do so by the proprietor and the *Thekadar* has been declared to be protected. **Tulsiram Bapu v Dajiba. I N L R 71.**

5.—Ss, 65, 116—Malik Mukbuza holding—First charge for revenue-Sale of holding-Free of incumbrances.

The revenue payable on a Malik Mukbuza holding, is under s. 65 of the Act a first charge upon the land comprised therein. The Malguzar through whom the revenue is paid has first charge on the land if he likes, for that revenue. He may sell the land free from all incumbrances or he may not. Under S.116 he might ask the Deputy Commissioner to realise the arrears of revenue for him and if the Deputy Commissioner sold the land, it would, like other lands sold for arrears of revenue, be sold free of incumbrances, **Kheta v Sukh Deo. 1 C P L R 127,**

Notes:—*Cons* 11 C P L R 95. Ref: N L R 117.

6.—Land Revenue Act Section 65—Section 85; T P. A.—Charge.

The Charge created by Section 65, Land Revenue Act, cannot be enforced otherwise than by bringing a suit for sale in accordance with the provisions of the Transfer of Property Act. Under s, 85 of the latter Act all persons having an interest in the land and of whose interest the plaintiff has notice should be joined as parties to the suit. (16 C P L R 52; 10 C P L R 48; 11 C P L R 95; 14 C P L R 17; 12 C P L R 26; 17 Cal 301 Referred to.) **Mangal Prasad v Chandra Mal. I N L R 117.**

Notes:—Ref II N L R 79.

7—Sec. 65 A.—Thekader—Ejectment—Proprietor—Suit to eject Thekadar—Thikajama—Cause of action.—

A declaration of protection under Sec. 65 A of L R Act relates back to the date on which but for such declaration the Thekadar would have been liable to be ejected. If the proprietor has brought a suit to eject the Thekadar, his right to recover Thikajama for the period during which the ejectment proceedings are pending only accrues on the date on which the Thekadar is declared to be protected. 9 Cal 255; 15 Cal 258. Dist: **Tulsiram Bapu v Mt Janka. 16 C P L R 33.**

8.—Land Revenue Act (C P) Ss. 68, 74, 78, 83 and 152—Jurisdiction of Civil Court—Suit for cancellation of order of settlement officer under s. 74.

Where there was no dispute that the plaintiff was in possession as plot-proprietor, and the sole question was whether he was entitled to hold it wholly or partially free from revenue as against the other *Malguzars* of the *mehal* and the Settlement Officer recorded that the plaintiff was liable to pay rent.

Held, that this was a case under s 74 of the Central Provinces' Land Revenue Act and not under s. 68; and as an investigation under s 74 is not included within the scope of s 78, s. 83 is of no avail in such a case and under s. 152, the Civil Court has no jurisdiction to cancel the decision of the Settlement Officer. (11 C P L R 45 Dist.) **Beni Ram Sarugs v Mahomed Abdullah. 2 Ind Cas 69.**

Central Pro. Land Revenue Act S. 71,

See Central Pro Land Revenue Act S 138 Case No (21 A) **5 N L R 189.**

9—10.—Section 74—Decision recorded by a settlement officer—Jurisdiction of Civil Courts.

Where revenue has been assessed upon a

Central Provinces Land Revenue Act XVIII of 1881-*Contd.*

holding and the proprietor claims that he is exempted from payment of such revenue, the jurisdiction of the Civil Courts is restricted to giving effect to any decision recorded by a settlement officer or by a Deputy Commissioner under s. 74 of the Land Revenue Act. 11 C P L R 45 Fol. 14 C P L R 107 Ref to. **Ambika Prasad v. Vishwanath. I N L R 140.**

Notes:—Fol: 6 N L R 27.

11.-Ss 74, 132 and 152—Civil Court jurisdiction —Payment of Revenue—Right of reimbursement —S. 69 of the Contract Act.

A and B mortgage their *malguzari* village with C, excluding some *sir* and *khudkashat* lands. In due course *C* became the owner of the village, under a decree absolute for foreclosure. C. paid the assessment of the excluded also under the terms of the settlement engagement, for which he sued A & B.

Held, that the suit is congizable by the Civil Court under S 9 C P C 1908.

Held, also, that, in view of the provisions of Ss 74 and 132 read with S. 152 of the Land Revenue Act, a Civil Court is not competent to entertain a claim put forward by the proprietor of a land to hold it wholly or partially free from revenue as against the *malguzar* whether such claim be advanced by way of a suit or by way of defence to a suit to recover the Revenue.

Held, further, according to S 69 of the Contract, it is not necessary that there should be any contract or privity between the obligor and the obligee, nor need there be circumstances, from which a contract can be implied between the two. It is enough if there is an original liability to pay, and its discharge by a person interested to pay.

Held, where there has been a payment under compulsion of law by a person interested in the said payment, under circumstances which make it necessary that it should be paid to save the whole estate, in which is included the land of the person from whom the reimbursement is demanded, there is a right of reimbursement under S 69 of the Contract Act. (I N L R 140 and 9 C L J 850; Ref: 8 C P L R 106 (107) and 14 C P L R 107 (108) Ref.) **Chaturbhuj v Chandrmool, 6 N L R 27=5 Ind Cas 705.**

II C C. 74

Central Pro. Land Revenue Act XVIII of 1881-*Contd.*

12.—Ss. 78,82,83, 120,130 (b) 152 sub-sec. (b), cl 12—S 69, sub-sec (4), contrasted—Record-of-rights, entry in—S 83,—Title-suit by party-Onus.

When an entry has been made in the record of-rights as to any matter referred to in S 78 of the Act, such entry is presumed under S. 82 to be correct until the contrary is shown and under s. 83 a person aggrieved by the entry may institute a suit in the Civil Courts to have such entry cancelled or amended.

The remedy provided by S. 83 of the Act is cumulative and not exclusive.

Held, that the present suit by the plaintiff in which he sought relief, *inter alia*, on the basis of his alleged title as occupancy-tenant, was maintainable, although the defendant's name had been entered as the occupancy tenant in the record-of-rights, and the plaintiff had not instituted a suit under s. 83 for the cancellation or amendment of the entry.

Dibakar Bisi v Chatto Bag. 14 C W N 686=6 Ind Cas 672

13.—S 82—Land let for a year certain and thereafter—No grant of extension—Holding over —Tenancy from year to year—Seer land—No acquisition of occupancy rights.

Where land is let as is the usual custom for a year certain and thereafter, if the tenaney is not terminated by either party, for another year and so on, the land is held from year to year.

If there is no express stipulation then under the ordinary custom a tenant holds from year to year. If the land is *seer* then a right of occupancy cannot be acquired in it by the tenant.

Manbodh Lodhi v. Sheodiss Lodhi, 4 C P L R 35.

14.—S. 82—Settlement record, correctness of —Absence of evidence to the contrary.—

In the absence of evidence to prove that the settlement record is wrong it must under s. 82 of the Land Revenue Act be taken to be true.

Mt Kashi Shetani v. Mt Mangli. 3 C P L R 189.

—s. 87.

See Hindu Law—Partition—Requisites for Partition. **27 Cal 515; 4 C W N 582.**

Central Provinces Land Revenue Act XVIII of 1881-*Contd.*

—S. 87.

See—Hindu Law—widow—alienation
I C P L R 130

15—S. 87—awards of proprietary rights at the settlement, legal effects of the grant of —

The award of proprietary rights, at the time of the settlement, did not confer on the grantee, any new rights, nor did it take away, from the grantee, rights obtained and held otherwise than through the award The effect of the award was to make the estate heritable and alienable but these new incidents of tenure were only to be enjoyed side by side with any restrictions imposed by the personal law of the holder If, for instance, an estate was self acquired, it remained self-acquired, and if it was *stridhan* it continued to be *stridhan* So when any question arise as to the devolution of property or as to the power of alienation, it is necessary to go behind the grant and to see what the position of the grantee was prior to the award and to ascertain the nature of the pre-existing rights in the grantee
Nilkanth Rao Udhoji v Sambhoo Mali
2 N L R 1

16—S. 87—Award—Effect.

S. 87, Central Pro Land Revenue Act gives an award made under it the effect of a judicial decree but does not ascribe to it any adventitious force which would not belong to a decree pronounced in *pari materia* To be barred by such an award, a claim must have been decided by the officer making the award to be invalid, or inferior to the claim of the person in whose favour it is made **Rewa Prasad Sukal v Deo Dutt Ram Sukal.** 27 Cal 515 P C 27 I A 39 =4 C W N 582=2 Bom L R 558

Notes—Appl 13 C P L R 81

17—Ss. 87, 88—Grant of mouza by proprietor with consent of Government in favour of grand son to the exclusion of son—Right of grandson to dispose of mouza by will —

Where with the consent of the Government the proprietor of a mouza resigned the management thereof in favour of his grandson to the exclusion of his son and as the proprietary enquiry rights are conferred on the grandson alone the mouza did not become the ancestral property of the grandson and he could dispose of it by will in favour of any of his sons to the exclusion of his other sons The latter could not claim partition of the estate **Mt Mankuwar v Pyari Lall** 3 C P L R 105

Central Pro. Land Revenue Act XVIII of 1881 *Contd.*

18—Land Revenue Act—S. 117—Land held rent free Scope of S 117.

Section 117, Land Revenue Act, has no application to land held rent free by a tenant in a malguzari village The section merely authorizes the malguzar to demand revenue from persons who should pay revenue as distinguished from rent I C P L R 30 8 C P L R 106 Ref to **Sheo Prasad v Hulasi.** I N L R 153.

19—S 117—Revenue recoverable from rent-free grants—No limitation.—

S 117 of the Act is especially intended to enable the Malguzar to recover revenue from rent free grants which he cannot resume No limitation bars the right of the Malguzar to recover revenue assessed on the land
Raja Raghojee v Ganpat Rao
1 C P L R 30.

Notes—Ref 8 C P L R 106, Not Fol 1 N L R 153.

20—Act XVIII of 1881 (C P Land Revenue) S 138—Lambardar—S 190 Contract Act—Malik Makbuza, whether bound by agreement to which he was not a party

The reference in S 138 (*a*) to S 71 of the Act XVIII of 1881 does not justify the conclusion that the duty of collecting and paying the revenue due from the *malik makbuzas* does not fall on the *lambardar*, where there is only one *lambardar* If there is only one *lambardar*, the revenue necessarily falls to be collected and paid by him, the settlement officer not required to weigh rival claims under S 71.

A *malik makbuza* must pay his revenue through *lambardar* and not to a co-sharer, any private agreement notwithstanding The maxim *delegatus non potest delegare* which finds expression in S. 190, Indian Contract Act, also applies to prevent him from binding a *malik makbuza* by an agreement to which the latter is no party. 7 C P L R 133, Fol 7 All 79 (83); 18 All 364 (365), 21 Cal 392 (400) 20 Cal 79 (85)

Central Pro. Land Revenue Act XVIII of 1881-*Contd.*

Ref. 34 Cal 51, Fol, II C W N 19 Ref, 56 L J Ch. 603 Ref **Sakharam v Soms. 5 N L R 189**

21—S 144—Village papers not called for—Right to declaration that one is not bound to furnish them—Patwari's remuneration not to be levied on land held free from payment of land revenue—

Where a person has not been called on to produce what are called village papers in the Land Revenue Act he has not any right to ask the Court for a declaration that he is not bound to furnish them He is not entitled to a decree declaring what the law is in order to meet a possible invasion of his rights *Held*, also that s 144 of the Act leaves out of contemplation the liability for payment of the Patwari's remuneration It seems to have been understood that that liability was imposed independently of the Act In fixing the amount of assessment at which the settlement of a mahal should be offered to the proprietors the Government could provide for the payment by the proprietors, of an amount sufficient for the salaries of the Patwaris but this could not be done in the case of land which was not liable to assessment Consequently the levy of Patwari's remuneration on land granted by Government free from payment of land Revenue is not legal **Gopal Hurry Bhiday v Secretary of State for India 3 C P L R 100**

22—S 152 (b), 13 (a)—Shares in a mahal imperfect partition of, by Revenue officer—order by Revenue officer for payment of revenue legality of—Civil Court jurisdiction of, to determine revenue of co sharers—Where a Revenue Officer makes an imperfect partition of shares in a *mahal*, he is not empowered to determine the respective liabilities of the co sharers for payment of the land revenue assessed on the whole *mahal*, and any order passed by him, apportioning the land revenue, *ultra vires* Where it had been so determined the Civil Court has jurisdiction over the allotment of the revenue, as amongst the co sharers, and is not debarred by the terms of s 152 (b) (13 a) of the Act from declaring the extent to which each of the co-sharers is respectively liable. **Daryao v Tukaram 1 N L R 100.**

23—S. 165 (a)—Sir land—Jurisdiction of

Central Pro. Land Revenue Act XVIII of 1881-*Concld.*

Civil Courts ousted during settlement—Decision of Civil Courts not valid—

Where a notification under the Act has been issued in respect of a district under settlement it is for the settlement officer to determine whether any particular land is sir or not and under s 152 (a) of the Act the ordinary Civil Courts are ousted of their jurisdiction in the matter If, in spite of this, a Civil Court entertains a suit and decides that a particular land is *sir* and that the plaintiff in the suit is entitled to recover possession the decree is that of a Court not having jurisdiction **Shrawan v Ragho Kunbi. 6 C P L R 17.**

Notes—Ref 7 C P L R 141, 10 C P L R 17 1 N L R 103, 6 N L R 168

Central Provinces Land Revenue Act XVI of 1889

1—Private Partition between co-sharers—creation of relation of landlord and tenant between co proprietors—When two co-sharers in a village by mutual agreement make a private partition of their respective shares and hold them in severalty, one of them can become the tenant of the other by holding land situated in the share of that other The provisions in the act relating to partition does not exclude the possibility of a valid partition of a similar kind made voluntarily by the parties themselves. If a partition can be made privately it shall put the parties to it in the same position as an imperfect partition under the act would place them, it follows that the relation of landlord and tenant can exist between the owner of one share and a co-proprietor holding land in that share. **Thakur Hazarising v Jagatsing 7 C P L R 54.**

Notes:—Ref 7 C P L R 137.

2—Mortgage by tenant—Possession of mortgagee through Court Process—Mortgagee not a licensee.

The mere fact that the mortgagee of a tenant may have been compelled to get possession through the Civil Court cannot render him a licensee of the tenant. (3 C. P. L R 9. Diss.). **Thamman Singh v Manjoo, 11 C P L R 22.**

Notes—Ref. 11 C. P. L. R. 138.

Central Pro. Land Revenue Act XVI of 1889-*Contd.*

3.—Mortgage by absolute occupancy tenant —Amount of loan unrestricted—Necessity for consent of landlord.

Where an absolute occupancy tenant mortgages his holding in such a way that the amount to be advanced by way of loan was unrestricted, the transfer required the consent of the landlord and in the absence of such consent the transfer was void as against the landlord.

Rekchand Mohta v Krishna Mali, 11 C P L R 127.

4—Grant of sub-lease by tenant—Effect of determination of tenancy on sub-lease.—

Where a sub-lease is granted by a tenant without the consent of his landlord the sub-tenancy comes to an end with the determination of the tenancy. But where a sub-lease is legally granted a voluntary surrender by the tenant does not operate to prejudice the interests of the sub-lease. 5 C P L R 120; 6 C P L R 74 and 109, 18 All 354, 23 W R 281, Ref. **Diwan Maharajsha v Abheram Gujar. 11 C P L R 5.**

Notes:—Rel: on 3 N L R 162; Ref: 12 C P L R 168, 2 N L R 170.

5—Lease from absolute occupancy tenant—Lease deed not registered—Right of lessee to sue for possession.

In the absence of a contract to the contrary a tenancy from an absolute occupancy tenant would be presumed to be from year to year and the tenant would be entitled to resume possession on the expiry of the lease. Consequently a sub-tenant from such occupancy tenant could not sue for possession bearing his title on an unregistered lease. **Hanmant Rao v Narain, 4 C P L R 173.**

6—Sale of occupancy tenure without landlord's consent—Right of landlord to sue for possession from purchaser.

A sale of an occupancy tenure made without the consent of the landlord is void as against him, and the landlord is entitled to sue for the possession of the land sold by the occupancy tenant and occupied by a stranger. The latter cannot plead that he holds under the occupancy tenant who had sold him the tenure, for their interests are adverse to each other and the stranger cannot resist the landlord's suit for possession. **Chandrabhan v Deochand. 4 C P L R 172.**

Notes.—Ref: 6 C P L R 49.

7—Sir land—Loss of its character as sir for want of occupation.—

In consequence of the alteration made in the definition of the term *sir* land by s.5 of Act XVII of 1889 it is necessary in order that land may lose its character as *sir* for want of occupation, that it should have remained unoccupied for six consecutive years before the land Revenue Act came into force. **Nana Patel v. Mulla, 8 C P L R 72.**

8.—Ss. 22, 136, H—As amended by Act (XVI of 1889), ss, 22, -136-H (1)—Act II of 1904 repealed by Bengal Act IV of 1906—Second Appeal —Application for partition—Decision of Deputy Commissioner—Appeal to Commissioner-Second appeal to High Court, whether maintainable.

An application for partition was dismissed by the Deputy Commissioner, Sambalpur. An appeal from that order was preferred, to the Commissioner who dismissed it. A second appeal was filed in the High Court. *Held*, that, under s. 136-H (1) of the Central Provinces Land Revenue Act as impliedly amended by Bengal Act IV of 1903, the appeal from the Deputy Commissioner lay to the District Judge, but as it was wrongly preferred to the Commissioner, the appellant lost his remedy, and the second appeal was incompetent. **Raghunath Singh v, Abdhut Singh, 9 Ind. Cas 202=13 C L J 412.**

9—Ss. 28, 33, 36—Notification of settlement —Jurisdiction of Civil Courts to entertain suit under S. 57 of Tenancy Act.—

Where a notification of settlement under S. 28 and not under S. 33 or 36 is issued by the Chief Commissioner the Jurisdiction of the Civil Courts is not ousted in respect of a suit under S. 57, sub-s. (2) of the Tenancy Act, whether or not incidentally there may arise in the suit a question regarding a matter which a settlement officer is required to decide or to enter in the record of rights. **Manbodh v. Asai, 10 C P L R 17.**

10—S. 49—Remission of land Revenue—Effect on proprietors.—

Central Pro Land Revenue Act XVI of 1889-*Contd.*

The remission of land Revenue by Government cannot affect respective right and liabilities of superior and inferior proprietor.

Rao Raghunath Rao v. Baboo Tataiya Naidoo, 11 C P L R 106.

11—Ss. 65, 118—Suit to enforce charge under S. 65—Limitation.—

The limitation provided in S. 118 applies to a suit to enforce a charge mentioned in S.65. (10 C P L R 4 Ref:) **Khemchand v. Dhanraj Kirar, 16 C P L R 52.**

12—S. 65A—Ejectment Proceedings—Order of protection—Suit for thika jama — Accrual of cause of action.—

An order declaring a person to be protected under S. 65A of the Act as a retrospective effect inasmuch as the object of the section has been to provide for the protection of the thikdars and gaontias against arbitrary enhancement or ejectment. The cause of action for a suit by the proprietor to recover thika jama for the period during which his ejectment proceedings were pending accrues from the date of order of protection. (12 M I A 244 Fol:). **Tulsi Ram Bapu v. Mt Janku, 16 C P L R 33.**

13—Ss. 65 (a), 152 (a)—Exercise of Power by Settlement Officer — Bar of jurisdiction of Civil Courts.—

Where a Settlement Officer is empowered to dispose of a particular matter under the provisions of s. 65 (*a*) the jurisdiction of the Civil Courts is barred by s. 152-(*a*). **Rao Sadashiva Rao, Malguzar v. Girdhari, 9 C P L R 33.**

14.—Ss. 71, 138, 140—Liability of lambardar to pay revenue to Government—Legality of private arrangement among co-sharers to collect and pay revenue,

A malik-makbuza does not pay rent to the proprietors. His land is separately assessed with revenue in a Mahal and it is quite clear, reading ss, 71, 138 and 140 together, that save in the exceptional case of his being ordered under the provisions of the last of those sections to pay the revenue assessed on his holding direct into the Government treasury he must pay it through a lambardar or a sub-lambardar. A lambardar or a sublambardar cannot delegate the duty of either collecting or paying in the revenue to any other co-sharer. Consequently a private arrangement among co-sharers that each should collect the revenue payable by those malikmukbuzars whose land is situated within his own share is illegal.

Baboo Singh v. Daxin. 7 C P L R 133.

Notes:—Fol. 5, N, L R, 189.

15,—S. 72.—Entry in record-of-rights—Presumption as to correctness of entry—Burden of proving its incorrectness.

An entry in the record of-rights relating to a holding would not be an " award, " it would be merely a statement as to a condition of facts which in the course of his inquiry under the provisions of s.72,the Settlement Officer had ascertained and the only legal effect of it would be that it would be a piece of evidence,not conclusive in itself, but carrying a presumption of correctness until the contrary was shown. The burden of proving the incorrectness of such an entry would lie very heavily on a person who disputed its correctness.

Lachman Ram v Bhimsen. 10 C P L R 33.

Notes:-Dist. 14 C P L R 31; Fol: 2 N L R 65.

16,—Ss. 72, 74, 152 (9)—Muafi Khairati—Record by Settlement Officer—*Suit* for declaration that record had been wrongly made—Maintainability of.

Where the Settlement Officer acting under the powers conferred on him by s. 72 of the Act recorded certain land as defendant's *muafi khairati* a suit was maintainable for a declaration that the entry had been wrongly made.

Muneerkhan v Mangal Khan. 11 C P L R 129.

Notes:- Ref: 2 N, L R, 65.

17.—Ss. 72, 78, 152—Pendency of settement—Suit to eject tenant for default of agreeing to pay enhanced rent—Plea by defendant that he is occupancy tenant—Jurisdiction of Civil Court not ousted.

A Civil Court is not deprived of the jurisdiction to entertain a suit instituted under s. 57 of the Tenancy Act to eject a tenant who is recorded in the Jamabandi as an ordinary tenant, in default of his agreeing to pay an enhanced rent merely because that the defendant pleads that he

Central Pro. Land Revenue Act XVI of 1889-*Contd.*

is an occupancy and not an ordinary tenant.

Mukundram Shukal v Lalsing Rajput. 9 C P L R 41.

18.—S.83-Entry in record of rights—Conclusiveness thereof.

An entry in the record of rights relating to a holding made in the course of an enquiry under s. 72 is final and conclusive unless and until it is cancelled or amended in the manner provided by s. 83 of the Act. **Lachman Singh v Bhimsen 10 C P L R 33.**

Notes.—Dist: 14 C P L, R 31, 2 N. L R 65.

19.—S. 83—Suit *re* entry in record of rights—Documents to be filed with and prayer in plaint.

Where a suit is brought to have the decision of a Settlement Officer set aside or to have an entry made in the record-of-rights cancelled or amended, a certified copy of the decision or of the entry should be filed with the plaint and the precise nature of the relief asked for should be clearly stated. **Mt Maina v. Ramkrishna. 13 C P L R 140.**

20.—S. 87—Awards of proprietary rights at the settlement, legal effect of the grant of.

The award of proprietary rights at the time of the settlement, did not have the effect of conferring, on the grantee, any rights new and not pre-existent;nor did it take away,from the grantee, rights obtained and held otherwise than through the award. The effect of the award was to make the estate heritable and alienable, but these new incidents of tenure were only to be enjoyed side by side with any restrictions imposed by the personal law of the holder. If, for instance, an estate was self-acquired in the hands of a man, it remained self-acquired:and if it was *stridhan* in the hands of a woman, it continued to be *stridhan*. So when any question arises as to the devolution of property or as to the power of alienation, it is necessary to go behind the grant and to see what the position of the grantee was prior to the award and to ascertain the nature of the pre-existing rights in the grantee. **Nilkanth Rao Udhoji v. Sambhoo Mali, 2 N L R 1.**

21—S. 87 — Award of proprietary rights on widow — Effect of award on rights otherwise acquired by her.—

S. 87 of the Act does not make it compulsory on the Court to hold that a widow on whom proprietary rights have been conferred possesses only a widow's estate. An award of proprietary rights does not take away from her right obtained otherwise than through the award and already possessed by her. **Ram Charan v. Jagannath, 12 C P L R 143.**

Notes:—Agreed: 2 N L R 1.

22—S. 87—Settlement with two sisters one of them a widow—Nature of estate conferred on widowed sister-Her right to mortgage her share.—

Where the proprietary right in an estate was conferred at a settlement upon two sisters one of them being a widow at the time, the rights conferred upon the widowed sister were those only which, under the Hindu Law, she would enjoy in land inherited by her from her husband and consequently she could not mortgage her share in the estate so as to prevail against her sister's son. Though in practice hereditory claims were recognized to a very great extent, the actual rights were not inherited, but were conferred at the settlement. **Narain Sing v. Mt Rewa, 6 C P L R 154.**

Notes—Ref: 8 C P L R 102; 13 C P L R 81.

23—S. 87—Settlement in name of a co-widow—Act no bar to succession by heir of original owner on widow's death.—

Where at the settlement proprietary rights were conferred on one of the co-widows of a deceased owner in preference to his adopted son, the case was governed by s. 87 of the Land Revenue Act on the death of the widow the settlement-award was no bar to the devolution of the property on the adopted son, her husband's heir, who would dispute any alienation made by the widow in contravention with the provisions of the Hindu Law. (6 C P L R 154 Fol·)
Nilkant Rao v. Tukaram, 8 C P L R 102.

Notes:—Ref: 14 C P L R 94; 13 C P L R 81.

24—S. 116—Payment by lambardar of entire revenue—Right to recover for assignee of defaulting co-sharer proportionate amount of revenue so paid.—

Central Pro. Land Revenue Act XVI of 1889-*Contd.*

Where a lambardar paid the entire revenue due in respect of a mahal he could not recover from the assignee of a defaulting co-sharer, the proportionate amount payable by such co-sharer. (14 Cal 809, 14 All 273; 11 Mad 452 Ref:)
Balaji Sonar v. Govinda, 11 C P L R 111.

25—S. 117—Sale of sir land by malguzar—Liability of purchaser to pay revenue assessed thereon.—

Where a malguzar sold out and out his *sirland*, s. 117 of the act applied and the purchaser was liable to pay the revenue of which it was assessed and which the malguzar had to pay. (1 C P L R 80 Ref:) **Raghoba v Raghoba, 8 C P L R 106.**

Notes:—Ref: 6 N L R 27; Not Fol: 1 N L R 153.

26—Ss. 121, 139 -Proprietor, meaning of.—

The term "proprietor" in s. 139 of the Act means not only the proprietor in the strictest sense of the term but also any person who has lawfully entered into possession of proprietary rights and who is for the time being the representative of the proprietor.
Thakur Maharaj Singh v. Jagannath Murlidhar, 11 C P L R 15.

27—Ss. 136, 152—Private partition interference by defendant with possession of the plaintiff —Plaintiffs' right to sue for declaration of title to lands interfered with.—

Where there had been a private partition by metes and bounds of a village of which the plaintiffs were co-sharers as malguzars and possession of the different shares remained with the persons to whom they were respectively allotted until some of the defendants interfered with the arrangement by suing some of the plaintiffs' tenants a suit by the plaintiffs that the suit specified in the plaint should be declared to be their separate fields and possession of those fields should be given to them was not barred by Ss. 136 & 152 of the Act, as there was no question of suing or applying for the partition, perfect or imperfect, of a mahal, or of any question of the distribution of the land, or allotment of the revenue of the mahal by partition.
Sujanmal v. Mt Bhaga Bai, 6 C P L R 103.

28—S. 136-G—Sirland objection to partition

Central Pro. Land Revenue Act XVI of 1889-*Contd.*

on ground of prior partition—Objection relating to question of title.—

Where the partition of *sirland* has been objected on the ground that the land has been enjoyed in severalty in virtue of a partition the objection falls within the meaning of s. 136-G of the Act. **Govind Rao v. Narayan Rao, 17 C P L R 129.**

29.—Land Revenue Act-Section 136 G.-Partition of Landed property-Objection to partition —Claim for improvement—Title—Question of title.

An objection to a partition which takes the form of a claim for improvements is an objection of raising a qustion of title within the meaning of S. 136 G. of the Land Revenue Act. It is difficult to define the expression "question of title" as used in S. 136 G; it means and includes any objection which, unless and until such objection were settled, would debar a Deputy Commissioner from making the partition. 15 C P L R 153; 2 All 619, 23 All 271; 9 All 388; 18 All 210, 10 C P L R 37 & 40 ref to. **Seth Birdhi Chand v Mt Kaini Bi. 17 C P L R 5.**

30.—Section 136 G.—Valuation suit for partition-Jurisdiction of S. 36 G, explained,

The value for the purposes of jurisdiction of a suit for partition is not the value of the entire property but the value of the share in respect of which partition is sought. Under S. 136 G. if a non-applicant in a partition proceeding raises any question of title or proprietary right, two courses are open to the Revenue officer. He may either stay the proceeding and refer the parties to the Civil Court or he may as a revenue officer proceed to inquire into the merits of the objection. But if he elects to take the latter course he does not thereby convert himself into a civil court, and it is perfectly immaterial whether he has or has not been invested with powers under the Civil Courts Act. He is bound to observe the procedure laid down in the C P C for the trial of original suit (8 Cal 157; 17 Cal 680, 12 All 506, 20 Mad 289; 8 Bom 31; 22 Bom 315 ref to.)
Jafar Hussen v Abdul Kadar. 15 C P L R 81.

31—Scope of — Rights of co-sharers after partition.—

Central Pro. Land Revenne Act XVI of 1889-*Contd.*

S. 136-N of the Act is a rule for the guidance of the partitioning officer, not a rule for the guidance of the Courts in determining the rights of the parties after partition. After partition the mutual rights depend on the partition and the intention of the partitioning officer as evidenced by the partition proceedings. The section does not refer to the wish of the co-sharers or give them an option in the matter of effecting partition. (10 C P L R 6 Diss:) **Bisandas Marwari v. Bhagwant Atmaram, 12 C P L R 137.**

32—Ss. 138 & 139—Lambardar—Right to collect remuneration summarily—right to recover by ordinary means money spent for management of village.

The remunertion to which a lambardar is entitled as such is simply the remuneration provided by s. 137 for the performance of his statutory duty defined in s. 138. Besides this remuneration, which he is empowered to recover summarily, a lambardar has a right to recover from the co-proprietors by ordinary means their quota of sums which he spends properly and necessarily for the general management of the village on behalf of the proprietary body. (2 C P L R 110, Dist.) **Tatya Patel v. Dhundiraj Paetl, 11 C P L R 27.**

33—Land Revenue Act (C P Act XV of 1889) —S.151—Award of Collector under—Subsequent reference to the Court under the Land Acquisition Act, S. 10 whether could be made.

Held, there is nothing in the Act restricting the jurisdiction of Civil Courts to determine the compensation payable under S. 151. The intention of the section, clearly, is that those povisions of the Land Acquisition Act, which relate to the making of an award, including the reference to the Court, shall be applied in the matter of the determination of the compensation payable under the section. **Govind Rao Badkas v. Collector of Nagpur. 2 N L R 172.**

34—S. 152 (a)—Notification announcing settlement of a District during pendency of suit to recover sir-land in that District—Jurisdiction of Court over suit not deprived by notification.

Where subsequent to the institution of a suit to recover possession of sir-land a notification was issued by the Chief Commissioner of the Central Provinces declaring the District, in which the property was situate, was under settlement, the notification did not under s. 152, cl. (*a*) of the Act deprive the Court of jurisdiction over the suit. (14 Bom 516, Dist.) **Idu Miyan v. Bala Kunbi, 8 C P L R 21.**

Notes—Cited, 16 C P L R 122.

35—Co-sharer—Right of, in the matter of effecting partition.

S. 152 (*b*) (13-*a*) does not refer to the wish of a co-sharer or give him an option in the matter of effecting a partition. It refers to the action of the Deputy Commissioner when making the partition **Bisandas Marwadi v. Bhagwant Atmaram, 12 C P L R 137.**

Central Pro. Land Revenue Act XII of 1898.

1.—Sections 69 and 83 and 132—Entry of Settlement officer's record—Sirland—Suit for the reversal of an entry of the settlement officer.

Subject to the result of a suit instituted under Section 83 of the Land Revenue Act an order or entry of a Settlement officer recording or omitting or refusing to record any land as sir land under sub-section (1) of Section 69 is final. **Kodoo Rao Patel v Baxi. 15 C P L R 12.**

2.—S. 182—Jurisdiction of Civil Court to apportion revenue of Mahal. **14 C P L R 107.**

Central Provinces Laws Act XX of 1875.

1.—S. 5 — Pre-emption—Applicability of —Mahomedan Law where all parties are Mahomedans.

Notwithstanding the provisions of s. 5 of Act XX of 1875 the rule of Mahomedan law as to pre-emption should be applied on grounds of equity where the pre-emptor, the seller and the purchaser are all Mahomedans **Must Sahibbee v Bannoo Mian, 2 C P L R 231.**

Notes.—Ref; 7 C P L R 117.

Central Provinces Municipal Act (XVI of 1903).

1.—Ss. 66. 67.—Municipal Act, construction of—Statutory powers of—How to be exercised—Abuse of power—Effect—*Central Provinces Municipal Act*.—Power of Committee, President or Vice-President—Power to impose conditions on owners of lands to ensure safety—'Projection law fully in existence,' meaining of—Power to remove—*Compensation*—Notice under Ss.66 (5) and 153 (3) S.88—Rebuilding a building, what is—Discretion exercised by Municipal Committee when can be interfered with by Civil Courts.

A public body like a Municipal Committee investsd with statutory powers must take care not to exceed or abuse their powers. They must rigidly keep within the limits of the authority committed to them. If they act beyond their powers,they have to make compensation to the person sustaining damage by reason of their unlawful proceedings.

An Act like a Municipal Act, which touches the private rights of individuals, must be most carefully construed "without unwarrantable severity on the one hand or unjustifiable lenity on the other."

Any action to be taken or order to be passed or notice to be issued in the exercise of powers conferred by the Central Provinces Municipal Act, 1903, must be taken, passed or issued, respectively by the Committee, by means of a resolution passed at a meeting convened and conducted under Ss. 15 to 19 inclusive. But, in cases of emergency, the President, or, in his absence or during the vacancy of his office, a Vice-President, may direct the execution of any work or the doing of any Act, which the Committee are empowered to execute or do, and the immediate execution or doing of which is, in his opinion, necessary for the service of safety of the public; under S.66 no power is given to a Committee absolutely to deprive owners of the legitimate use of their lands, but the Committee can only impose conditions to ensure the safety and sanitation of the building and suitability of its structural appearance relatively to neighbouring buildings, and also to conserve the health, safety or convenience of the public, or of persons dwelling in the vicinity. Under S. 67, a Committee cannot require any projection or structure over any public drain to be removed, if the projection or structure has been lawfully in existence at the date of the commencement of the Act, without making reasonable compensation for damage caused by such removal. But power of removal of projection without compensation is limited to cases of altogether new structures, and does not extend to structures taking exactly the place of pre-existing structures. Any projection, in the absence of ony rule declaring it a public or common nuisance under the former Act, and in the absence of any action by way of civil proceedings for its removal by the Committee, must be held to be lawfully in existence. Before a Committee can acquire a power to pull down a building erected or re-erected in violation of the provisions of S. 66,it must give,a notice to remove under sub-S.(5), and also a second notice under S. 153 (3) if the first notice is not complied with.

Central Pro. Municipal Act XVI of 1903-*Concld.*

The exercise of its discretion by an authority like a Municipal body, in respect of a matter within its jurisdiction, when that discretion has been honestly and *bona fide* exercised, cannot be controlled by an action in Court. But if the discretion is capriciously or perversely exercised,and injury results to the plaintiff, he may then have a cause of action, and not till then. Where, a *chapri* was in existence for 20 years, and plaintiff took down the roof and the posts, and after fixing new posts, put back the roof in its old place, *held*, the renewal of the old posts, and then to put back the roof in its old position can scarcely be called re-building. (1905) L J Ch,629. 27 Bom 221 (227). Ref:23 Bom 248. 25 Cal 160 & 21 Mad 4,Ref: 66 L J Q B 427 (433, 434); (77 L J Q B 61) 25 Mad 118 (133); 26 Cal 811 (815) and 22 Bom 230 (233). 28 All 199 (201): 12 Q B D 224 and 18 Bom 547 Ref.

Ramdularay v Chhindware Municipality. 6 N L R 53.

Central Provinces Rent Law (Act IX of 1883).

See Central Provinces Tenancy Act IX of 1883.

Central Provinces Tenancy Act (IX of 1883).

1.—Agricultural tenancy, devolution, of—Applicability of Hindu Law,

Central Pro. Tenancy Act IX of 1883-*Contd.*

Agricultural tenancies in Central Provinces are created by contract and statute, and their devolution is governed by the same statue. The Tenancy Act does not recognize right of survivorship, the vesting of a son's interest by birth, and so on. In the case of Hindus, the Courts, in dealing with agricultural holdings, will follow the Hindu Law of inheritance so far as it may be consistent with the principles of the Tenancy Act and no further. **Ghanya v Ukund Rao. 4 N L R 9.**

Notes.—Fol: 5 N L R 103; Ref: 5 N L R 117; Rel on: 5 N L R 172.

2.—Letting of land by Malik Makbuza—Nature of relationship created.

Where a Malik Makbuza let his land to another person the relationship between them was that of landlord and tenant within the meaning of the Tenancy Act. **Kahir v Onkar. 5 C P L R 46.**

3.—Inam, grant of-Grant right to collect revenues from certain villages—Tank, ownership of, whether covered by grant—Prescriptive right to use water to the extent of irrigation—Water-cess, levy of—Enfranchisement of inam—Settlement by Inam Commissioner as to the appropriation by Government—Water-cess for tirva jasti, legality of—Cess paid under fear of distraint—Right of recovery—Assignment.

The grant by Government of an *inam*, whereby the *inamdar* is to collect the revenues of property, covered by the grant, does not, in the absence of express words to that effect, convey any absolute right to any tank therein.

The water rights, however, that pass by implication with such grant amount to undertaking by the grantor not to refuse to *ryots*, holding *nanjai* lands the quantity of water necessary to enable them to irrigate their lands and so to pay the revenue which they had paid to Government before the grant.

The Government is, however, entitled to levy water-cess on a supply of water larger than is proved to have been the customary distribution to the *ryots*.

Where, on the date of the enfranchisement of an *inam*, the *Inam* Commissioner fixed the basis of the income and undertook that Government would not take more than a fourth of the income derived from the various sources taken into account.

Held, that it amounted to an engagement between the Government and the *inamdar* whereby the former undertook to content itself with one-fourth of the *faisal jasti* and *tirva jasti* on the average area then chargeable with those payments and it was illegal to levy further charge for water on that area.

Where a cess not legally payable was collected by a threat of distress in case of default: *Held*, that the person paying was entitled to recover the amount thus paid even though the payment was made before actual seizure of the property and the threat administered fell short of coercion as used in the Indian Contract Act. **25 Mad 548** Ref; 17 Cal 341; 19 Mad 306 Fol. **T. Lutchimee Doss v The Secretary of State for India. 6 M L T 242=19 M L J 470=32 Mad 456=3 Ind Cas 456.**

4—Wazibul-arz—Clause empowering Malguzar to prevent tranfer or building in village abadi—Applicability to towns.

Where a wazibul-arz contains a clause empowering the Malguzar to prevent any one from transferring house property or building a new house in the village abadi the clause does not apply to towns, bazaars and marts, but applies only to village site, the land made available by the Malguzar in villages for the ryots to build their houses on and which he is bound to furnish. **Debi-Parsad v Jawaharmal Nathamal. 5 C P L R 76.**

Notes—Ref: 12 C P L R 146, 8 C P L R 29, 16 C P L R 81.

5—Possession of land by landlord after unlawful ejectment of tenant—Rights of landlord to retain land as sir.

Where a landlord unlawfully ejected a tenant from his holding he could not be said to have occupied the land so as to give him the advantage of retaining it as *sir* land. **Shriram Sitaram v Gattaji. 5 C P L R 84.**

6—Claim for arrears of rent not to be joined with money claim.

Central Pro. Tenancy Act IX of 1883-*Contd.*

A claim for arrears of rent should never be joined in the same suit with claims for money.

Jagannath v Rambax. 5 C P L R 90.

7—Purchase of absolute occupancy rights by mortgagee in possession—Validity of purchase as against all but landlord.

The plaintiff was mortgagee in possession of a mouza for a number of years, while holding the village he purchased the absolute occupancy rights in certain fields. Subsequently he leased these fields to defendant for one year. Plaintiff now sued to recover possession from defendant whom he declared to be his sub-tenant. The mortgage had come to an end. The defendant denied that he was a sub-tenant and assented that he had obtained the fields from plaintiff as representing the malguzar. *Held* that the purchase of the occupancy tenure by the plaintiff was valid as against all others than the landlord and consequently the defendant could not call in question the plaintiff's rights as derived from his purchase.

(5 Cal 198, Ref.) **Balkrishen Seth v. Nandu.** 5 C P L R 105.

Notes—Ref: 10 C P L R 103.

8—Mortgage by tenant—Right of landlord to oust persons in possession by license from tenant.

The tenants have no power to mortgage their holding so as to bind the landlord without his consent, but all that the landlord is entitled to is a decree declaring that the mortgage executed by the tenant is void against him. He need not recognise the mortgagees or their sub-tenants as his tenants, but as long as the original tenancy subsists, he has no right to enter and oust persons who are on the land by license from the tenant.

Chhatersing v Narayen. 3 C P L R 70.

Notes—Ref., 11 C P L R 22.

9—Mortgage by occupancy tenant—Right of mortgagee as against landlord.

Where an occupancy tenant mortgaged his holding the mortgage could not prevail against the Malguzar or against the tenant holding directly from him. **Tallappa v Baloo.** 3 C P L R 121.

Central Pro. Tenancy Act IX of 1883-*Contd.*

9A—Right to residence of non-cultivating tenant in village abadi.

It is only the tenant who cultivates the Malguzar's lands that has a right to a residence in the village *abadi*. The Malguzar is not bound by any customary law to allow the cultivators of villages belonging to another malguzar to reside in that *abadi*. **Laxmanrao v Ganpatrao.** 3 C P L R 123.

Notes—Principle Appl., 16 C P L R 81.

10-Possession of "sir" land by Malguzar's son with another—No payment of rent—Land not unoccupied within meaning of Act.

Where the Malguzar's son held a "sir" land along with another and no rent was entered as payable the Malguzar retained possession of the land. Under the circumstances the land was not unoccupied by the proprietor within the meaning of the Tenancy Act. **Sobha v Bhondu Miya.** 3 C P L R 139.

11--Malguzar letting his share on theka—Possession of land by tenant for more than 6 years—Termination of land as "sir" land.

Where a Malguzar let his share of the village on Theka and the land was held by a tenant for more than 6 years the land ceased to be sir-land and the tenant became an ordinary tenant and not a sub-tenant. **Dhundiraj v Tukoo Gouli.** 3 C P L R 146.

12-Right of tenant to effect mortgage by conditional sale.

Though the terms of a Wajib-ul-arz may not allow a mortgage by conditional sale, it has generally been held that such a mortgage can be made by a tenant. **Dallu Patel v. Madho Patel.** 3 C P L R 158.

Notes—Ref: 10 C P L R 42.

13-Cultivation of land by landlord with another—Partner not a tenant.

Where a landlord himself takes a part in the cultivation of his land, the person associated with him therein and who gets a share of the produce as his remuneration is not *ipso facto* a tenant within the meaning of the Act. **Kishan Sukal v Jaiwant Rao Misar.** 3 C P L R 180.

Central Pro. Tenancy Act IX of 1883-*Contd.*

14—Transfer of tenant-right—Right of landlord to eject transferee.

By attempting to transfer his holding by mortgage a tenant does not lose his rights. The transfer is void as against the landlord and therefore the tenant-right remains. Thus when a mortgagee of the tenant is in possession he is in possession under a license from the tenant and the landlord cannot be allowed to turn him out. But if the tenant sells his holding outright the purchaser does not hold as licensee of the tenant, but holds against him and the landlord in consequence is entitled to oust the purchaser. Similarly if the mortgagee has ejected the tenant in execution of a decree obtained against him on the mortgage the mortgagee does not hold as licensee of the tenant and consequently the landlord is entitled to eject the mortgagee. **Govinddass Bania v Madho Prasad.** **3 C P L R 9.**

Notes—Fol., 6 C P L R 49, 7 C P L R 20; Ref. 9 C P L R 101 ; Diss., 11 C P L R 22.

15—Cultivation by absolute occupancy tenant in partnership with his relations—Acquisitions of occupancy rights of relations.

Where an absolute occupancy tenant cultivates his land in partnership with his relations the latter do not cultivate as tenants so as to acquire occupancy rights. In most cases a right of occupancy cannot be acquired in land sub-let by an absolute occupancy tenant. It is not possible to decide the question satisfactorily without knowing whether the occupancy tenant had acquired an occupancy right under Act X of 1859.
Mt Kashi v Ramchand. **4 C P L R 33.**

16—Land held from Government in lieu of services as village servant.

Holder of land or holder from him cannot acquire occupaney right. Where land is held from Government revenue or rent free in lieu of services as a village servant the holder of the land is not a ryot and cannot acquire an occupancy right in the land. He is bound to quit the land on the termination of his service. Consequently no tenure can be created by or can arise under him, which will last beyond the term of his service. Therefore a person holding from such a person cannot acquire any occupancy right in the land.
Gadai Sahu v Bandhu Gonda. **4 C P L R 36.**

Central Pro. Tenancy Act IX of 1883-*Contd.*

17—Right of owner of house to pull down and re-build-Right of mulguzar to appropriate vacant site on house being pulled down.

The owner of a house in a village has a perfect right to pull it down and build it up again and a mulguzar cannot appropriate the site of a house when it has become vacant owing to the house being pulled down in order to the erection of a new one. **Deorao Deshmukh v Tukaram.** **4 C P L R 40.**

Notes—Ref: 16 C P L R 81.

18—Occupancy tenure—Mortgage without landlord's consent—Right of landlord to set aside mortgage.

A landlord is entitled to ask for a declaration that a mortgage of an occupancy tenure made without his consent, did not affect his rights and for the cancellation of the mortgage-deed.
Kashiram v Behari Dube. **4 C P L R 49.**

19—Cultivation by tenant with another—No acquisition of occupancy rights by that other.

Where land is cultivated by a tenant with another the latter cannot by such cultivation acquire occupancy rights therein. It is the tenant, and not a person who may with his permission cultivate with him, that acquires occupancy rights. So where the father first held the land. and on his being ejected, the son held it the latter could only count, for the purpose of acquiring an occupancy tenure, the time during which he himself has held the land. **Daya v Nand Ram,** **4 C P L R 53.**

20—Simple occupancy tenant — Right to mortgage his holding.

A simple occupancy tenant cannot without his landlord's consent mortgage his holding so as to bind his landlord. **Narayandas v Gulabchand,** **4 C P L R 59.**

Notes—Ref.. 11 C P L R 22.

21—Transfer of tenant's interest—Building house in abadi with consent of malguzar—No right to builder to sell house and site on leaving village.

Where with the consent of the malguzar a person builds a house in the *abadi* he does not acquire a right in the site and cannot sell the house with

Central Pro. Tenancy Act IX of 1883-*Contd.*

the site to another on his leaving the village. **Thakur Nibalsing v Thakur Sardarsing. 3 C P L R 7**

Notes—Ref., 12 C P L R 146; 16 C P L R 81.

22—Purchase of Malik Makbuza land by Malguzar—Position of Malguzar in respect of land purchased.

Where a Malguzar purchases Malik Makbuza land he is not a Malik Makbuza in respect of that land after his purchase. A man cannot be at the same time a Malguzar and a Malik Makbuza. **Wasudeo Bhasker v Sheoram, 6 C P L R 82.**

Notes—Diss: 4 N L R 2. Ref: 6 C P L R 107.

23—Determination of tenancy—Right of sub-tenant to become tenant under Malguzar.

Where a tenancy is determined the sub-tenancy which is granted upon it is necessarily determined also and the sub-tenant cannot become a tenant under the Malguzar except under a contract of tenancy entered into directly with him. **Bhopalsing v ThakurBorelsl 6 C P L R 74.**

Notes—Ref: 2 N L R 29; 11 C P L R 5.

24—Transfer of tenancy to stranger—Suit by landlord against transferee and original tenant—Right of transferee to obtain possession.

Where there has been an out and out transfer by a tenant of his holding in a suit by the landlord against the transferee, a stranger, and the original tenant the landlord cannot get possession of the property, but he will be entitled to posression, if the tenant has not been a party to the suit. (3 C P L R 9 Fol. 4 C P L R 172 Dist.) **Tarachand Mohkumchand v Sambha. 6 C P L R 49.**

Notes—Fol. 13 C P L R 39; Ref: 7 C P L R 20; 9 C P L R 13 and 101, 15 C P L R 17.

25—Malguzar a lessee—No claim for renewal of lease.

According to history regarding the tenure of land in the Nagpur province a Malguzar was synonymous with a lessee and leases were given for short periods. The rights of a lessee did not extend beyond his lease and he could not claim a renewal. **Vitoba v Laxamangir 6 C P L R 19.**

Notes—Ref., 13 C P L R 81.

Central Pro. Tenancy Act IX of 1883-*Contd.*

26—Mortgage by conditional sale before Act—Foreclosure after act—Amount of value, payable by landlord.

Where a mortgage by conditional sale made before the passing of the Tenancy Act is foreclossed after the passing of the Act and the sale made absolute, the value which the Malguzar, a landlord, must pay if he wishes to take the holding is the value that a revenue officer may fix. **Ramchandra v Mithulal Hemraj, 6 C P L R 10.**

Notes.—Ref: 9 C P L R 30.

27—Wajib-ul-arz—Right of owner of house to transfer and of purchaser to re-build.

In the absence of a provision in the Wazib-ul-arz to the contray the owner of a house in a place like Harda may transfer it and the purchaser may enlarge or re-build it. **Debi Prasad Saligram, 5 C P L R 124.**

Notes.—Ref: 8 C P L R 29.

28—Mortgage of occupancy tenancy before Act—Possession by mortgagee—Disappearance of tenant for long time and no succession to him—Right of owner to sue for possession.

Plaintiff a sharer in a mouza sued for possession of a field. The defendant claimed to hold possession as mortgagee of the occupancy tenant. The mortgage was created before the passing of the Tenancy Act and in favour of a person who at that time held the share in question from a widow, who had only a life interest and on whose death it passed to the plaintiff. The occupancy tenant had not been heard of for many years and was considered to have been dead. *Held* that as the occupancy tenant had disappeared and no one whom the law recognised as entitled to inherit from him had succeeded him the plaintiff as owner and landlord was entitled to take possession of the field. **Kushabai v Rewaram. 5 C P L R 120.**

Notes.—Ref. 11 C P L R 5.

29—Tenant of Muafidar—Possession for less than 12 years—Status as sub-tenant.

Where the tenant of a Muafidar did not hold the land for 12 years when the tenancy Act came into force he would be considered as a sub-tenant. **Ramchandra Rao v. Balaji. 5 C P L R 110.**

Notes.—Ref. 6 C P L R 92 and 101.

Cantral Pro. Tenancy Act IX of 1883-*Contd.*

30—Adverse possession by occupancy tenant holding land of another.

Where one occupancy tenant takes the land of another the former can hold adversely to the latter. **Narayan Singh v Babu Singh. 2 C P L R 197.**

31—Grant of sir land to Mukhtar—Grantee not an ordinary tenant—Possession by virtue of agency.

Plaintiff was engaged by the defendants as their Mukhtar and was given some *sir* land rent free for his services. The Mukhtarnama said that the land was interested to the plaintiff in lieu of salary and that as long as he was defendant's Mukhtar the defendants would not disturb his possession. *Held* that the relation of landlord and tenant was not created among the parties as contemplated by Act IX of 1883. Plaintiff was not an ordinary tenant within the meaning of the Act and he could not be ejected if he did not render service on the ground that he had not paid his rent. The contract was one for discharge of certain services and not for letting and hearing. Plaintiff's holding was by virtue of the agency. **Lalla Lachman Singh v Hajiram 1 C P L R 182.**

Notes.—Diss: 15 C P L R 42 ; Ref. 3 N L R 185.

32—"Sir" land—No express reservation of "sir" rights—Effect of passing Act on nature of tenancy.

Where before the Tenancy Act came into force lands were let without express reservation of "sir" rights, on the passing of the Act they ceased to be "sir" and the tenant became an ordinary tenant liable to be evicted only for reasons mentioned in the Act. **Madho Rao Gangadhar v Dasru Kunbi, 1 C P L R 123.**

33—Suit to eject tenant to be instituted before commencement of agricultural year.

A suit to eject a tenant under the Tenancy Act must be actually instituted on a date which is not less than ten weeks before the first of June on which day the agricultural year commences. **Vinayak Jageshwar v Madho 1 C P L R 99.**

34—Tenancy for five years—Holding over by tenant during sixth year—Notice to quit before the end of sixth year—No proper determination of tenancy—Determination of land as sir.

An ordinary tenant shall, notwithstanding any contract to the contrary, continue to be an ordinary tenant until the tenancy is terminated in due course of law. So where the tenant who had obtained a lease for five years, of a *sir* land continue to hold on during the sixth year and a notice to quit was given by the landlord before the end of the sixth year, there was no proper determination of the tenancy at the end of the fifth year and the tenant having occupied the land as an ordinary tenant for the sixth year, the land ceased to be *sir*. **Kasai v. Jairam. 2 C P L R 195.**

35—Suit for mutation of names—Maintainability of.

A suit for mutation of names will not lie as a Revenue Officer alone has power to make mutation and a suit cannot be brought against him to compel him to do so. **Paikoo v Jairam. 2 C P L R 181.**

36—Mortgage with possession by occupancy tenant to landlord—Subsequent mortgage of same holding by tenant to another—Right of landlord to hold possession.

Where an occupancy tenant mortgaged his holding with possession to his landlord and subsequently without the consent of the landlord mortgaged the same holding with possession to another, the landlord was entitled to possession as mortgagee against the tenant and as landlord against the subsequent mortgagee and the latter could not set up his mortgage against the landlord, **Baldeo Onkar v Set Fatechand. 2 C P L R 16.**

Notes.—Cited, 7 C P L R 89 , Ref. 4 N L R 57.

37—Tenant right, devolution of—Necessity for occupation on behalf of minor tenant.

Under the Act a tenant's right to devolve as if it were land; but the person on whom it devolves has, whether he is a minor or not, certain things to perform as a condition of his tenancy, and if he is a minor, some one must take up the holding on his behalf. If the holding is unoccu-

Central Pro. Tenancy Act IX of 1883 *Contd.*

pied, the tenancy will not be preserved for a minor merely because being a minor he was unable to occupy it or pay rent. **Bukharia v Jugal Kishore. 2 C P L R 6.**

Notes:—Ref: 9 C P L R 1, 2 N L R 101.

37A—Mortgage by occupancy tenant—Suit by landlord to set aside—See Limitation Act, 1908, art. 120, **5 N L R 28=1 Ind Cas 956**

37B—Applicability of—to absolute occupancy tenants—Difference between the rights of ordinary tenants and those of absolute occupancy tenants—See Right of Occupancy—Loss of right. **6 N L R 6**

38—S. 3 cl. (3) right of thikadar to enhance rent.

A thikadar is a landlord within the definition of that term in s. 3 sub s. 3 of the Act and as such he is entitled to make proceedings for enhancement of rent in the manner provided by ss. 56 & 57 unless he is restrained from s doing by a stipulation to that effect in his lease **Ramji Das v Madhab Parhi. 6 Ind Cas 75.**

39.—Tenancy Act (C P) Act IX of 1883 Ss. (3) 43 (2)—Second appeal.

The consent of the lessee of landlord, to a mortgage by an occupancy tenant of his holding, is binding so long as the interest of the consentor lasted and this includes the interest of those claiming under or through him, and is not binding on the original landlord after the termination of the interest of the lessee.

If the right view of the law can be argued upon the facts found, the High Court can decide the question of law in second appeal. **Lukra Das v Madhab Parhi 6 Ind Cas 75.**

40.—Tenancy Act—S 3 (2), Act IX of 1883. now S. 2 (10)., Act IX of 1898. Tenant-Agent.

The plaintiff was engaged as defendant's Mukhtar, and received some sir-land rent-free in lieu of salary with a condition that so long as plaintiff remained defendant's agent he would not be disturbed in his possession. *Held* that the plaintiff's holding was by way of agency and not of tenancy. The case is different where land

Central Pro. Tenancy Act IX of 1883-*Contd.*

is let to a person in consideration of his performing certain services. **Lala Lachman Singh v. Hariram. 1 C P L R 182.**

41.—S. 14—Encroachment by tenant on land not belonging to holding—Right of landlord to eject tenant—Right to recover possession.—

A landlord is not bound to eject a tenant who has encroached on land not belonging to his holding and may if he pleases have the tenant's rent altered under S 14 of the Act; but there is nothing in the section which would prevent a landlord from suing to recover possession of his land. **Khemchandra v Ram Kisan 5 C P L R 39.**

Notes—Ref: 16 C P L R 36.

42.—Tenancy Act—s 18 (6). (C P)—Inferior proprietor—Malikana payment.

In the absence of general or special order by a Revenue officer under sub-section (6) of Sec 18 of the Tenancy Act an inferior proprietor is not relieved from payment of malikana S A No 124 of 1901 Refered to. **Raja Seth Gokul Das v Babar Patel. 14 C P L R 132.**

43—Hindu Law—Widow—Occupancy holding—Succession—Whether she can make absolute disposition of tenancy—Central Provinces Tenancy Act S 35—Alienation——Reversioner—Omission to offer refund of money proved to have been raised for legal necessity—Effect——Sale partially invalid - Effect——Legal necessity ——Burden of proof, See (6 C P L R 135; 15 C C P L R 89 and 6 C P L R 135 Fol; 4 N L R 9 (13) 3 N L R 182 (185): 29 All 331 Ref; 35 Cal 420 Fol; 31 Cal 433, 9 W R 108; 20 W R 187; 31 Mad 153 Ref: 27 All 494 Ref.) **Vithu v Mt Mendri 5 N L R 172.**

44.—Ss 36, 45, 95—Occupancy holding—Surrender—Next heir claiming under s. 46—application under s. 36—S 9 C P C.

Held, that S 36 gives absolute power to the Revenue officer to place the claimant in possession, and the jurisdiction vested in the Revenue Court must be held to be an exclusive jurisdiction not liable to be overridden by the Civil Courts exercising their ordinary jurisdiction

Central Pro. Tenancy Act IX of 1883-*Contd.*

under s 9 Civ Pro Code, 28 L J C P 242 (246), 78 L J Ch 27 (28), 46 L J Ex 775 (779).

Jagannath v Khuba. 5 N L R 176.

45.—S 38—Mortgage by occupancy tenant—Necessity for proof of landlord's consent.—

In the absence of direct evidence of consent or even of knowledge the consent of the landlord to a mortgage by occupancy tenant cannot be presumed. When occupancy tenants or those who take mortgages of their holdings from them wholly neglect the provisions of S.38 of the Act it is for them to adduce good evidence that a mortgage received the landlord's consent. **Narbada Prasad v Raja Bije Bahadur.** 5 C P L R 50.

Notes.—Ref: 7 C P L R 38.

46.—S 38—Exercise of right of pre-emption by malguzar—Wrongful payment by Collector of money paid by Malguzar-Liability of malguzar to pay mortgage-debt.

Where a Malguzar in exercise of his right of pre-emption given under s. 38 of the Tenancy Act paid to the Collector the price of the holding he was not responsible for a wrong payment of the amount by the Collector to the decree-holder instead of to the mortgagee. **Shet Gopikisan v. Hassanally** 1 C P L R 102.

Notes.—Obs 9 C P L R 30.

47.—S 38—Sale of occupancy holding void—Right of landlord to recover possession—Thekedar—Lessee may permit sale—Lessee or mortgagee of tenant may retain possession against wishes of landlord.

Where an absolute occupancy tenant sold his holding in contravention of the provision of section 38 of the Tenancy Act the sale was void and the landlord could recover possession of the land from the purchaser. But if the tenant continued in possession after the sale the landlord cannot eject him. Though a lease or mortgage may be void the lessor or mortgagee of the tenant may hold possession under the tenant and with his permission even against the wishes of the landlord. And a Thekadar who has obtained a lease from the landlord may permit the sale of an absolute occupancy holding. **Mt Luhanu Bai v Satish Chander.** 1 C P L R 148.

Notes.—Ref: 9 C P L R 101

Central Pro. Tenancy Act IX of 1883 *Contd.*

48.—S. 38—Leave void being contrary to provisions of—Right of landlord to recover possession.—

A lease not given in accordance with the provisions of S 38 of the Act is void and the landlord is entitled to recover possession of the land. **Bhau v Vishram** 5 C P L R 125.

Notes:—12 C P L R 127.

49.—S. 38 (5)—Proceedings in execution pending before Collector when Act came into force, applicability to.

The provisions of s. 38 (5) applied to proceedings in execution of a decree pending before the Collector at the time when the Act came into force. **Shet Gopikisan v. Hassanally** 1 C P L R 102.

Notes.—Obs. 9 C P L R 30

50.—S.38 (5)-Sale of absolute occupancy tenancy in execution—Right of landlord to pre-empt.

Under s. 38, sub s. (5) of the Act a landlord when the right of his absolute occupancy tenant has been sold in execution of a decree, has the same right of pre-emption as is given in the case of a sale by sub-s. (3) cl. (*a*). **Azamkhan Musalman v. Raoji Mohar.** 3 C P L R 1.

Notes.—Fol 10 C P L R 76; Ref 14 C P L R 162.

51.—S 38 (7)—Absolute occupancy tenancy-Contemporaneous lease and mortgage-Lease void against mulguzar but not against tenant—Right of lessee to recover possession from lessor.—

Where an absolute occupancy tenant leased his holding for a term of certain years in consideration of an annual rent payable to himself and to the mulguzar and on the same day executed a mortgage deed in favour of the same person (lessee) as against the mulguzar the lease must be regarded as part of the mortgage and, as the mortgage is under s. 38 of the Tenancy Act void, the lease also is void with it But as against the tenant (lessor) it is nevertheless valid and binding and the lessee is entitled to recover possession from the lessor. (10 B L R 134, Ref.)

Ghanashyam Nathuram v. Gyarsi. 1 C P L R 48.

Notes—Ref., 9 C P L R 69, 10 C P L R 37

Central Pro. Tenancy Act IX of 1883-*Contd.*

—S. 41 (1).

See. Central Pro. Tenancy Act XI of 1898 S. 2. Case No. (4). 3 N L R 182.

52.—S. 41—Right of tenant of Sambalpur to be deemed an occupancy tenant.

By s. 41 of the Act every tenant who is, when the Act Comes into force, a tenant of land in the district of Sambalpur shall be deemed to be an occupancy tenant of that land. **Bihari Das Mahant v. Dhanardan Meher.** 4 C P L R 63.

53.—S. 41—No acquisition of occupancy right by sub-tenant—Exclusion of tenants of absolute occupancy tenants from description of occupancy tenants.

S. 41 of the Act does not recognise the acquisition of an occupancy right by a sub-tenant Tenants of absolute occupancy tenants are excluded from the description of occupancy tenants as defined by s. 41. **Mt. Pilabai v. Gadi Mhali** 6 C P L R 99

Notes.—Ref: 3 N L R 163.

54.—S. 41—Absolute occupancy tenant—Notice by, to sell his holding to stranger—Landlord claiming to purchase at value fixed by Revenue Officer—Such claim good—Remedy by suit—Transaction for consideration and called sale—Surrender in reality — Sale-deed — Not necessary.

C, an absolute occupancy tenant, sent to D, the landlord, notice of his intention to sell the holding to a stranger at a certain price, and gave him an option of purchasing the same at that price. D, the landlord, in his reply, stated that he would get the holding valued by a Revenue Officer, and "claimed" a right to purchase the same at the price that may be fixed by such officer. *Held*, that the landlord was entitled to make such a claim, and that, on failure to give up the holding at the price so fixed, the landlord can compel the tenant by suit to do so. (14 C P L R 162, 2 N L R 27. Dist.). A document whereby a tenant gives up his holding to the proprietary body is really a surrender, though it may be for consideration and be called a sale (5 N L R 97, Ref.) And no sale deed is necessary in such cases. **Dagu v. Chamru** 6 N L R 190=8 Ind Cas 1186.

55.—Ss. 41, 43, 44,—Occupancy tenant—

II C. C. 76

Central Pro. Tenancy Act IX of 1883-*Contd.*

Right of tenant to transfer and regulate succession to his right in holding by will.

As the contract of occupancy tenancy is personal between the landlord and tenant and as succession to it is regulated by law the succession to his right in his holding by a will, whether the tenancy is for the tenant's life time or otherwise. **Musst Laxmi Bai v. Alyar Khan.** 2 C P L R 167.

Notes.—Ref: 6 C P L R 135; Rel. on 15 C P L R 1.

56.—S. 41, cl. 2—Mortgage of absolute occupancy-holding for sum requiring notice under s. 41—Other properties also mortgaged—Absence of notice—Mortgage void—Courts not bound to apportion value and uphold mortgage.

When any other property, moveable or immoveable, is mortgaged along with an absolute occupancy holding, for a sum which required notice to the landlord under s. 41, cl. 2, Central Proviences Tenancy Act, without such notice, the mortgage will become void, and the Court cannot be asked to value the other properties to apportion the mortgage-debt between the occupancy holding and those properties in proportion to their respective values, and uphold the mortgage if the amount so ascertained would not have required notice to the landlord. (11 C P L R 17, Dist.) **Gangadhar Rao v. Raja Laxman Rao.** 7 C P L R 20.

57.—S. 41, (2)—Notice, whether necessary in case of simaltaneous mortgage and lease to one and the same person—See Transfer of Property Act 1882 s. 105. 6 N L R 65=6 Ind Cas 817.

58.—S. 41, (5)—Landlord's right of pre-emption—Statutes—Rule of construction.

S. 41, (5) of the Tenancy Act applies to the foreclosure of such a mortgage only as might be made without notice to the landlord.

So, where the right of an absolute occupancy tenant in his holding is sold or is foreclosed by order of a Civil Court, in execution of a decree other than a decree obtained by his landlord, *held*, the landlord will have a right of pre-emption, only if the mortgage, in respect of which a decree has been obtained against the tenant, has been effected without notice to the landlord but not where the landlord has actually interviewed

Central Pro. Tenancy Act IX of 1883-*Contd.*

the mortgagee and expressly authorised him to make an advance, being unable to find the requisite money himself.

Held also, where words of an old statute are made part of the new statute, it is always done with the object and intent of giving to those words any legal interpretation which has been put upon them by Courts of law. (5 C P L R 65 (68) ; 6 C P L R 131 (132) : 7 C P L R 89 (91) Ref: and Fol: 3 N L R 40 and 6 N L R 6, Ref: 10 C P L R 42 and 10 C P L R 76, Ref. (1862) W R 66 (67); 25 Bom 151 (154); 6 C W N 556 (569) and Dale's case, 50 L J Q B 234 (262) and Maxwell on the Interpretation of Statutes, p. 462, 4th Ed., Ref.). **Than Singh v. Chandu Lal.** **6 N L R 69=6 Ind Cas 819**

59.—S. 42—Sale in execution of co-sharer's interest—Purchase by other co-sharer—Possession of sir land by purchaser at time of sale—Right of debt co-sharer to recover land as tenant—Limitation.

S. 42 of the Act applies to all transfers made after the act came into force. Where the right of a co-sharer in a village sold in execution of a decree was purchased by the remaining co-sharer and at the time of the sale the sir land appertaining to the share sold was in the possession of the purchaser the right of the co-sharer, whose interest was sold, to recover the land as its tenant accrued on the date of the sale and a suit therefore could be brought within two years from the date of such sale. **Ramprasad Sonar v. Raghubar Prasad.** **2 C P L R 175.**

60.—S. 43—Mortgage by simple Occupancy tenant—Right of malguzar to eject mortgagee in possession—Right of tenant in possession.

Where a simple occupancy tenant mortgaged his holding without the consent of the malguzar, the latter was entitled to recover possession from the mortgagee, but not from the tenant if he was in possession. **Nathu Persad Sheo Persad v. Gopal Jiwaji.** **1 C P L R 125.**

61.—Absolute occupancy tenant—Suit to recover arrears of rent charged upon land—S. 43 Central Provinces Tenancy Act.

A suit to recover arrears of rent from an absolute occupancy tenant, by enforcing payment

Central Pro. Tenancy Act IX of 1883-*Contd.*

of money charged upon land under s. 43 of the Central Provinces Tenancy Act, is governed by Art 110 and not by Art. 132. Arrears of rent for any period in excess of three years cannot be recovered 16 C P L R 52 Fol: 11 C P L R 95; 14 C P L R 17; 1 N L R 117; 7 All 502; 21 All 454; 22 Bom 846, 24 Mad 233, 27 Cal 180 Ref.

Gourishankar v Laxmanprasad.
3 N L R 81.

61A—Central Provinces Tenancy (Act IX of 1883), section 43—Central Provinces Act of 1898, Section 45 clause (3), s 47—Occupancy holding, transfer of part of.

When statutory rights and liabilities have been created and jurisdiction has been conferred upon a special Court for the investigation of matters, which may possibly be in controversy, such jurisdiction is exclusive and cannot concurrently be exercised by the ordinary Court.

When a transfer of occupancy holding was effected without the consent of the landlord at a time when the rent law in force was Act IX of 1883, as amended by Act XVII of 1889, the Civil Courts have jurisdiction to entertain a suit for ejectment. But it is otherwise after the passing of the Central Provinces Tenancy Act of 1898.

The change made in the law in this respect in 1898 is not of procedure only; it affects substantive rights.

Section 43 of the Tenancy Act of 1883 refers to transfers of entire holdings and not of a portion only. So long as the original tenancy subsists the landlord has no right to re-enter and oust the persons, who are in the land by license from the tenant. **Icharam Singh v Nilmony Bahida.** **7 C L J 499=35 Cal 470=12 C W N 636.**

62.—S. 45—Scope of the section—Applicability to leases not affecting proprietary rights.

S. 45 of the Tenancy Act applies only to leases or other transfers of proprietary rights, in *sir* fields. It does not apply to agricultural lease, which do not affect the proprietary rights. (1 N L R 32 Ref). **Bhagirathi Bai v Anyaji Kunbi.** **3 N L R 159.**

Central Pro. Tenancy Act IX of 1883-*Contd.*

63—Central Provinces Tenancy Act—Ss. 45. 46, 47—Act IX of 1883 as amended by Act XVII of 1889, S. 43—Transfer of possession of occupancy holding—Unauthorized alienation—Ejectment—Jurisdiction.

Under the Rent Law of the Central Provinces as contained in Act IX of 1883 as amended by Act XVII of 1889 the Civil Courts have jurisdiction to deal with a suit for ejectment when a tenant having a non-transferable holding made an alienation and parted with the possession of a holding.

The right to institute a civil suit upon an alienation which took place in 1892 was not taken away by Act XI of 1898 the provisions of which, in this respect, are not retrospective. S. 43 of Act IX of 1883 refers to the transfer of an entire holding and not to a portion thereof.

Ichharam Singh v Nilmoney Singh. 12 C W N 636=35 Cal 470.

Central Pro Tenancy Act s. 46

See Central Pro. Tenancy Act s. 36.

5 N L R 176.

Central Provinces Tenancy Act s. 46.

See Central Provinces Tenancy Act s. 70

1 N L R 178.

64—S. 46, Sub-S. 3—Ejectment, suit for—Sub-lease, grant of, tenant.

Under the Central Provinces Tenancy Act, none but an occupancy tenant can be ejected from his holding for granting a sub-lease.

Sadasib Jhemkir v Jaja Gaontia. 8 C L J 156.

65—S. 46 (5),—Transfer of holding—Non-registration of a deed—Jurisdiction of Civil Courts.

Where an occupancy tenant purports to transfer his holding by virtue of a document which required to be registered but which could no be registered owing to the prohibition contained in S. 46 (5) of the Tenancy Act, the Jurisdiction of the Civil Courts to eject the transferee as a trespasser is not barred. 14 C P L R 14 Dist: 16 C P L R 135 Ref: **Chamru Sao Bania v Tulsidin Singh. 17 C P L R 49.**

Notes:—Ref: 1 N L R 112.

Central Pro Tenancy Act XVI of 1903-*Concld.*

66—S. 49—Settlement—Rent fixed by settlement officer—Tenant's liability to pay—Omission of the words "notwithstanding any contract to the contrary"—Effect.—

An occupancy tenant is bound to pay rent at the rate fixed by the settlement officer, notwithstanding the previous contract to the contrary. (9 C P L R 27 Ref:). The words "notwithstanding any contract to the contrary" are omitted in s 49, because they would be superfluous since the section defines the only way in which the rent of an occupancy holding is to be fixed at the time of new settlement. **Bhikaji v. Tukaram 7 N L R 17.**

66A—S. 51—Tenant of Malik Makbuza a sub-tenant.—

The tenant of a Malik Makbuza was not originally a sub-tenant. The original definition of sub tenant in s. 51 of Act IX of 1883 was amended by Act XVII of 1889, under which the tenants of Malik Makbuza became sub-tenants. 5 C P L R 110 Dist. **Mt. Pilabai v. Gadi Mhali, 6 C P L R 92.**

Notes—Ref 3 N L R 162.

67—Ss. 51, 55—Tenant of Malik Makbuza holder—Wrongful ejectment—Right to be reinstated.—

Where the tenant of a Malik Makbuza or his mortgagee is ejected in contravention of the provisions of s. 55 of Act IX of 1883 he is entitled to be reinstated. **Budhu Hazari v. Hiralal and Ram Prasad. I C P L R 17.**

68—S. 55—Ordinary tenancy, determination of—Notice to quit, effect of.—

The tenancy of an ordinary tenant cannot be determined by the landlord except as provided in s. 55 of the Tenancy Act. A notice to quit by the end of the agricultural year cannot determine the tenancy. **Shankar Sing v Atmaram. 1 C P L R 120.**

69—S. 55 (b)—Separate holding not holding.

A separate holding of *sir* land and other land by the tenant did not constitute a single holding within the meaning of section 55, cl. (b)

Chitrawati Bai v Sheru Musalman. 4 C P L R 65.

Notes: –7 C P L R 36.

Central Pro. Tenancy Act IX of 1883-*Contd.*

70—S. 61—Landlord cannot eject tenant for sub letting.—

The landlord of an ordinary tenant cannot eject him merely on the ground that he has sub-let his holding. **Mt. Bhena Bai v Bhau Sonar. 1 C P L R 114.**

Notes:—Ref: 9 C P L R 86.

71-S. 61 (2) Mortgage with consent of lambardar not void as against landlord.—

A lambardar being the Agent of the co-sharers for the management of the village the person who grants lease and collects rent must be looked upon as the landlord whose consent under s. 61 (2) of the Act is necessary to the validity of a transfer of property in respect of his holding by an ordinary tenant when such consent is given to a mortgage it cannot be void as against the landlord. **Ram Ratan v Hira 5 C P L R 47.**

Notes.—Ref: 8 C P L R 41.

72-73-S.70-Although a *lambardar* represents the body of co-sharers in their dealings with Government for certain purposes, he is not alone entitled to bring a suit to eject a trespasser. 13 C P L R 113, Ref. **Nilmoni Guntia v Jogendra Guntia. 6 Ind Cas 389.**

74—S. 72—Decree obtained by landlord on bond taken for arrears of rent and other sums due—Right to make application under.—

If a landlord has taken a bond from a tenant for arrears of rent and other sums owing to him and obtains a decree on such bond he cannot make an application to a Court under s. 72 of the Act. **Jagannath v. Ram Bax 5 C P L R 90.**

75—S. 74—Sub-tenants—applicability to.—

The provisions of s 74 of the Act apply to all tenants including sub-tenants. A sub-tenant is a tenant just as much as the other specially described tenants such as occupancy and ordinary tenants are tenants.

Mt, Radhabai v Yado Rao Gajanan, 1 C P L R 111.

76—S. 81—What constitutes ejectment of tenant—Limitation for suit to recover holding.-

Central Pro. Tenancy Act IX of 1883-*Contd.*

To constitute an ejectment it is not necessary that a landlord should actually remove a tenant of a field. It is sufficient if the tenant is excluded from the possession so where on the death of a tenant the landlord and not his heir took possession of the holding was governed by the 2 years' limitation calculated from the date of the tenant's death. **Kavlooki v Ganpat Rao. 1 C P L R 107.**

77—S. 87—Settlement of share in a village in favour of widow of one of two undivided brothers for life—Effect of settlement award—Break up of joint family property—Succession on widow's death.

Where prior to the settlement of a village one of the two undivided brothers, who were entitled to the village, died leaving a widow and the Settlement Officer awarded the widow a share in the village for her life-time, the effect of the award at the settlement was to break up the joint family property and to make the share awarded to the widow separate property. On the death of the widow the heir of her husband was entitled to the share awarded to her in preference to the heir of her husband's brother. **Musst-Dhamo v Shamlal. 2 C P L R 99.**

Notes:—Ref: 13 C P L R 81.

78—Ss. 87, 88—Award at settlement confers clear title—Bar to claim of others—Adverse possession—Limitation.—

An award at the settlement confers on the person to whom the award is made a clear title to the property and ss. 87 and 88 of the Act bar the claim of any other person thereto. At the time of the settlement on the admission of one of four brothers the rights of the other three brothers to an estate were affirmed. Thereupon these three brothers applied to the Collector for partition of the estate and notwithstanding the objection of the other brother partition was ordered to proceed but during the pendency of the proceedings, the objector died leaving a minor son. Then one of the three brothers managed the estate on behalf of the family and the partition proceedings were dropped. On the minor attaining majority he asserted an exclusive right to the estate and refused his uncles all share in the profits thereof. Thereupon the uncles sued

Central Pro. Tenancy Act IX of 1883 *Contd.*

to recover their shares. The defendant contended that in a family partition during his father's life-time the suit estate fell to the share of his father and that the suit had become barred by limitation. *Held*, as on the admission of the defendant's father proprietary rights were awarded to the plaintiffs it was quite immaterial whether there was or was not a partition before the settlement. The award of the settlement officer gave a clear title to the plaintiffs and ss. 87 and 88 of the Act barred any claim on the part of the defendant's father or of the defendant. *Held*, also that no time could be counted before the settlement as plaintiffs started with a clear title from that time. Further as the defendant's father died within twelve years from the date of settlement and as after his death the entire estate was managed by one of the plaintiffs there was not adverse possession for twelve years. Consequently the suit was not barred by limitation.
Dadu v. Raja, 2 C P L R 116.

Notes:—Ref: 13 C P L R 81.

79—S. 92 — Decision of Tahsildar that a person is tenant—Resjudicata—Jurisdiction of Civil Court.

The second clause of S. 92 of the Act is not exhaustive. A Tahsildar's decision, that a person is a tenant, is not *res judicata* so as to bar the trial of the issue, whether he is tenant or not in a Civil Court. In other words the fact that a Tahsildar has put a person into possession under S. 92, does not make that person a tenant if he is not a tenant. **M. T. Durbasa v. Khalaksing, 4 N L R 63.**

80—S. 94 (1)—" Ejected ", meaning of—S. 116, Transfer of Property Act.

In order that the special period of limitation prescribed by S. 94 (1) of the Tenancy Act may be applicable, the tenant must have been " ejected " from the land of which he seeks to recover possession.

Even a wrongful withholding of possession may be treated as an ejectment under S. 116, Transfer of Property Act, which may reasonably be regarded as *prima facie* applicable even in case not coming under the Act. Where a lessee holds over and the lessor assents to the tenant continuing in possession, the lease is, in the absence of a contract to the contrary, renewed. The lessor has thus an option of treating the lessee as still a tenant or as a trespasser. 5 N L R 97, 22 Bom 893 and 24 Bom 504 and 29 Bom 213 (216), Ref: **Sheoram v. Abdul Wahidkhan, 6 N L R 95=6 Ind Cas 937.**

Central Pro. Tenancy Act IX of 1883-*Concld.*

81—S. 94—Ejectment, Limitation.

Where plaintiff, a tenant, sues to recover possession of land sold by his guardians to the defendant, the *malguzar* of the village, on the ground of fraud.

Held, that the sale of a tenant right by the tenant to a landlord possessing the whole proprietary right is in fact a surrender.

So, the landlord when taking possession under the sale took possession as landlord.

Possession taken with the plaintiff's guardian's consent is not an ejectment within S. 94; and the special period of limitation in S. 94 does not apply. (9 C P L R 122; 14 C P L R 29, Fol. 2 C W N 175; 6 C W N 333; 30 Cal 536; 32 Mad 72 Ref:) **Ganpat v. Trimbak, 5 N L R 97=3 Ind Cas 51.**

Notes:—Fol: 6 N L R 78. Dist: 6 N L R 95, Ref: 6 N L R 190.

Central Provincies Tenancy Act XVII of 1889.

1—Suit for damages against malguzar and tenant from him for wrongful letting—Plaintiff entitled to decree against malguzar only.—

Where the plaintiff claimed damages from his malguzar and a tenant to whom the malguzar had let land to which the plaintiff was entitled, plaintiff was entitled to a decree against the malguzar and not against the tenant from the malguzar, the tenant not being responsible for the wrong done to the plaintiff by the malguzar. **Dukaloo v. Dhularsing. 4 C P L R 187.**

2—Mortgage of occupancy holding—Right of mortgagee to sue for sale of holding.—

The mortgagee of an occupancy holding is entitled to bring a suit for sale against the tenant-mortgagor. (7 All 511, 851 and 878, Ref:) **Onkar Seth v. Kharagsen, 10 C P L R 53.**

3—Mortgage by tenant—Extinguishment of mortgage on tenant's death.—

Where an occupancy tenant mortgaged his holding and then died leaving no heir, the mort-

Central Pro. Tenancy Act XVII of 1883-*Contd.*

gagee became extinguished as the tenant could mortgage nothing beyond his tenant right

Vithal Narain v Ganpat Rao Gopal Ghatatey, 10 C P L R 65

Notes —Rel on 2 N L R 92

4—Partition among co proprietors and attornment by tenants—Each proprietor landlord of his patti —

If the proprietors elect to partition the village and if they agree that each proprietor shall collect the rents from those tenants whose lands fall within his share and if the tenants in their turn make attornment, then each proprietor becomes the landlord of his patti within the meaning of the Tenancy Act. (11 C P L R 144 Ref)

Chandrabhan v Deo Rao Kunbi 12 C P L R 66

5—Occupancy tenant—Right of person who was occupancy tenant between passing of Act and date of amendment —

A person who was an occupancy tenant under a malik makbuza during the interval that elapsed between the passing of C. P Tenancy Act and its amendment by Act XVII of 1889 did not cease to be an occupancy tenant and become a sub tenant on the amending act being passed, provided there was no express agreement either that a right of occupancy should not be acquired in the land or that the tenant should quit the land at the termination of the lease (6 C P L R 101 7 C P L R 145 Rel) **Dowla v R S Balwant Rao Bhuskutey, 12 C P L R 132**

6—Sale of house site by non agriculturist occupant Right of malguzar to recover possession

Where a non agriculturist resident of a village sold a strip of house site belonging to him to a neighbour in the village the malguzar could not sue to recover possession of the said land (3 C P L R 7 8 C P L R 29 Dist 5 C P L R 76, Ref) **Bhondusao v Jagat Ram 12 C P L R 146**

7—Land sub let by absolute occupancy tenant—Right of landlord to resume possession —

Where land has been sub let by an absolute occupancy tenant the fact that it has not been specially sub let from year to year or for any period fixed cannot be a ground for not allowing the landlord to resume possession. Where there has not been a contract to the contrary a tenancy would be one from year to year according to custom **Mt Sarja Bai v Nakal 4 C P L R 97.**

Central Pro Tenancy Act XVII of 1883-*Contd.*

8—Adverse possession by malguzar for more than twelve years—Suit by purchaser from mortgagee of occupancy right—Bar by limitation —

Where the malguzar of a land dispossessed the occupancy tenant and enjoyed the land adversely for more than 12 years, a suit by the purchaser of a mortgage executed by the occupancy tenant was barred by limitation (10 Cal 68, Ref)

Gopal Jhira v Mt Gora 4 C P L R 99.

9—Right of tenant to retain possession of house in abadi —

A tenant is entitled to retain a house so long as he has not severed his connection with the village Where a ryot is a tenant he can claim the house when a site is assigned to him whereon to construct himself a house but he cannot claim to keep a house which is the property of his landlord and to which he was admitted on sufferance and during the good pleasure of the owner. **Amrit Rao v Ramchandra 4 C P L R 109**

10—Possession by thekedar of land in excess of his holding—Continuation of possession after termination of theka—Right of landlord to claim rent for excess land —

Where a thekedar held land in excess of his Malik Mal buzah holding and continued in occupation even after the termination of the theka the landlord was entitled to demand rent for the land so held in excess **Thakur Hamir Singh v. Govinda Khati 4 C P L R 123**

11—Lease of mouzah — Grant of lease by lessee for less than his term—Gift by sub lessee with consent of lessee — Right of purchaser of mouzah and set aside sub lease and gift and obtain possession —

The lessee of a mouzah granted to his mother a lease of certain fields in the village for a period not extending the term of his lease She with his consent gifted the lease to her daughter and son in law Plaintiff purchased the village after the grant of the lease and sued to set aside the lease and the gift and to obtain possession of the fields. *Held*, that the plaintiffs could not set aside the lease unless it was fraudulently given and taken and they could not either set aside

Central Pro. Tenancy Act XVII of 1883-*Contd.*

the gift or obtain possession of the fields as long as the original lessee retained possession of the village under his lease **Ganpatlal Udechand v Deviprasad 4 C P L R 170**

12—Sale by Malguzar of malguzari lands—Transfer by vendee to another Validity of such transfer

Where a malguzar sold certain lands belonging to his malguzari undertaking not to eject the vendee from the lands and to receive always a fixed rent, without claiming possession, and the vendee sold it again to another such sale was not void as the sale by malguzar fell within the definition of a lease in the Transfer of Property Act and, in the absence of any local usage or law forbidding it, such a lease would be capable of transfer **Bisniram v Ramprasad 8 C P L R 33**

Notes—Ref 9 C P L R 27

13—Holding under Malik makbuza—Decree declaring status as tenant passed before Act—Change of law after Act—No necessity for setting aside decree

A person who held under a *malik malbu a* did not obtain a permanent status as a tenant merely in consequence of having had his position as a tenant declared by a decree passed before the Act came into force The effect of such a decree was merely to declare the person a tenant under the law as it stood at the time when the decree was made After the passing of the Act all tenants under *Malik makbu as* except those who had obtained occupancy rights before the alteration in the law at once became by the mere operation of that alteration sub tenants. After the change in the law the decree lost its force and there was no necessity for its being set aside **Tukaram v Vishna Kunbi 7 C P L R 143.**

14—Execution of deed of sale by tenant—Avoidance of sale by landlord—Right of tenant to sue for possession of holding

Where, subsequent to the execution of a deed of sale by an occupancy tenant and delivery of possession to the purchaser the landlord refused to recognize the transfer and sued to eject the transferee, the voiding of the deed of sale by the landlord had the effect of restoring all parties to the *status* in *quo ante* and the tenant could sue to regain possession of his holding, provided that in

Central Pro Tenancy Act XVII of 1883 *Contd.*

the circumstances of the case there was nothing to show a deliberate intention on the part of the tenant of abandonment of the holding (9 C P L R 13 Dist 20 Cal 590 6 C P L R 49, 7 C P L R 45 Ref) **Aladad Khan v Daula Rajput 9 C P L R 101.**

Notes—Ref 12 C P L R 160, 15 C P L R 17, 13 C P L R 39.

15—Transfer of holding by tenant—Right of landlord to obtain possession

In a case of unauthorized transfer of a holding by a tenant the landlord's right to possession did not depend on whether the tenant was a party to the suit or not, but depended on the question whether the original tenant had or had not any interest in the holding (6 C P L R 49 Expl) **Thakursing v Adku Teli 9 C P L R 13**

Notes—Not Fol 9 C P L R 101

16—Proprietor cannot be his own tenant

If regard be had to the definition of the term 'tenant' in the Act a proprietor cannot be his own tenant (10 W R 15 12 Cal 82, Dist) **Dulichand v Seth Madanmohan 8 C P L R 74.**

Notes—App 10 C P L R 103.

17—Malik makbuza also Thekadar—Lease by Malik makbuza—No loss of Malik-makbuza rights

A *Malik malbu a* of certain lands who is also the *Thekadar* of the village, does not by leasing out the said lands lose his *Malik makbuza* rights in them His right to be *Malik makbu a* lands is wholly distinct from his right as *Thekadar* **Govind Raghunath v Sakharam 8 C P L R 61,**

18—Sale by tenant of his holding—Right of Malguzar to recover possession

On a sale by the tenant of his holding the Malguzar is entitled to recover possession of the land from the vendee and the latter's lessee 7 C P L R 20 and 45 Dist **Balakrishna Lakhsman v Krishnarao 8 C P L R 45.**

Notes—Ref 15 C P L R 17, 5 N L R 136, 9 C P L R 101

19—Right of lambardar to assent to transfer of absolute occupancy holding.

Central Pro. Tenancy Act XVII of 1883-*contd.*

The lambardar of a village has authority to assent in consideration of the payment of a fine to the transfer of an absolute occupancy holding (2 C P L R 103 Dist) **Sitaram Narain v Arjun Kunbi.** **8 C P L R 41.**

20—Surrender of holding by tenant not equivalent to sale.

A surrender of a holding does not amount to the transfer of ownership thereof to the landlord, even though the surrender is for consideration. The right of ownership which the tenant possessed is extinguished, not transferred. **Birdhi-Chand Marwadi v Kashiram. 9 C P L R 122**

Notes.—Ref., 14 C P L R 29, 6 N L R 78, Fol., 5 N L R 97.

21—Sale of absolute occupancy tenure Right of malguzar to sue for possession and declaration that sale is void.

A malguzar is entitled to sue for possession of land held by an absolute occupancy tenant sold by him to defendant without notice to him (malguzar) and for a declaration that the sale is void. **Ramdin v Malikram.** **4 C P L R 181.**

22—Mortgage by occupancy tenant with consent of Malguzar-Foreclosure before the death of tenant—Right of Malguzar to oust mortgagee in possession.

A Malguzar by consenting to a mortgage other than an usufructuary one consents by implication to foreclosure. If the mortgagor of an occupancy right died before foreclosure, the mortgagee's interest would cease altogether with that of the mortgagor. The case is widely different, however where foreclosure has taken place before the death of the mortgagor and while his right still subsisted. The right becomes transferred in such a case by the foreclosure just as it would be by a voluntary sale by the tenant with the consent of the Malguzar and the subsequent death of the tenant can no more affect the one transaction than the other. In such a case the Malguzar cannot, on the death of the tenant, sue to oust the mortgagee in possession under his foreclosure decree.

Joharuddin v Kesheorao Mahadeo 6 C P L R 109.

Notes—Ref: 11 C P L R 5; Rel. on. 3 N L R 92.

Central Pro. Tenancy Act XVII of 1883- *contd.*

23. –Ss. 3 cl. (7), 55, cl. (b) –Lease of sir land and other land at the same time—Right of landlord to eject tenant from sir land.

Where at the time certain *sir* land and other certain sir-land were set out at one aggregate rent both the lands were held under one lease, forming one holding as defined in cl. (7) s. 3 of the Act, and the tenant could not be ejected under the provisions of section 55 of the Act from the sir land because the holding did not consist entirely of *sir* land within the meaning of cl. (2) of s. 7. **Gulabchand Balmukund v. Baktawar Rajput. 7 C P L R 36.**

24.—S. 3 (11)—"Last preceding settlement" meaning of.

The words "last preceding settlement in s. 3 cl. (11) of the act have not a uniform meaning but are to be interpreted with reference to the context. **Ganpat Gaontia v Halsai Raut. 11 C P L R 81.**

25.—S 3 (11)–Six consecutive years, meaning of.

The six consecutive years referred to in Expl I of S. 3 (11) of the Act (1883) does not mean the six years immediately proceeding the coming into force of the amending act 1889. The six years may be referred to any period between the date of the settlement and the commencement of the amending Act. **Salig Ram Sukal v Kanhaiya. 11 C P L R 13.**

26.—S. 3, cl. (11) Expl. 1—Land originally sir in occupation of proprietor of another share—Loss of character of land as sir.

Land which was originally *sir* can lose its *sir* character under explanation 1 of cl. (11) of s. 3 of the act for want of occupation by the proprietor of the share in which it is situated, when it is let to, and is occupied by, the proprietor of another share. **Thakur Hazari Sing v Jagat Singh. 7 C P L R 54.**

Notes.—Ref: 7 C P L R 137.

27.—S. 3 (11), (b)—Ryoti land—Continuous occupation for 12 years—Conversion as sir-land—Non-occupation—Cessation as sir land.

All ryoti land which by continuous proprietary cultivation had become *sir* before the Act

Central Pro. Tenancy Act XVII of 1889-*Contd.*

was amended by Act XVII of 1889 and which on the 29th October 1889 was unoccupied by the proprietor ceased to be *sir*. On the contrary land which had been cultivated by the proprietor for 12 consecutive years and which was on the above date in his occupation became *sir land* notwithstanding the fact that the *sir-rights* which had previously accrued might have been temporarily extinguished by subsequent inoccupation for six consecutive years

Lala Ganesh Prasad v Mt Narbadia. 11 C P L R 20.

28.—S. 7—Notification of Chief Commissioner finding date for payment of rent—Applicability to rents payable in kind.

The courts in the Central Provinces would be bound to take judicial notice of the Chief Commissioner's notification issued in accordance with the provisions of s. 7 of the Tenancy Act. But the notification of the Chief Commissioner fixing the 1st. January as the date for the payment of an instalment of rent is not applicable to the case of a rent payable in kind and payable in a sort of grain which is not harvested till some month later. **Mukund Ram Sukal v Murli. 8 C P L R 7.**

29.—S. (28)—Status of Malguzar after purchase of Malik Makbuza holding.

Where a Malguzar purchases a Malik Makbuza holding he ceases to be a Malik Makbuza of that holding after the purchase. (6 C P L R 82 Fol.), **Govind Rao v. Bapu. 6 C P L R 107.**

Notes.—Diss: 4 N L R 2.

30.—S. 33—Gift without donee being placed in possession—Claim of donee supported by donor—Validity of gift as against person claiming adversly to both donor and donee.

Where a donor supports a gift, it does not become invalid, by reason of the fact that the donor has not delivered possession to the donee, as against a person claiming adversely to both the donor and the donee. (11 Cal 121 Fol.; 1 C P L R 41 Dist.) **Kishan Rao Baikunth Rao v Mt. Rukhma. 11 C P L R 11.**

31.—S.34—Sub-letting by tenant—No liability to ejectment.

II C. C 77

Central Pro. Tenancy Act XVII of 1889-*Contd.*

A tenant does not by sub-letting his holding become liable to ejectment. He remains the tenant of the field and responsible for the rent to the landlord. S. 34 of the Act shows that a tenant shall be considered to have surrendered his holding only when he has left it uncultivated and the rent unpaid for a period of 2 years.

Sambhu v Sitaram. 4 C P L R 107.

Notes—Ref: 9 C P L R 86.

32—S.34—Temporary absence of tenant—Arrangement made for cultivation-Land not left uncultivated within the meaning of.

Where a tenant arranged for the cultivation of his holding during his temporary absence from the village and had no intention of surrendering his holding he cannot be said to have left it uncultivated within the meaning of s. 34. (1 C P L R 114, 4 C P L R 107, Ref.) **Ramsaran v Padrao Chamar. 9 C P L R 86.**

33.—S. 34—Dispossession by landlord of minor heir of occupancy tenant—Applicability of.

S. 34 cannot be applied to a case in which the landlord himself prevents the minor heir of an occupancy tenant or his guardian from cultivating his land, when he wishes to do so, (2 C P L R 6 Dist). **Daolat v Chitoo. 9 C P L R 1.**

34.—Ss. 34, 43. 61—Transfer of tenant right—Consent of landlord not obtained-Extinguishment of tenant right.

The tenant of an ordinary or of an occupancy tenure cannot make a valid transfer of his tenant right without the consent or the acquiescence of his landlord. The term transfer implies a passing from the hands of one person into those of another. When a tenant makes an ostensible transfer which has not the consent or the acquiescence of the landlord the transaction is a mere nullity and leaves the party in *statu quo ante* except for any remedy that the purchaser may have against the vendor. As the tenant-right cannot by such a transaction pass to the purchaser so it cannot pass from the vendor. Consequently a landlord has no right to possession of the holding as against the tenant merely on the ground that the latter has parted with his tenant right. The mere invalid transfer by a tenant of his right does not extinguish that right;

Central Pro. Tenancy Act XVII of 1889-*Contd.*

there must, in order to extinguish, be a complete abandonment of his connection with the land. **Sonoo Patel v Sitaram. 7 C P L R 45.**

Notes.—Ref: 13 C P L R 39, 11 C P L R 122, 9 C P L R 101, 8 C P L R 45, 10 C P L R 37; Diss: 15 C P L R 17.

35.—Ss. 34, 38, 43 61—Avoidance of transfer by tenant—Right of tenant to be restored to possession.

Where a landlord elects to avoid the sale of a holding by his tenant and ejects the vendee the avoidance of transfer leaves the parties in *statu quo ante* and in the absence of any express or implied surrender on the part of the tenant either by agreement or by operation of law, the tenant is entitled to be restored to possession (7 C P L R 45, Fol: 24 Cal 212, Dist: 24 Cal 152, Ref.) **Chote Lal v Kaluram. 11 C P L R 122.**

Notes.—Cited: 5 N L R 136.

36.—S. 35—Purchase of tenancy holding by lessee—Purchase enuring for benefit of lessee only during term of lease.

Where the lessee of a village purchases the tenancy holding during the currency of his *thika* the purchase enures only for the benefit of the proprietor and does not enure for the benefit of the lessee beyond the term of his lease. (5 C P L R 105, Dist: 8 C P L R 74, 17 W R 274, 25 W R 503, Ref.) **Dwarka Pershad v Tulsee Ram. 10 C P L R 103**

Notes.—Appl: 14 C P L R 169.

37.—S. 38—Assignment by lambardar of his rights and interests—Lambardar no longer landlord.

Where a lambardar assigned away all his proprietary rights and interests he no longer continued to be a landlord within the meaning of the Act. **Gopal v Bhojraj 11 C P L R 19.**

38.—Ss. 38 and 43—Right of Hindu widow to dispose of occupancy holding inherited from her husband.

The words "shall devolve as if it were land" in ss. 38 and 43 of the Act imply that the devolution is to be regulated subject to the restriction in s. 43 as regards collateral heirs by the personal law of succession which governs the persons concerned. Consequently a widow inheriting an absolute occupancy holding from her husband does not obtain such an interest in it as to enable her to alienate it to the prejudice of her husband's next male heir.(2 C P L R 167,Appr.) **Fakira v Hari. 6 C P L R 135.**

Notes.—Fol: 5 N L R 172; Disc., 5 N L R 103, Ref: 15 C P L R 89.

39.—S. 38—Transfer of holding by tenant—Possession by landlord—Right of transferee to eject landlord.

Where a tenant left his holding uncultivated and the landlord entered upon possession, the landlord could not be ousted at the instance of a transferee from the tenant, where such transfer was void as against the landlord. (11 C P L R 22, 24 Cal 212, Ref.) **Murlidher v Phulchand. 11 C P L R 138.**

Notes.—Expl, 17, C. P L, R. 29.

40.—S. 38—Sale by Collector of absolute occupancy holding in execution—Necessity for giving notice to Malguzar of intended sale-Validity of sale without such notice.

The Collector is not required to give the Malguzar notice of the intended sale of an absolute occupancy holding in execution of a decree and an omission to give the notice does not render the sale invalid (3 C P L R 1 Not Fol.) **Laxmikant Rao v Kalloo Singh, 10 C P L R 76.**

Notes.—Ref. 6 N L R 69.

41.—S. 38—Transfer of holding by tenant without landlord's consent not void but voidable.

A transfer made by a tenant of his holding without the consent of the landlord is not absolutely void, but is voidable at the election of the landlord and does not amount to a surrender of the tenancy (1 C P L R 23 and 48 Appr; 7 C P L R, 45, Dist.) **Ganpat Rao Rangrao v Keshav Rao Malguzar, 10 C P L R 37.**

Notes:—Ref. 17 C P L R 5; 14 C P L R, 182; Expl, 17 C P L R 17; Appl 2 N L R 108; Cited, 1 N L R 108.)

Central Pro. Tenancy Act XVII of 1889-*Contd.*

42.—S. 38 Purchase of absolute occupancy holding by landlord from tenant with knowledge that mortgagee from tenant has obtained possession under foreclosure decree—Right of landlord to recover possession from mortgagee.

Where a landlord knowing that the possession of an absolute occupancy holding has passed to a mortgagee of the tenant under a foreclosure decree chose to obtain a purchase of the holding from the tenant, he could not succeed in a suit for possession against the mortgagee, inasmuch as he did not avail himself of his right to claim pre-emption but chose to pay the entire price to the tenant. (18 All 354; 5 C P L R, 125, 6 C, P L R, 131, 7 C P L R, 89, Ref.) **Seth Lakhmichand v. Thakur Raghuraj Singh. 12 C P L R 127.**

43.—S, 38—Usufructuary mortgage by tenant without landlord's consent—Right of landlord to claim pre-emption.

Where a tenant mortgaged with possession his absolute occupancy holding without giving notice to or obtaining the consent of the malguzars the latter cannot sue for pre-emption. **Madhosingh v Tikaram, 9 C P L R 91.**

44.—S. 38—Right of some co-sharers to obtain mortgage from tenant without consent of other co-sharers—**See**—Co-sharers-Enjoyment of property of Co-sharers. **11 C P L R 144.**

45.—S. 38—Applicability to mortgage executed before Act came into force,

Mortgages executed before the Act came into force are also governed by the provisions of s, 38 of the Act. (1 C P L R 102; 6 C P L R 10, Fol,) **Ramchand v Mt Kashi Malguzarin. 9 C P L R 30.**

46.—S. 38 (2)—Mortgage of several holdings —Ascertaining value of mortgage for purposes of—

Where an absolute occupancy tenant mortgaged his holdings in two villages to one and the same person for the purpose of ascertaining the value of the mortgage within the meaning of s. 38 (2) the mortgage should be split up in proportion to the value of each of the holdings mortgaged. **Beni Parshad v Dharamdas Kalar. 11 C P L R, 17.**

47.—S. 38 (2, 4, 5)—Mortgage by absolute occupancy tenant–Consequences of landlord not purchasing holding.

So far as s. 38, cl. (5) of the Act as amended by Tenancy Act XVII of 1889 lays down that when the right of an absolute occupancy tenant is foreclosed the landlord shall have a right of pre-emption it clearly refers to the foreclosure of such a mortgage as might be made under cl. (2) without notice to the landlord. In the case of other mortgages the landlord has the option under cl.(4) of purchasing the holding and if he does not care to do so the mortgage holds good and the landlord cannot afterwards if it is foreclosed raise any objection. **Gopalji Joshi v Holu. 5 C P L R 65,**

Notes:—Ref: 6 C P L R 131, 6 N L R 69.

48-49.—S. 38 sub-s. 7—Mortgage of absolute occupancy holding with notice to landlord–Possession of mortgagee under foreclosure decree—Right of landlord to sue for possession.

Where the tenant of an absolute occupancy holding mortgaged his holding without notice to the landlord, although the proportion which the sum for which the mortgage was made bore to the rent of the holding was such that without such notice the transaction was void as against the landlord under the provisions of sub s. 7 of s. 38 of the Act and the mortgagee was placed in possession under a foreclosure decree the landlord was entitled to recover possession from the mortgagee. **Punjaji v Beharilal Golabchand 6 C P L R 131.**

Central Pro. Tenancy Act XVII of 1889-*Contd.*

Notes:—Ref: 12 C P L R 127; 6 N L R 69.

50.—S. 39—Non-feasance-Liability of Municipal Committee.

Under the Act no statutory liability attaches to a Municipal Committee in the Central Provinces for any act of non-feasance. (14 Mad 386 Ref,) **Municipal Committee of Nagpur v Shrimant Naoloji Rao Gujar, 11 C P L R 35.**

51.—S. 40—Rent a first charge—Right to realize rent by sale of holding.

What is meant by the rent being a first charge on the holding is simply that so long as any rent remains due on the holding the landlord has right to realize the rent due by the sale of the holding in preference to any other creditor and that that right is not affected by any sale or transfer of the holding. (15 Cal 492, 17 Cal 301, 1 C P L R 16 Ref,) **Bhaoo Patel v Raja Raghoji Rao Sahib Bhonsle. 10 C P L R 48,**

Notes:—Ref: 16 C P L R 52. Doubted 11 C P L R 95. Relied on: 1 N L R 117.

52—S. 43—Mortgage of proprietary share and sir land—Sale of proprietary share for arrears of revenue—Mortgagor becoming occupancy tenant of sir land—Foreclosure of mortgage—Suit for ejectment by purchaser—Right of mortgagee to resist claim.

Where a proprietary share in a village together with certain sir land were mortgaged and the proprietary share was subsequently sold for arrears of revenue, the mortgagor becoming occupancy tenant of his sir land, the mortgagee, who later on foreclosed his mortgage and got possession of the land, could not resist the claim of the purchaser at the revenue sale to eject him. (11 C P L R 133. 24 All 538, Appl.) **Harikrishna Brahman v. Jaideb, 17 C P L R 33.**

53—S. 43 (2)—Thekadar—Powers of, in the absence of restrictive conditions in lease.

In the absence of conditions in the lease restricting his power a thekadar of proprietary rights would have all the powers and privileges that a landlord would have under the Act in respect of his tenants. **Lachman v. Nanhusing, 8 C P L R 39.**

Notes—Obs., 15 C P L R 17.

Central Pro. Tenancy Act XVII of 1889-*Contd.*

54—S. 51—Status of tenants holding lands prior to Act came into force.

The operation of the amendment in the above section of the Act which was effected by s. 12, Act XVII of 1889 was intended to be retrospective and those who held as ordinary tenants when the amendment came into force became sub-tenants but those who had held their holdings for more than 12 years when the Act came into force acquired rights of occupancy and could not be ejected as sub-tenants. **Sheoram Brahmin v. Raghoba, 6 C P L R 101.**

Notes—Ref., 16 C P L R 41, 7 C P L R 45; Fol: 12 C P L R 132.

55—S. 51, as amended by Act XVII of 1889—Ejectment suit by Malik Makbuza—passing of amendment during pendency of suit—Suit governed by amendment.

Where during the pendency of a suit by a Malik Makbuza to eject a person from his holding the amending Act XVII of 1889 was passed, the rights of the parties could not, according to the general principle applicable to such cases, be governed by the law as it existed when the action began, for the amending Act clearly showed an intention to vary the rights of parties with retrospective effect, the object of the amendment being prevention of creation of tenant right in Malik Makbuza lands. **Raoji Kalai v. Eshwardas Marwari. 7 C P L R 10.**

56—Ss. 57 to 60—Necessity for agreement being made by tenant in Court—No recognition of private agreement.

The intention of the Legislature is to give the benefit of the protection afforded by s. 60 of the Act only where the agreement has been made by the tenant in Court either by the presentation of written statement under sub-s. 1 of s. 57 or by a statement made in Court and recorded by the Court under sub s. 1 of s. 58, except in the case of an ejectment decree which has become void by default of the landlord under sub-s. 2 of s. 59. A private agreement is not recognised at all. **Raghunath Row v Mt Chandni, 7 C P L R 113.**

57—S. 61—Assisting a tenant in cultivation and receipt of produce not constituting co-sharer.

Where some persons assist a tenant in the

Central Pro. Tenancy Act XVII of 1889-*Contd.*

actual cultivation of the land and receive a portion of the produce for their pains they are not by that fact made co sharers under s 61 of the Act. The term "co sharer" implies an interest of the same kind as that of the tenant. **Basora v. Jugal Kishore, 6 C P L R 116.**

Notes—Ref: 12 C P L R 119, 1 N L R 178.

58.—Interest absolutely within discretion of Court.

S. 70 of the Act leaves the question of the rate of interest that may be allowed to the plaintiff in a suit for arrears of rent absolutely in the discretion of the Court. **Amritrao Meghe v. Baliram, 8 C P L R 9.**

59—S. 71—Suit for rent against defendant as sub-tenant—Defence of direct tenancy from landlord—Appealability of decision adverse to defendant.

Where the plaintiff sued the defendant as his sub-tenant for rent and the defendant pleaded that he was the tenant of the holding in question directly under the *Malguzar* an appeal lay from a decision adverse to the defendant, as the matter related to conflicting claims to the land, notwithstanding widow, she is only a collateral relative of her brother, who was the last full heir. **Mt Salita v. Sitaram, Zamindar, 6 C P L R 138.**

Notes—Ref: 15 C P L R 89; Fol: 5 N L R 172.

60—S. 71—Transfer of holding by tenant without landlord's consent—Remedy open to landlord.

Where a tenant transferred his holding without the landlord's consent under s. 71 of the Act of 1898 the landlord could apply to the Revenue Divisional officer for possession but could not sue in the Civil Court for declaration of title and possession. 14 Cal 644, Dist; 13 C P L R 143, Ref. **Dayaram Patel Lodhi v. Shaligram Lodhi, 16 C P L R 135.**

61.—Section 81— Agricultural Tenancies—Ordinary tenant—Limitation.

The C P. Tenancy Act applies to every sort of agricultural Tenancy in the Central Provinces. Agricultural tenants seem to be exhaustively divided into 5 classes by S, 4 of the Act, the last clause that of ordinary tenants comprising

Central Pro Tenancy Act XVII of 1889 *Concld.*

all tenants who are not included in some one of the other classes specified in the section. The mere fact that by a special contract a tenant is freed from some of the conditions which but for such a contract would regulate his tenancy does not prevent him from being an ordinary tenant. Thus a tenant holding under a perpetual lease at a fixed rent is an ordinary tenant and if ejected by his landlord, he must sue within two years as provided in section 81 of the C. P. Tenancy Act. 8 C P L R 33 Dist. **Durga Patel v Ganpati Patel. 9 C P L R 27.**

Central Provinces Tenancy Act (XI of 1898).

1.—Transfer by occupancy tenant—No forfeiture of holding

Where an occupancy tenant sold his holding without the consent of the landlord the sale did not entail a forfeiture of the holding. 24 Cal 212 Dist.

Anant Ram v Bhopat Singh, 13 C P L R 39.

2.—Anything required by Act to be done by landlord—Persons who should do same.—

In the absence of any special arrangements to the contrary anything which the Tenancy Act requires or authorises a landlord to do must be done either by all the co sharers acting together or by an agent authorized to act on their behalf. **Gopal Ramkrishna v. Govind Pandurang Rangari. 13 C P L R 113.**

Notes.—Rel on 2 N L R 45; Ref., 4 N L R 45, 2 N L R 108.

2 A.—Central Provinces Tenancy Act (XI of 1898)—Landlord and tenant— Co-sharer landlords —Ejectment suit for—Right to sue alone:—

Under the Central Provinces Act, a lambardar is not alone entitled in the absence of the other co- sharers, to bring a suit for ejectment. He is not an agent for the co-sharers for any other purpose than that of representing them in their dealings with Government. **Nilmoni Gountia v. Jogendra Gountia. 12 C L J 104=37 Cal 694.**

3.—Personal remedy and real remedy.

A landlord has in case of arrears of rent a *personal* remedy, against the tenant, based on

Central Pro. Tenancy Act XI of 1898-*Contd.*

contract, and *a real* remedy against the holding. A suit for the personal remedy can only be maintained against the tenant or some representative personally liable to pay the arrears. A suit for the real remedy follows the land, and lies against whomsoever, having any interest in such land irrespective of any representation of the defaulting tenant. The real remedy is enforceable by a suit for sale under S. 100 of the Transfer of Property Act.

The personal remedy is governed by Art 110 of the Limitation Act, and the real remedy by Article 132.

A suit against persons, to whom the tenancy is transferred by a private sale binding on the landlord, being a suit to enforce the real remedy is governed by Art. 132 of the Limitation Act. (7 All 502 (P C) Ref; 3 N L 81 Diss; 16 C P L R 52; 26 All 138; 26 All 82; 29 Mad 305 Dist; 26 Mad 730 (733); 13 C P L R 9; 9 C P L R 113; 14 C P L R 17 Ref.) **Singai Murlidhar v. Lala Premnarain. 3 N L R 164.**

4.—Ss. 2 and 41—Holding, nature of—Partition of holding, effect of—"devolves," effect of.—

A holding, under S. 2 (3), Tenancy Act, 1898, is, by its very definition, a parcel of land held under one lease or set of conditions and is indivisible and cannot be affected by action to which the tenants alone are parties. Even if it were ancestral property in the lands of a father, and his son should acquire rights in it by birth, the son could not enforce a partition so as to bind the landlords to recognise each share as a separate holding.

By virtute of S 41 (1) Tenancy Act, the right of an absolute occupancy tenant "devolves as if it were land" and the use of the word "devolves" appears by necessary implication to exlude, for example, the taking by survivorship which obtains among Hindus in respect of joint ancestral property. (1 W R 10 and 8 Cal 118 relied on; 4 C P L R 57 and 13 C P L R 137 Fol. 11 C P L R 144, ref to). **Pancham Singh v Nankoo Singh. 3 N L R 182.**

5.—Settlement record, presumption, evidence—Central Provinces Tenancy Act (XI of 1898), Sec, 2 (10)—Holding of a survey number.

Central Pro. Tenancy Act XI of 1898-*Contd.*

The entry in the settlement record is not conclusive; it is only a matter of presumption.

The holding of a survey number in section 2 (10) Explanation II of the Central Provinces Tenancy Act has reference to the holding when the proceedings in a Civil Court are initiated, and it cannot avail a person that in a subsequent settlement he was recorded as a tenant.

Purkhit Panda v Ananda Gaontia. 8 C L J 116=12 C W N 1036.

6.—Tenancy Act (C P) Remission or suspension of rents—Payment of thekajama—Whether relieved or not—Intention of parties.

In the absence of a general or special order by a Revenue Officer under Sub-section 6 of s. 18 Tenancy Act, a Thekadar is not relieved from payment of thekajama—merely by reason of the fact that an order passed under Sub-sec. (1) certain rents have been remitted or suspended. The liability or non-liability for the payment of theka-jama under such circumstances depends entirely upon the intention of the parties at the time of making the contract. **Raja Kishore Singh v. Seth Jaith Mal, 14 C P L R 138.**

7.—S. 35—Surrender of holding by tenant—Necessity for registration of.—

A surrender such as is referred to in s. 35 of the Act (1898) does not require to be registered. 9 C P L R 122, Ref. **Trilochan Gaontia v. Lachman Padhan, 14 C P L R 29.**

8—Ss. 38 and 41 (3) (b)—Meaning of the word 'permit' in s. 41 (3) (b).

The legislature, by enacting and re-enacting S. 38 of the Tenancy Act, 1883, intended to cut down, not the landlord's, but the absolute occupancy tenant's rights. The word 'permit' in s. 41 (3) (b) should be interpreted as merely equivalent to 'suffer'. Where an absolute occupancy tenant intends to transfer any right in his holding by sale and gives to his landlord a written notice of his intention, the landlord does not, by reason of his inaction for one month after receiving the notice, forfeit the right to recover an amount equal to the rent of the holding for one year. The Select Committee's reports on an Indian Bill may be referred to, to ascertain the

Central Pro. Tenancy Act XI of 1898-*Contd.*

object of the corresponding Act. 22 Cal 788 (790) 17 All 498, 24 Bom 484. 25 Bom 259, Ref:
Seth Gangabishan v Balmukund. 3 N L R 40.

9—S. 41—Transfer contrary to—Voidable.

Any transfer made in contravention of the provisions of s. 41 of the Act is voidable at the instance of the landlord. (1 C P L R 53, 132, Ref.) **Mt Tulsa v Mt. Dasoda. 15 C P L R 173.**

10—S. 41—Legality of notice by tenant requiring landlord to purchase holding in eight days.

A notice by an absolute occupancy tenant requiring the landlord to purchase his holding within eight days is not bad in law. (3 C P L R 1, Ref.) **Bharat Singh v Dhansingh. 14 C P L R 162.**

11—S. 41—Sub-section (3), clause (a) Expression "claim to purchase."

The expression "claim to purchase" in section 41—Sub-section (3) clause (a) of the Tenancy Act implies a claim of such a nature as would sustain a suit for specific performance by the tenant should the landlord subsequently resile from his agreement to purchase. 14 C P L R 162, Appr: **Kodu Buksh v. Bishun. 2 N L R 27.**

12—S. 41 (3) (b)—Suit for rent by the Mulguzar—Purchaser from tenant not liable in a suit for a simple money decree.

In a suit by a Mulguzar, under s. 41 (3) (b) of the Act, for the recovery of one year's rent in which an absolute-occupancy tenant and his purchaser were made defendants, and where no attempt was made to make the rent a charge on the holding held that as the suit was for money only, no decree could be passed as against the purchaser.

Held, also that, even where there is contract between the vendor and the purchaser, to the effect that the purchaser must pay the year's rent, the Mulguzar, being a stranger to the consideration, cannot enforce performance of the contract by an action thereon in his own name, although he is the person intended to be benefited thereby, unless he is in the position of *cestui que trust* 11 C P L R 108, 14 C P L R 22 Fol. **Budha v Atma Ram. 3 N L R 111.**

Central Pro. Tenancy Act XI of 1898-*Contd.*

13—S. 41 (7)—Absolute occupancy tenant, transfer by.

Where an absolute occupancy tenant had made a transfer of his holding, transfer can be avoided, under S. 41 (7), of the Central Provinces Tenancy Act, 1898, only by the whole proprietary body acting together, or by an agent who is authorized to act on their behalf and whole authority should not have been revoked in regard to the particular transfer in dispute. A transferee cannot be disturbed, under S. 51 (7), if even one of many persons composing the body of landlords refuses to join in avoiding the transfer and a suit to avoid the transfer was, under the circumstances, dismissed.

Statutes interfering with private rights of alienation should be strictly construed. 13 C P L R 113, S A No 20 of 1906 of the J C S Court, Central Provinces, Fol; 12 C W N 249, 14 Cal 201 2 N L R 45 (47), Ref: S A No 20, 1906, Fol; 16 C P L R 135 (139), 14 C P L R 129, Ref. 20 W R 126, 7 Cal 414, 2 C W N 229, Ref. and Dist: 7 All 702 (707), Ref. **Ramji Patel Kunbi v Syed Nur. 4 N L R 45.**

14—S. 46 Powers of Registrars—Validity of transfer—Unregistered deed.

The effect of S. 46 of the Tenancy Act is to abrogate the powers of a Registrar or Sub Registrar to register certain documents. In other words where registration is essential to the validity of a transfer, the transfer is no longer possible. If the Registrar is deceived by false recitals in a bond, the document registered under such deception is not effective. 16 C P L R 135, 17 C P L R 49 ; 14 Cal 449 ; 18 Cal 556 ; 29 Cal 654 Ref. to. **Daji Vithal v Moreshwar Venkatesh. 1 N L R 112.**

15—S. 46—Succession to occupancy holding.

The law governing succession to the occupancy holding of a Hindu is the Hindu Law subject to the exceptions created by Statute Law. S. 46 of the Act lays down such an exception, and its provisions are absolute and are not merely enforceable at the option of the landlord.
Rajai v Fundi. 3 N L R 112.

Central Pro. Tenancy Act XI of 1898-*Contd.*

16—Ss. 59 and 60.

Although the tenant of a *malik makbuza* is styled a sub-tenant in S. 59 of the Tenancy Act, he is a sub-tenant with a difference. He is a sub-tenant, in that he does not possess the privileges of an ordinary tenant, but his landlord is not a lessee, but the owner of the land. A *malik makbuza* has free liberty to transfer his right and the sale of his rights is in no way analogous to an alienation by a tenant and does not necessarily determine the sub-tenancy. The purchaser can eject the tenant of *malik makbuza* only in circumstances which the original *malik makbuza* could have ejected him. 6 C P L R 92; 93, 11 C P L R 5 ; 12 C P L R 158 Ref :

Shamlal v Kanhai Lal. 2 N L R 162.

17—Ss. 70 and 46 of the Tenancy Act—Co-sharer.

The term 'co-sharer in the holding' as used in Sections 46 and 70 of the Tenancy Act is equivalent to co-tenant of the holding. 8 C P L R 11 ; 6 C P L R 116 Ref: **Deochand v Moti 1 N L R 178.**

18—S. 70 (now 80 of 1898) Special Contract to pay interest.

There is nothing in S. 80 of the Tenancy Act which prevents a landlord from recovering interest on arrears of rent at any rate which may have been agreed upon by the tenant. **Kunj Behari Lal v Gabru Kurmi. 16 C P L R 48.**

19—S. 81 (b)—Suit for rent—Claim of third party set up—Second appeal.

Where in a suit for rent the defendant pleads that the rent of the land is payable to a third person and such third person is not made a party to the suit, no second appeal lies from a decision passed in the suit, inasmuch as no question relating to a title to land as between parties having conflicting claims thereto is determined by the judgment therein. (7 Cal 330, 8 Cal 712 Ref.)

Hemraj Askaran v Kanhailal. 14 C P L R 31.

20—S 85—Recorded tenant, decree for arrears of rent obtained against, ejectment in execution of—Forfeiture of the entire holdings.

Central Pro. Tenancy Act XI of 1898-*Contd.*

The lands in dispute formed the occupancy holdings of one J, who died leaving two sons, the plaintiff K and another G. The fields were recorded in the name of G alone and in execution of a decree for arrears of rent obtained against him by the malguzar, the defendant in this case, G was ejected from the holdings. Thereupon, the present suit was instituted on behalf of the other minor son K by his mother as next friend, on the ground that he succeeded to the holdings jointly with G on the death of his father, that he was not a party to the suit for arrears of rent and was not therefore bound by the order of ejectment. *Held*, it was clear that, had the holding in the present case been *sold* in execution of a decree for arrears of rent obtained against G, the title of the purchaser could not have been questioned by the plaintiff K. (10 Cal 996, Ref ; 25 Cal 396, 26 Cal 677, 14 Bom 597, Fol ; 4 C W N 608, Dist.), and on principle, no distinction could be made between a case of sale and one of ejectment The decree was a decree against G as a manager representing the owners of the tenant rights, and the subsequent ejectment G was constructively also an ejectment of the plaintiff K. **Kisan Kunb v Raghunath Kalar. 2 N L R 101.**

21—S. 92—of Act XI. of 1898—Jurisdiction of Revenue Officers.

The summary jurisdiction conferred on a Revenue Officer by S. 92 of the Tenancy Act is restricted to cases in which a tenant has been ejected by his landlord. L R 22, I A 107, Ref:

Khandoo Teli v Kaloo Gond. 16 C P L R 70. Ref: to, in 16 C P L R 145.

22—S. 94—Suit by a trespasser—Application of s. 94.

The special period of limitation prescribed by s. 94 (1) of the Tenancy Act is only applicable where the tenant's ouster is effected by the landlord himself or by some one acting in concert with him or at his instance. A trespasser cannot by subsequently faking a settlement from the landlord obtain the benefit of the special period. (16 C P L R 145 Fol. 15 C P L R 125 ; and 29 Cal 610 Ref;) **Dinabandhu v Dukhu Mirdha. 1 N L R 73.**

Central Pro. Tenancy Act XI of 1898 *Concld.*

23—Limitation–Special period of limitation—Section 94—Tenancy Act—Suit by tenant against one who ousted him.

The special period of limitation prescribed by S.94 C P T Act applies to a suit instituted by a tenant against a defendant who has ousted him and who after such ouster has taken a settlement from the landlord. 15 Cal 317 & 450 ; 16 Cal 741 ; 17 Cal 926 , 24 Cal 40 ref. to. **Debidin Kalar v Hari 15 C P L R 125.**

24—S 94 (3), proviso—Retrospective operation—Applicability to rent suits.

The proviso to S. 94 (3) of this Act is retrospective, and governs all rent suits to which its terms are applicable from the moment of its enactment. (5 M I A 109, 17 Bom 289, 13 C P L R 143, 16 Cal 741, 17 Cal 926, 6 Bom 26, 1 I A 167, 38 Cal 270 Ref.) **Shankargir v Ramchandra. 7 N L R 125.**

25—S. 94 (1) C P Tenancy Act 1898.—Suit by a tenant—Tenant other than an A O tenant—Possession of land—Ejectment by a person other than the landlord.

A suit by a tenant other than an-absolute occupancy tenant to recover possession of land from which he has been ejected by a person other than his landlord, the landlord having had no hand in the ouster, is not governed by S. 94 (1) of the C P Tenancy Act, 1898 15 C P L R 125; 29 Cal 610; 24 Cal 40; 20 Cal 609 at p 628; 27 Cal 732 at p 758; 23 Cal 55 at p 59; 22 Cal 788; 21 Cal 732; 14 Cal 176; at p 183; 16 C P L R 70 Ref to. **Sonsa Chamar V Puransingh Rajput. 16 C P L R 145**

Notes Fol. & Ex: I N L R 73 (1905).

26—Tenancy Act XI of 1898—S. 95—Fixation of rent—Apportionment.

Apportionment of rent fixed already is not a fixation or alternation of rent within the meaning of section 95 of the Tenancy Act. **Piare v Gopal. 15 C P L R 37.**

Ceremonies.

See (1) Hindu Law—Adoption—Requisites for Adoption—Ceremonies.

(2) Mahomedan Law — Pre-emption—Ceremonies.

II C. C. 78

Certificate.

Certificate under Sec. 600 C. P. C. (1882)

1—"Otherwise fit for appeal"—Certificate.

In considering under what section of the Civil Pro. Code the certificate of fitness was given by the Court, it is the certificate itself which has to be looked at and not the order for the certificate. In granting a certificate under sec. 600, Civ. P. C , the Court must exercise its judicial discretion upon the matter. Unless the certificate upon which the leave to appeal is based is in such a form as to justify that leave, the Court must find that leave was not properly given and the appeal must be dismissed. L R 27 I A: 11: s. c 5 C W N 193 (1900), referred to. **Radha Krishn Das v Rai Krishn Chand (P. C.) 5 C W N 689.**

Certificate under Public Demands Recovery Act

2—Certificate, validity of—Service of notice—Limitation, suit to set aside a sale in execution of a certificate– Civil Procedure Code (Act XIV of 1882) Sec. 244.

Under the Public Demands Recovery Act (I of 1895 B. C.) as amended by Act Iof (1897 B C) section 19, section 244 of the Code of Civil Procedure is applicable and bars a separate suit when the only grounds alleged for setting aside a sale ,are irregularities not in the proceedings anterior to decree or in the decree which is sought to be executed, but in the execution proceedings subsequent to decree.

The law has changed subsequent to the decision of the cases of *Ram Taruck Hazra v. Dilwar Ali and Janki Das v. Ram Golam Sahu.*

Semble:—

The mere fact that a greater sum is claimed as due in the certificate, than what is really due, does not make the certificate and notice bad and does not prevent the running of time against the debtor provided that the notice was duly served. In serving the noitce the procedure prescribed by section 31 should be strictly followed. **Umed Ali Bhuya v Raj Lakshmi Debya. 33 Cal 84=10 C W N 130=1 C L J 538.**

Notes.—Dist: 32 Cal 1130=I C L J 542. Not Fol; 34 Cal 787. Fol: 5 C L J 555. Ref: 5 C L J 696 F B; 235; 240 F B; 11 C W N 745; 34 Cal 811 F B; Fol 5 C L J 555,

Certificate-Copy of.

1—C P C S 244 applicability of.

When the Copy of the certificate and the notice prescribed under Sec 11 of Act 1 of 1897 (B C) are issued and duly served, the certificate has the force of a decree, and sec. 19 of Act 1 of 1895 (B C) as amended by Act 1 of 1897 (B C) makes the provisions of sec 244 of the Code of Civil Procedure applicable to proceedings for enforcing the certificate, which bars a separate suit to set aside a certificate sale on the ground of irregularity, (6 C W N 331 Dist).

Art 12 (b), sch II of the Limitation Act applies to a suit to set aside such a certificate sale and the period of limitation is one year.

Barhamdeo Narayain Singh v Bibi Rasul Bandi. 1 C L J 360=32 Cal 691.

Notes—Doubt; 32 Cal 1130=1 C L J 542; 2 C L J 504. Ref: 5 C L J 696 F B; 11 C W N 745; 756 F B; 5 C L J 240 F B; 34 Cal 787; 811 F B.

Certificate of Administration 1-217.

(1) Certificate under Bombay Regulation VIII of 1827 & Act XIX & XX of 1841 1—15.

1 Bom. Reg. VIII of 1827—Right of suit 1—10.
2 Act XIX of 1841 11—12.
3 Act XX of 1841 13—15.

(2) Act XXVII of 1860 & VII of 1889 & Grant of certificate 16—35.

1 Act XXVII of 1860 16—34.
2 Act VII of 1889 35.

(3) Right to sue or execute decree without certificate 36—87.

1 Representative of deceased creditor, suit by 36—40.
2 Adoptive son of deceased creditor 41.
3 Assignee of mortgaged property 42.
4 Application for execution by legal representative without certificate 43—47.
5 Hindu widow, suit by 48.
6 Recovery of property of deceased from party in wrongful possession, suit for 49—50.
7 Devisee under a will suit by 51.
8 Necessity of producing certificate 52.
9 Dismissal of suit pending decision of application for certificate is improper 53.

Certificate of Administration-*Contd.*

10 Representatives of deceased decree-holder, right of, to execute decree 54.
11 Application for execution of decree by heir of deceased decree-holder 55.
12 Representative of assignee of debt by devise, Right of, to sue 56.
13 Debt due to estate of deceased person—suit by legal representative 57.
14 Debt due to estate of deceased person—execution of decree by representative for 58.
15 Right of heir to sue 59.
16 Succession Certificate Act VII of 1889, s. 4 60—87.

(4) Issue of, and right to certificate 88—145.

1 Issue of certificate 88—94.
2 Disretion of Court to grant certificate 95.
3 Right to certificate 96—143.
4 Separate certificate to several heirs 144.
5 Brother's widow 145.

(5) Nature & form of certificate 146—162.

1 Certificate for portion of property 146.
2 Limited certificate 147.
3 Certificate to collect fractionor share of debt 148—153.
4 Joint certificate 154—161.
5 Fresh certificate—Act XXVII of 1860, s. 6. 162.

(6) Procedure 163—179 B.

1 Evidence improperly taken 163.
2 Enquiry as to right 164—179.
3 Succession certificate want of—objection first raised on appeal 179A.
4 Suit by son of deceased unusufructuary mortgagee for amount due on mortgage—Certificate of heirship not necessary 179B.

(7) Effect of certificate 180—197.

1 Indemnity of debtors paying debts 180—181.
2 Right of co-heir against holder of certificate 182.
3 Adjudication of title 183—190.
4 Effect of certificate in subsequent suit 191.
5 Decision as to validity of will 192—193.

Certificate of Administration-*Contd.*

6 Decision under Act XXVII of 1860, effect of 194.

7 Power to negotiate Government securities 195.

8 Effect of certificate on title enacted by will 196—197.

(8) Cancelment & recall of certificate 198—212.

1 Act XVII of 1860—Grant of certificate by High Court 198.

2 Application for cancelment 199.

3 Refusal to recall certificate 200.

4 Jurisdiction to recall 201.

5 Recall of certificate granted without jurisdiction 202.

6 Recall of certificate of administration fraudulently obtained 203—206.

7 Power to recall certificate obtained by fraud and misrepresentation 207.

8 District Court, Power of, to cancel certificate granted 208.

9 Suspension or recall of certificate 209.

10 Recall of certificate granted without list of debts being filed 210.

11 Recalling certificate ground for 211.

12 Cancelling great empowering person to deal with securities claimed by another 212.

(9) Bombay Minor's Act XX of 1864 213—217.

1 Mother of minor 213.

2 Joint Hindu family 214—215.

3 Certificate granted to Collector 216.

4 Effect of certificate on adoption 217.

Certificate of Administration.

See Cases under appeal—Certificate of administration.

—Application for.—

See Limitation Act, 1877, art. 178.

1 CERTIFICATE UNDER BOMBAY REGULATION VIII OF 1827, AND ACTS XIX AND XX OF 1841.

(1) Bom Reg VIII of 1827-Right of suit.

1—Suit to establish title under will.

A plaintiff can sue to establish his title under a will without producing a certificate under Regulation VIII of 1827. 9 Bom. H C A C 31, distiguished. **Mafatlal Narandas v Bai Parson. 19 Bom 320.**

Notes.—Ref: 5 Bom L R 645; 643.

2—Certificate of heirship granted under Regulation VIII of 1827 was not *prima facie* evidence that the holder of it was the rightful heir of the deceased. The effect of such certificate was merely to give security to persons in possession of, or indebted to, the estate of the deceased in dealing with such holder as the legal representative of the deceased. **Ramchandra Kulkarni v Vithoji valad Malharji Patil. 4 Bom H C R A C 178.**

Notes.—Fol: 10 Bom 449. Dist: 8 B H C R 152 F B.

3—Effect of certificate under Regulation VIII of 1827, s. 7, cl. 2—Representative of estate.—

A certificate of administration granted under Regulation VIII of 1827 only indicates the person who for the time being is in the legal management of the property in respect of which it is granted, but does not constitute the holder of the certificate a representative of the estate for the purpose of distributing it amongst his co-sharers. **Keshav Jagannath v Narayan Sakharam. 14 Bom 236.**

Notes.—Fol: 15 Bom 135. Ref: 5 Bom L R 355.

4—Reversal of order-Payments made before reversal.—

Where a widow obtained an order for a certificate of administration to the estate of her deceased husband, which order was, however, reversed on appeal before the certificate was granted, it was held that payments made to the widow before the order was reversed were unauthorized. **Damodhar Bapuji Pacha-parkar v Zinga** *Kom* **Kandlika. 7 Bom H C R A C 31.**

Notes:-Ex. 8 B H C R 152 F B Fol. Ref: 9 B H C R 37.

5—Payment of debts to supposed heirs of deceased before grant of certificate of heirship.

A defendant who is sued by the holder of a certificate of heirship to a deceased Hindu for a

Certificate of Administration-*Contd.*

(1) Certificate under Bom. Reg VIII of 1827 & Acts XIX & XX of 1841—*Contd.*

debt due from the defendant to the deceased is at liberty to show, notwithstanding the certificate of heirship, that he has paid the debt to the actual heir of the deceased before the grant of the certificate. It will not, however, be sufficient for such defendant to show that he has paid his debt to a person whom he *bona fide* believed to be such heir. **Purshotam Mansukh v Ranchhod Purshotam. 8 Bom H C R A C 152.**

Notes.—Fol: 8 B H C R O 140, Ref: 7 Bom 341 F B.

6—The holder of a certificate of administration under Reg. VIII of 1827 of the estate of a deceased decree-holder is a transferee by operation of law of the decree within the contemplation of s. 232 of the Civil Procedure Code and can, therefore, apply for execution of such decree.

Khanderav v Ganesh Shrotri. P J (1887) 19=11 Bom 368.

7—The words "may appoint" in s 9 of Reg. VIII of 1827 are not merely permissive. The District Court cannot refuse to appoint an administrator when the occasion arises. **Shri Vishwambhar Pandit v Vasudev Pandit. P J (1888) 63=13 Bom 37.**

8—Regulation VIII of 1827, Sec 4.—Certificate of heirship based on adoption—Regular suit to prove adoption—Adoption—Application for certificate of heirship.

H applied under Regulation VIII of 1827 to a District Judge for a certificate of heirship to a deceased D under a registered deed of adoption by his widow executed nearly fifty years after D's death. The opponent claimed to be the heir and denied the legality of the adoption. The District Judge referred the applicant to a regular suit to establish the validity of his adoption.

Held, in appeal, that the District Judge was bound to investigate the case, following the procedure laid down in Sec. 4 of Regulation VIII of 1827, and had no authority to dismiss the application and refer the applicant to a regular suit to establish the validity of the adoption.

Harising v Bhausing. P J 1895, p. 188; 20 Bom 548.

9—Jurisdiction—Administrators appointed by the Court—Order to deliver property—Regulation

Certificate of Administration-*Contd.*

(1) Certificate under Bom.Reg. VIII of 1827 & Acts XIX & XX of 1841—*Contd.*

VIII of 1827, Sec 9—'Determined"—"Finally determined"—Right of appeal—Illegal order—Civil Procedure Code, Sec. 622—Extraordinary jurisdiction.

Sec. 9 of Regulation VIII of 1827 empowers the District Court to make an order directing the administrators appointed under the Regulation to make over the property, when "it has been determined" between the rival claimants who is the heir of the deceased, but to give full effect to the object of the Regulation, the word "determined" must be under-stood "finally determined."

Where the Judge considered that he was bound to make an order directing administrators appointed under Regulation VIII of 1827 to make over the property of the deceased to one of the rival claimants who was judicially declared to be the heir of the deceased.

Held, that so long as the party, against whom the decision in the matter of the rival claims was given, had a right of appeal, the order of the Judge was one which he could not make under the Regulation, and that in exercising his jurisdiction under the Regulation he had exercised it illegally and that being so, the High Court had power under Sec. 622 of the Civil Procedure Code to interfere in the exercise of its extraordinary jurisdiction. **Vishvambhar Pandit v Vasudev Pandit. P J 1892, p 3, 16 Bom.708.**

10.—Certificates under Bombay Regulation Act VIII of 1827 and under Act XXVII of 1860—Jurisdiction of Court-Foreigners residing abroad.

Regulation VIII of 1827 looks simply to the locality of the assets as the ground of the Court's jurisdiction to grant a certificate of administration, and does not, like Act XXVII of 1860, look to the person whose estate is to be administered. Where there are assets within a district, and certain specified circumstances exist, a certificate may be granted. The appointment of an administration excludes all other representatives so long as it endures. The authority of an administrator under S. 9 is the same as under S. 7. Under S. 3 of Act XXVII of 1860 certificate can be granted only for the estate of a British subject either resident within the District where the certificate is sought, or else having no fixed place of residence. The Act does not make provision for ad-

Certificate of Administration-*Contd.*

(1) Certificate under Bom. Reg. VIII of 1827 & Acts XIX & XX of 1841—*Contd*

ministration of the effects of a foreigner domiciled abroad. **Ibrahim Alikhan v. Ziaulnissa Ladli Begum. 12 Bom 150=1887 P J 167.**

Notes —Ref: 21 Bom 102.

(2) Act XIX of 1841.

11.—Summary procedure—Act XXVII of 1860.

A (a Hindu) died intestate in December 1865 leaving his widow in possession of his property, moveable and immoveable. The descent of A's property was admittedly governed by the law of the Mitakshara. On the 19th January 1866, A's nephew presented a petition to the Zillah Court, under Act XIX of 1841, denying the title of the widow. Upon this alone the Judge directed the widow to come in and show cause, which she did on the 2nd February following. A daughter of A on the 19th March presented a petition in opposition to the nephew's claim for possession The nephew filed a reply. In the meantime, the widow applied for a certificate under Act XXVII of 1860, which was opposed by both nephew and daughter. The nephew also filed a cross-petition under Act XXVII of 1860. All these petitions came on by consent together for adjudication on a state of facts admitted by all parties through their pleaders, who also, by consent between themselves, submitted their view of the question of law to be decided on the Acts of 1841 and 1860. The questions so submitted were—(1) Did it appear on the evidence that there was a separation between A and its nephew according to the Mitakshara doctrine ? (2) If the evidence *per se* established a legal separation, was such separation negatived by certain admissions of A ? The Judge refused the application of the widow under Act XXVII of 1860, and granted possession to the nephew under Act XIX of 1841. The nephew was a man of substance, and able to bring a regular suit, and there was no evidence of possession by force or fraud on the part of the widow, the only question being her right according to the Mitakshara Law. *Held* that the Judge was in error in proceeding summarily under Act XIX of 1841 on the declaration of the applicant alone and without other enquiry, but that this defect was cured by the widow's appearing. That the Judge ought not to have tried the cases under Act XIX of 1941 and Act XXVII of 1860 together and on the same issues; but the Judge

Certificate of Administration-*Contd.*

(1) Certificate under Bom. Reg VIII of 1827 & Acts XIX & XX of 1841—*Concld.*

having jurisdiction over the subject-matter and to frame the issues, his order was not open to appeal or review. **Jusoda Koonwur v Gowree Byjnath Pershad. 1 Ind Jur N S 365 : 6 W R Mis 53.**

12.—Curators Act XIX of 1841, Secs. 3, 5, 6, 7 and 8—Title—Jurisdiction.

The District Court appointed a Curator under Secs, 5, 6, 7, and 8 of Act XIX of 1841 without first determining the titles of the parties as required by Sec. 3 of the Act,

Held, there was nothing illegal in the exercise of the Court's jurisdiction. **Hassan Khatu v. Mahmad. P J 1894 p. 4.**

(3) Act XX of 1841

13.—Order granting certificate Effect of.

The effect of an order granting a certificate under Act XX of 1841 was not to establish a will incontestably against the whole world, or to prevent a will from being impeached in a suit if set up to defeat the rights of parties claiming under the Law of Inheritance. **Mahomed Azeemoolah Khan v Suhoodra Bebee. W R 1864, 227.**

14.—Nature of certificate.

A certificate for collecting the debts due to the estate of a deceased person given under Act XX of 1841 gives a personal right and is not transferable by sale. **Mehdee Ally Khan v. Luchmeeput Baboo I W R Mis 28.**

15 —Cancelling of certificate.

A Court cannot solely on the petition of a party, cancel a certificate granted to him under Act XX of 1841, or declare that his trust and gurdianship have ceased. If he gives up his duties of his own accord, he does so on his own responsibility and the Court will not order him to act. **Sumbhoo Chunder Khan v Ishad Chunder Banerjee. W R 1864 Mis 24.**

2 ACTS XXVII OF 1860 & VII OF 1889, & GRANT OF CERTIFICATE.

(1) Act XXVII of 1860—Trustee.

16—The object of Act XXVII of 1860 is not to enable the parties to dispute contested titles

Certificate of Administration-*Contd.*

(2) Acts XXVII of 1860 & VII of 1889 & Grant of Certificate—*Contd.*

but to enable the debtors to pay the debts due by them to the representatives of the deceased with safety,and thus to facilitate the collection of such debts. Thus the Act gives safety to the debtors and preserves the estate from loss by enabling some one to collect the debts due to the estate. The holder of a certificate under the Act is a trustee liable to account for the money received to the heirs or legal representatives of the deceased. **Nobodip Chunder Biswas.**

Prankisto Biswas v. Nobodip Chunder Biswas, 8 Cal 868.

Notes:—Dist: 15 Cal 574; 29 Mad 539=16 M L J 582=1 M L T 333.

17—Application of Act—Act XXVII of 1860, s. 2—Presidency Town—Natives—Refusal to pay—Want of fraudulent or vexatious motive in withholding debt.—

Act XXVII of 1860, which provides that no debtor of a deceased person shall be compelled to pay his debt to any person claiming to be entitled to the effects of such deceased person, except on the production of a certificate to claim debts or of probate or of letters of administration unless the Court shall be of opinion that payment was withheld from fraudulent or vexatious motives and not from any reasonable doubt as to the party entitled, is applicable to Hindus within Presidency Towns. Where Hindu died a intestate and his debtor refused to pay debt to his widow as she did not produce letters of administration and the widow sued to recover the debt without taking out a certificate or letters of administration, and it was found that there was no reasonable doubt that the widow was entitled to the debt, but that the debtor refused to pay neither from any fraudulent nor vexatious motive, but to avoid the danger of having to pay money again. *Held* that the suit must be dismissed.

Muttammal v Bank of Madras. 7 Mad 115

18—A certificate under Act XXVII of 1860 can be issued only for the estate of a British subject, either resident within the district where a certificate is sought, or else having no fixed place of residence. The Act does not make provision for the administration of the effects of a foreigner domiciled abroad. **Mir Ibrahim v Ziaulnissa 12 Bom 150=1887 P J 167.**

Notes:—Ref. 21 Bom 102.

Certificate of Administration-*Contd.*

(2) Acts XXVII of 1860 & VII of 1889 & Grant of Certificate—*Contd.*

19—Act XXVII of 1860, s 2—Bond given to secure debt due to estate of deceased Hindu—Suit by heir—Waiver of right to protection implied.

R, being a debtor to the estate of a deceased Hindu, executed a bond promising to pay the debt to V, the divided brother of the deceased, as his heir. A suit having been filed against V by the widow of the deceased, who claimed his estate, R offered to pay the debt to V on production of a certificate under Act XXVII of 1860, but not otherwise. *Held* that, as R had executed a bond promising to pay the debt to V, he could not rely on the protection afforded by Act XXVII of 1860.

Kottam Zamindar v Pittapur Zamindar. 9 Mad 171.

20—Omission to pay debt from vexatious motive to one holding a certificate of Administration.

The deceased had left a son and widow who with the concurrence of the deceased had taken out a certificate of administration of his estate. The son alone sued for the recovery of debts due to the estate. *Held* that s 2 of act XXVII of 1860 prohibited A from suing alone, for although he was beneficially interested to recover the debt yet there was no fraudulent or vexatious withholding of the debt. *Per Garth C. J*—A debt cannot be said to be 'vexatiously withheld' within the meaning of that section merely because the debtor omits to pay it. **Chunder Coomar Roy v Gocool Chunder Bhuttacharjee. 6 Cal 370.**

Notes:—Dist: 24 Cal 34. Ref: 13 Cal 47; 7 Mad 115; 20 Bom 537; 30 Mad 419.

21—Necessity for grant of certificate.

Before the grant of a certificate under Act XXVII of 1860, some necessity for it must be shown, as that there are debts to be collected.

Raj Chunder Bhuttacharjee v. Meertunjoy Shiromonye. 2 Hay 299.

22.—Necessity for certificate—Procedure on application under Act XXVII of 1860.

When an application is made for a certificate under Act XXVII of 1860, the Judge, instead of considering the necessity or otherwise for a certificate, should ascertain whether the applicant, or

Certificate of Administration-*Contd.*

(2) Acts XXVII of 1860 & VII of 1889 & Grant of certificate- *Contd.*

any one else is entitled to the certificate sought, and grant the same accordingly.
Mean Jan. **5 W R Mis 20.**
Jamsedji Kavasji v. Motibai.
2 Bom H C R 397: 2nd Ed. 375.

Notes.—Fol: 8 W R 317.

23—Existence of recoverable debts — Act XXVII of 1860.—

Where an application is made for a certificate under Act XXVII of 1860, the Judge, instead of enquiring whether any debts are due, and whether or not those debts are barred by limitation, ought simply to determine the right to the certificate, and if there be such a right, to grant the certificate. **Kaleenath Dutt.** **8 W R 12.**

Notes:—Ap: 8 W R 317 Dist: 9 W R 331. 24 W R 211.

24-25—Existence of debts —

Before granting a certificate under Act XXVII of 1860, a Judge is not required to ascertain whether there are any debts due to the estate of the deceased. **Shurut Chunder Mookerjee v Thakoormonee Debia,** **9 W R 240.**

Notes:—Ref: 24 W R 211.

26—Existence of debts—Act XXVII of 1860, s. 2—Debtor.—

Certificates under Act XXVII of 1860 should be granted in those cases only in which it is shown that the deceased person at the time of his death had certain debts owing to him, or, in other words, that there were persons who could be called debtors of the deceased. A person in whose hands are the surplus sale-proceeds of a property belonging to the deceased is a debtor within the meaning of s. 2. **Bishnoo Das v. Mungul Dass,** **24 W R 203.**

27—Existence of debts.—

A petitioner for a certificate under Act XXVII of 1860 need do nothing more than prove his title to collect the debts if there are any, not even give *prima facie* evidence of the existence of debts. The title is the thing to be looked to, and that would be established (no other reason being shown to the contrary) by relationship to the deceased, **Beemul Doss v. Shikhur Chand,** **24 W R 211.**

Certificate of Administration-*Contd.*

(2) Acts XXVII of 1860 & VII of 1889 & Grant of certificate -*Contd.*

28—Existence of debts.—

A certificate of administration ought not to be given without it being proved that there are debts, and that the grantee has the best right to collect them. **Uchhuba Dossia v. Nittyanund Shaha,** **24 W R 463.**
Wooma Tara Goopta v. Kalee Tara Goopta, **25 W R 93.**

29—Existence of debts—Act XXVII of 1860 —Questions to be determined on application.—

The sole question in an application for a certificate under Act XXVII of 1860 is the title to collect the debts due to the estate of the deceased, and it is not a matter for the Judge's consideration whether there are any, and what, debts due to the estate. **Bhugobutty Kooer v. Bholanath Thakoor,** **8 W R 317.**

30—Existence of debts.—

To entitle an applicant to a certificate under Act XXVII of 1860, it is not necessary for him to show that debts are actually due; it is sufficient if circumstances render it possible that debts may be due, or may accrue within the jurisdiction of the Court. **Bamakallee Dossee,** **10 W R 4.**

Notes:—Ref: 24 W R 203; 211.

31—Existence of debts.—

Where application is made for a certificate under Act XXVII of 1860, on the allegation that there are debts due to the estate of the deceased, and the allegation is not denied, the Court is bound to hear the petition. **Fuzl Moula v. Gholam Shurruff.** **12 W R 505.**

32—Act XXVII of 1860 — Certificate for collection of debts—Rival claimant — Enquiry into, and adjudication upon, title set up by.—

D. R., the eldest son of H. R. deceased, applied for a certificate under Act XXVII of 1860, to enable him to collect the debts due to his deceased father. The application was opposed by T.D. the younger son of H. R. deceased, who claimed a certificate under a will alleged to have been executed by H. R., the genuineness and validity of which was disputed by D. R. The Court (Judicial Assistant) refused to take evidence as to the genuineness and validity of the will, and granted

Certificate of Administration-*Contd.*

(2) Acts XXVII of 1860 & VII of 1889 & Grant of certificate -*Concld.*

a certificate to D. R, as eldest son of H. R. deceased, subject to his furnishing security.

Held, by Plowden and Smyth, JJ. (Lindsay, J., dissenting), that the Court was bound to go into the question of the genuineness and validity of the will.

An objector claiming a certificate under Act XXVII of 1860 under a will, is entitled to have an enquiry into and adjudication upon the title which he sets up, before a decision by the Court as to which claimant should get the certificate.— **Thakur Das v. Dya Ram, P R 36 of 1878.**

33—Jurisdiction—(Act XXVII of 1860).

The petitioners applied to the district Court at Agra, for a certificate under Act XXVII of 1860, in respect of certain money due to their deceased father some of which were at Agra and some at Allahabad. The district Court granted them a certificate limited to the money of the deceased at Agra. *Held*, that the Court should have granted a certificate in respect of the whole of the property of their deceased father that might be found in the N.W. Provinces. The certificate should be recalled and a fresh one granted. **Tribeni Sahai, 2 W N 69.**

34—Act XXVII of 1860 — Court-fees Act, sch. I, art. 13—Power of third parties to compel grantee to render accounts.—

The power given to a Court to compel the grantee of a certificate under the Act to file a statement on oath of all moneys realized or recovered by him is not intended to be exercised to enable strangers to compel such grantee to render accounts of the administration of the estate. **Bava Sant Ram v. Jasmal, 94 P R 1887.**

(2) Act VII of 1889.

35—Succession Certificate Act (VII of 1889) s. 14—Refund of deposit.—

If an application for a succession certificate is granted, the sum deposited by the applicant cannot be refunded; but if no order for the grant of the certificate has been made, a refund can take place. **Sankara Ayyar v. Nainar Mooppanar, 21 Mad 241.**

Certificate of Administration-*Contd.*

3 RIGHT TO SUE OR EXECUTE DECREE WITHOUT CERTIFICATE.

(1) Representative of deceased creditor, Suit by.

36—Act XXVII of 1860 — Court Fees Act, 1870, sch. 1, cl. 12 —

A certificate under Act XXVII of 1860 is not necessary to give to a person, claiming to be the representative of a deceased creditor, the right to institute a suit to recover a debt due to the estate of the deceased, or the right to present an application for execution of a decree obtained by the deceased. But such certificate, or a probate, or letters of administration, must be produced by the person proceeding as representative before a decree or order can be passed, or process of execution issued for payment of the debt due, unless the Court should think that payment is withheld from fraudulent or vaxatious motives, and not from any reasonable doubt as to the party entitled The effect of the provision in the note to art. 12, sch. 1 of the Court Fees Act (No. VII of 1870), on the consideration of a certificate duly granted, which has become liable to cancellation under that provision, but has not been cancelled, considered. Until cancellation, the certificate remains in full force as proof of the representative right to sue or obtain execution, whatever be the amount of the debt. **Govindappah v. Kindappah Sastrulu. Govindappa v. Kyatadoo Mattappa v. Nagannath, 6 Mad H C R 131.**

Notes—Dist 6 Cal 370. Ref: 13 Cal 47; 23 Cal 87 F B.

37—Succession Certificate Act (VII of 1889) S. 4-Suit by assignee of heir of deceased creditor.

In a suit by assignee of heir of a deceased creditor to recover the debt:

Held, that a succession certificate must be produced by the plaintiff before he can obtain judgment.

Per Curium: Certificate can be granted in respect of a particular debt. **Karuppasami v. Pichu Putter, 15 Mad 419=2 M L J 117.**

Certificate of Administration-*Contd.*

(3) Right to sue or execute decree without certificate—*Contd.*

38—Legal representative, Suit by, to recover debt due to the deceased—Act XXVII of 1860.—

The production of a certificate under Act XXVII of 1860 is not a condition precedent to the institution of a suit by a person claiming to be the legal representative of a deceased creditor. It is only where there is a reasonable doubt as to the person entitled to the property claimed in the suit that such a certificate can be required **Ramdas Brij Govandas, 10 Bom 107.**

39—The Recovery of debts of the deceased person—Right to—Act XXVII of 1860.—

Where payment of a debt due to the estate of the deceased is not vexatiously withheld but from a reasonable doubt as to the person entitled to recover it, the person desirious to recover it is bound to produce a certificate under Act XXVII of 1860 before he can obtain a decree or execute a decree already obtained by the deceased. But he may institute a suit or apply for execution without such certificate provided the certificate is filed before the decree or before the execution issues. **Janaki Ballav Sen v. Hafiz Mahomed Ali Khan, 13 Cal 47.**

Notes:—Doub: 15 Cal 54. Fol. 19 Cal 482 Dist: 15 Cal 54; 19 Cal 336; 22 Cal 143. Ref: 23 Cal 87 F B; 12 C W N 145; 7 C L J 658=12 C W N 145

40 – Suit by a deceased creditor's representative–S. 2 of Act XXVII of 1860—Special defence not put in issue—Plea of want of certificate.

The want of a certificate under Act XXVII of 1860 is not of itself a bar to a suit by the representative of deceased creditor and such a special defence should not be entertained in an appeal unless it is insisted upon and put into the issue in the Court of first instance. The word 'Debtor' in S. 2 of Act XXVII of 1860 does not include the purchaser of a mortgage property nor does that section contemplate a case of a decree other than a personal decree. 13 Cal 47 doubted. **Roghu Nath Shaha v. Poresh Nath Pundari, 15 Cal 54.**

Notes:—Ap: 22 Cal 143; 19 Cal 336; 26 Cal 839; 4 C W N 558. Ref: 7 C L J 658= 12 C W N 145.

(2) Adoptive son of deceased creditor.

41—Suit by an adoptive son Defendants Nos. 1 & 2 were Hindu co-parceners, Defendant No. 1 as managing member hypothecated the family property to plaintiff's father, as security for a loan, for the benefit of the family. Defendants No. 1 & 2, then separated each getting his share of the property. Defendant No. 1, after partition hypothecated a portion of his property on security for a debt for his own use to defendant No.3. Defendant No. 3 brought a suit against defendant No. 1 & purchased the hypothecated property at a Court sale. Plaintiff as the adoptive son of the obligee (deceased) of the hypothecation bond brought a suit against Defendants No. 1, 2 & 3 to recover his debt by the sale of the whole family property which belonged to Defendants No. 1 & 2. *Held*, the plaintiff was under no obligation to obtain a certificate under Act XXVII of 1860 for the purpose of maintaining the suit. **Gopala v. Saminathayyan, 12 Mad 255.**

Certificate of Administration-*Contd.*

(3) Right to sue or execute decree without certificate—*Contd.*

(3) Assignee of mortgaged property.

42—Succession Certificate Act 1869,—S. 4—Debtor mortgagee asking for sale of the mortgaged property.—

The word 'debtor' in S. 4 of Act VII of 1889; does not include the assignee of the mortgaged property, and a mortgagee praying for sale of the mortgaged property and asking for no personal relief against the mortgagor is not bound to take a certificate before he can obtain a decree. (15 Cal 54 applied. 13 Cal 47 distinguished). **Kanchan Modi v. Baij Nath Singh, 19 Cal 336.**

Notes:—Diss; 16 All 259. F B. Ap: 22 Cal 143; 26 Cal 839; 4 C W N 558. Fol: 28 Bom 630 Ref: 12 C W N 145=7 C L J 658.

(4) Application for execution by legal representative without certificate.

43—A Legal representative applying for execution without certificate.—

S. 4 of the Succession Certificate Act 1889 only prohibits the Court from proceeding upon an application of a person claiming to be entitled to execute a decree, without the production of a certificate or other authority of a like nature. But it does not follow from that section, that an application might not be made without the production of a certificate, the certificate being

II C. C. 79

Certificate of Administration-*Contd.*

(3) Right to sue or execute decree without certificate—*Contd*

supplied during the pendency of the proceedings 13 Cal 47 followed. **Brojo Nath Surma v Iswar Chunder Dutt, 19 Cal 482.**

Notes —Fol 20 Bom 76, 16 All 26, 18 All 34. Ref 13 C W N 533, 9 C L J 443

44—Ss 1 & 4—Act VII of 1889—Retrospective effect—Applicability of s 4 to suits under s 88 of Act IV of 1882 —

Sec. 4 of Act VII of 1889 made no change in the substantive law, but enacted merely a rule of procedure Inasmuch, therefore, as 'no one has a vested right in any particular form of procedure," the above mentioned section is applicable to suits instituted before the coming into force of Act No VII of 1889 6 All 462 followed L R 3 Ch D 69, L R 4 Ch D 752 and 6 H & N 227 referred to. Sec 4 of Act No VII of 1889 applies to suits for sale under s. 88 of the Transfer of Property Act of 1882 16 Mad 64 distinguished. 19 Cal 336 dissented from **Fateh Chand v Muhammad Bakhsh 16 All 259, 14 W N 74**

Notes—Not Fol. 29 Mad 77 Dist 26 Cal 839, 4 C W N 558, 28 Bom 630 Ref 20 Mad 232, 16 All 418, 17 All 537

45—Execution of decree — Application for execution made before production of certificate.—

In cases where a certificate of succession is required before execution of a decree can be taken out, all that is necessary is that the certificate should be produced before an order for execution can be made. It is not necessary that the certificate should be produced along with the application for execution. 19 Cal 482, and Weekly Notes, All (1893), p. 197, referred to. **Kalian Singh v. Ram Charan, 18 All 34= 15 W N 148**

46—Application for execution unaccompanied.

Though under certain circumstances a Court may be prohibited by Act No VII of 1889, from granting execution of a decree unless a certificate of succession as provided by the Act is produced before it, it does not therefore follow that under such circumstances an application for execution is a bad application because it is unaccompanied by a certificate 19 Cal 482 followed **Mangal Khan v Salim Ullah Khan 16 All 26, 13 W N 197.**

Notes —Fol: 20 Bom 76, 18 All 34. Ref 31 Mad 77, 13 C W N 533, 9 C L J 443

47—Right to maintain suit without certificate—The mortgagee during the execution proceedings—His heir substituted in his place.

S 4 of the Succession Certificate Act (VII of 1889) is not a bar to an execution proceeding of a mortgage decree on the application of the original mortgagee because the original mortgagee died during the pendency of the execution proceedings and his legal representatives, substituted in his place have not produced the succession certificate 16 All 259 dissented from **Mahomed Yusuf v Abdur Rahim Bepari. 26 Cal 839. 4 C W N 558**

Notes —Ref 29 Mad 77, 12 C W N 145=7 C L J 658 Fol 28 Bom 630.

(5) Hindu widow, suit by

48—Suit for recovery of immoveable property —Hindu widow

A Hindu widow, as holder of a certificate under Act XXVII of 1860 is not necessarily the proper person to continue a suit for the recovery of immoveable property, though she is entitled to do so as heir of the deceased, if he died without issue, and was the sole owner of the property. **Sevinthia Pillay v Mootoosawmy. 8 W R 2.**

Notes —Ref 4 B H C R 178, 2 Cal 45.

(6) Recovery of property of deceased from party in wrongful possession, suit for.

49—Act XXVII of 1860.

A certificate under Act XXVII of 1860 authorizes the holder of it to collect debts due to the deceased but not to recover property which belonged to the deceased from a person wrongfully in possession. **Awkinfee v Meenay. 8 W R 1. Seetaram Sahoo v Sheo Gholam Sahoo. 18 W R Cr 34.**

Notes —Fol 6 B H C R O 67. Ref, 2 Bom 67; 24 All 319 F B.

Certificate of Administration-*Contd.*

(3) Right to sue or execute decree without certificate—*Contd*

50—Hindu widow s power to sue executors and trustees for share of the estate without certificate

S 2 of Act XXVII of 1860 does not apply to claims against executors and trustees, it applies to debts In no case it applies to claims for immoveable property Therefore, a Hindu widow, suing for a share of the residuary immoveable property is not disabled from suing, because of her not obtaining a certificate of administration **Treepoorasoondary Dossee v Debendranath Tagore.** 2 Cal 45

(7) Devisee under a will, suit by

51—Suit for rent—Possession

A devisee under a will need not take out a certificate, and can sue for rent without having obtained possession **Banee Madhub Ghose v Thakoor Das Mundul** B L R Sup Vol, 588, 6 W R Act X 71

(8) Necessity of producing certificate

52—Order directing certificate to issue

A plaintiff suing as the heir of deceased person is (where a certificate of heirship is necessary to enable him to sue) bound to produce the certificate itself. It is not sufficient for the heir to show that the order has been made directing the issue of such certificate to him **Mulchand v Motichand Hargovandas** 9 Bom H C R 37

Notes —Dist 19 Bom 320

(9) Dismissal of suit pending decision of application for certificate is improper

53—Succession certificate—Dismissal of suit pending decision of application for certificate is improper.

Held, that the dismissal of a suit for non production of a succession certificate is improper, where application to obtain the certificate is pending in Court **Amir Singh v Ram Chand** 94 P L R 1902

(10) Representatives of deceased decree-holder, right of, to execute decree

54—Parties who are representatives of decree holders on the record are *prima facie* entitled to take proceedings in execution and draw the money standing to the credit of the deceased under their decree, without the necessity of taking out a certificate under Act XXVII of 1860, when there are no debts to be collected as due to the estate of the deceased decree-holder. **Manick Moyee Chowdrain v Poorno Chunder Roy.** 17 W R 510.

(11) Application for execution of decree by heir of deceased decree-holder.

55—Transfer-Certificate-Civ Pro 1859, s. 208 —Act XXVII of 1860

To enable the heir of a deceased person to apply under section 208 of Act VIII of 1859, for the execution of a decree held by such person, a certificate under Act XXVII of 1860 is not indispensable **Karam Ali v Halima,** 1 All 686,

(12) Representative of assignee of debt by devise, right of to sue

56—Act XXVII of 1860—Assignee by Devise —Probate

A suit by a plaintiff representing his minor son by virtue of a certificate under Act XL of 1858, to recover money due upon a bond executed by defendant in favour of a testator by whom it has been bequeathed to such minor son, will not be, unless the plaintiff have first taken out probate of the will or obtained a certificate under Act XXVII of 1860, to realize the debts belonging to the estate of such testator **Shodone Mohaldar v Halalkhore Mohaldar.** 4 Cal 645=3 C L R 492.

Notes —Ref 13 Cal 47.

(13) Debt due to estate of deceased person Suit by legal representative.

57—Certificate for collection of debts.

It is not an imperative condition precedent to the institution of a suit by the legal representative of a deceased person for a debt due to his estate that such legal representative should first obtain a certificate under Act XXVII of 1860 **Lachmin v Ganga Prasad,** 4 All 485.

(14) Debt due to estate of deceased person, execution of decree by representatives for.

58—Application for execution of decree without certificate—(Act XXVII of 1860.)

Certificate of Administration-*Contd.*

(3) Right to sue or execute decree without certificate—*Contd.*

Held, following W N 1882, p. 122, that the possession of a certificate under Act XXVII of 1860 is not "an imperative condition precedent to the institution of execution proceedings by the representative of a deceased decree-holder", but that in each case the Court should consider whether the objections to execution are vexatiously raised. or they are *bona fide* objections on the part of the judgment-debtor to the title of the person seeking to execute the decree. **Hoti Lal v Hardeo. 5 All 212, 2 W N 191.**

Notes:—Ref: 13 Cal 47; 23 Cal 87 F B.

(15) Right of heir to sue.

59—Act XXVII of 1860.

A certificate under Act XXVII of 1860 is not indispensable in order to allow a party who is next heir to come in to represent a deceased party in a suit. **Olongo Moonjoree Dossee v Gobindnath Sen W R 1864 Mis, 13. Ekram Hossein v Kirtee Chunder. 3 W R Mis.. 9,**

(16) Succession Certificate Act VII of 1889 S. 4.

60—A suit is brought upon a bond executed by defendant to a Hindu plaintiff's father.

The defendant, it was held, was entitled to insist on the production of a certificate under Act VII of 1889, unless it appears on the face of the bond that the debt claimed was due to the joint family consisting of the father and the son. **Venkataramana v Venkayya 14 Mad 377**

Notes—Fol: 20 Mad 232. Dist: 17 Mad 147. Ref: 17 Mad 108; 19 Bom 338; 17 All 578; 7 C L J 658=12 C W N 145.

61–S. 4 cl. (b):-Application for execution-Succession Certificates—Retrospective legislation.

Held, that S. 4, Cl (b) of Act VII of 1889 does not apply to applications to execute decrees which were pending at the date, of the passing of the Act, but refers to applications made after the Act came into force. **Rama Row v Chellayyamma 1 M L J 602=14 Mad 458.**

62—Clause (b), Sub-section I of s. 4 of act VII of 1889 does not apply to proceedings in execution pending at the time at which that Act came into force. **Balubhai Dayabhai v Nasar bin Ab lul Habib Fazly. P J (1890) 170=15 Bom 79.**

Notes.—Fol: 14 Mad 458. Ref: 15 Bom 265.

63—Plaintiff, who had sued for a debt on a mortgage bond, executed to their deceased father, compromissed the suit with defendants. *Held*, that plaintiffs were bound to produce a certificate under Act VII of 1889, s. 4. before a decree could be passed according to the compromise. **Santaji Khanderao v Ravji. P J (1890) 254 15 Bom 105.**

Notes.—Dist: 28 Bom 630. Ref: 7 C L J 658= 12 C W N 145.

64—S. 4 Cl. (1) (b), —Act VII of 1889, s. 4 cl. (1) (b), applies to the execution of decrees passed prior to that Act coming into force if there were no proceedings pending when the Act came into force. The fact that he had already on two occassions presented a Darkhast which had been disposed of, before the act came into force did not affect the question. **Chimniram Umaji v Hanmanta. P J (1890) 262=15 Bom 265.**

65—Succession Certificate Act VII of 1889, Sec. 4—Debtor of a deceased person—Certificate–Sale of Deshmukhi Hak—Vesting of the Hak in the vendee—Death of the vendee—Recovery of the Hak by the vendors—Suit for damages—Money had and received.

Sec. 4 of Act VII of 1889 prevents a Civil Court from passing a decree against a debtor of a deceased person for payment of his debt.

T and others, who were entitled to recover from the Government treasury a certain sum on account of *Deshmukhi Hak*, sold it to B in 1873 in consideration of a debt due to him. B died in the year 1884. In the year 1886, T and his co-vendors themselves recovered from the Government the said, sum, which, under the sale-deed, was recoverable by B. In a suit brought by the heirs of B to recover the amount from T and the other executants of the sale-deed:—

Held, that a certificate under Act VII of 1889 was not required to enable the plaintiffs to sue. By the sale in 1873 the property in the amount of the *Hak* sold had become vested in the deceased before his death, but the defendants never became his debtors at any time, as the amount so

Certificate of Administration-*Contd.*

(3) Right to sue or execute decree without certificate - *Contd.*

assigned was not received by them from the revenue authorities till after his death in 1884. For wrongfully receiving it in 1886, the defendants could either be sued in damages by the persons entitled to receive the *Hak*, or treated as their debtors and sued for money had and received to their use. **Narayan Bhau Bartake v Tatia Ganpatrao Deshmukh. P J 1891 p, 10; 15 Bom 580.**

Notes—Disap: 22 Mad 139. Ref: 18 Mad 457.

66—Succession Certificate Act VII of 1889—Undivided Hindu family—Death of one of two undivided brothers—Debt due to family—Suit by surviving brother and manager—Arbitration—Award—Filing award—Certificate under Act VII of 1889 not necessary.

Ramchandra and Narayan were undivided brothers; Narayan was the elder, but Ramchandra was the manager of the family property. Narayan died leaving a widow and three sons,and after his death Ramchandra sued the defendant to recover certain debts due to the family.

The parties referred the dispute to three arbitrators appointed by them without the intervention of the Court and applied to the Court to have the arbitrators' award filed.

A question having arisen whether the award could be filed without a succession certificate under Act VII of 1889.

Held. that there was nothing in Act VII of 1889 to prevent the award being filed without a certificate. **Ramchandra Hari v Bapu P J 1891. p 113; 16 Bom 240**

67—Un divided brothers—Decree obtained by one of two undivided brothers—Right of surviving brother to execute decree—Certificate of heirship.

A decree was obtained by one of two undivided brothers. He died, and the surviving brother applied for execution of the decree. *Held* that, if the debt was in its nature a family debt,the right to execute the decree would have devolved on him by survivorship, and not as the heir of his deceased brother, and in that case no certificate of heirship under s. 4 of Act VII of 1889 would be necessary; but if, on the contrary, the debt was part of the separate property of the deceased, the applicant could only execute the decree as

Certificate of Administration-*Contd.*

(3) Right to sue or execute decree without certificate—*Contd.*

heir, and must, in that case, obtain a certificate to enable him to proceed. **Raghavendra Madhav v. Bhima. 16 Bom 349.**

Notes—Fol: 23 Cal 912. Ref: 17 Bom 6; 19 Bom 338.

68.—Death of plaintiff—Suit continued by legal representative before representation taken out—Civil Procedure Code (Act XIV of 1882), s. 50,

Where the original plaintiff dies, the suit since the passing of Act VII of 1889, if not under s. 50 of the Civil Procedure Code, may be continued by his legal representative, although the latter has not taken out administration to the original plaintiff's estate. All that the defendant can insist on in such a case is that representation shall be complete before decree

Torregrosa Vasquez v Pragji Hurji. 16 Bom 519.

Notes.—Ref: 12 C W N 145=7 C L J 658.

69.—Where a party applied for leave to sue in *forma pauperis* to recover assets forming part of the estate of a deceased person, and his application was dismissed on the ground that he produced no certificate under Act VII of 1889. *Held* that the application was wrongly dismissed, no certificate being necessary for such a suit. **Kammathi v Mangappa. 16 Mad 454.**

Notes.—Dist: 22 Mad 68 F B Ref: 9 C L J 331=13 C W N 509.

70.—S. 4—Mortgage by conditional sale—Suit for foreclosure and permission pending suit.

Held: (1) that a mortgagee by conditional sale is entitled to sue for possession along with foreclosure, though the mortgagor has been in wrongful possession of the mortgaged property, subsequent to the date of the mortgage and for more than 12 years before suit.

2. That the plaintiff need not produce a succession certificate under Act VII of 1889, when the suit has been instituted before the Act came into force.
3. And that in a suit by the heir of the mortgagee for recovery of the mortgage money by sale no succession certificate

Certificate of Administration-*Contd.*

(3) Right to sue or execute decree without certificate—*Contd.*

was necessary if there was no personal liability to pay. See also 21 Mad 326 ref, 16 All 259 ref. **Ammanna v GuruMurti. 2 M L J 155=16 Mad 64.**

Notes.—Ref: 21 Mad 326 F B; 5 M L J 294; 16 All 259 F B; 29 Mad 77.

71.—Decree obtained by Mahunt on behalf of Muth-Representative.

A decree obtained by a Mahunt for Costs incurred in execution proceedings carried on for the muth, may be executed by the successor and representative of the Mahunt without obtaining a probate, succession certificate or letters of administration. **Jogendranath Bharati v Ram Chunder Bharati. 20 Cal 103.**

72.—Foreign Court, Proceedings of—Probate issued from native Court in Cutch—Certificate of Political Agent-Suit in British India.

Executors of the will of a native of Cutch obtained a probate from Bhuj Court, got a true copy of it signed and sealed by the Political Agent of Cutch, paid stamp fees required under Court Fees Act 1870, and filed a suit to recover a debt in a South Malbar British Court which was dismissed as the probate was not as required by s. 4 of Act VII of 1889. *Held* that the plaintiffs were not entitled to a decree but the Lower Courts did wrong in dismissing it. They should have allowed time for the plaintiffs to take out probate or letters of Administration or to produce such a certificate as is required by Act VII of 1889. **Manasing v Amad Kunhi. 17 Mad 14.**

73.—Suit by surviving partner and heir of deceased partner—Suit on promissory note by surviving partner of firm—Parties—Right of suit Contract Act (IX of 1872), s. 48.

In a suit for the recovery of money on a promissory note alleged to have been executed by the defendant to a mercantile firm of two partners, it appeared that one of the partners was dead and that it was brought by his representatives and the other partner. The representatives had not obtaind letters of administration or a certificate of succession. The plaintiffs were the surviving partners and the undivided sons of the deceased partner. *Held* that a surviving partner can sue alone for the recovery of a partnership debt and in that case no certificate was necessary. *Held*, further, that such a suit was maintainable if brought by a surviving partner jointly with the heir of the deceased partner in which case a certificate of heirship will be necessary, unless it appears on the face of the documents sued on that the debt is a coparcenary debt. **Vidyanatha Ayyar v Chinnasami Naik 17 Mad 108.**

Notes.—Ref: 17 All 578; 9 C L J 331=13 C W N 509.

74.—Succession Certificate Act VII of 1889—Landlord and tenant-Suit for rent.

A certain firm mortgaged with possession its immoveable property to two other firms trading jointly, who let out the property to the mortgagor firm. Afterwards some of the partners of the mortgagee firms having died, the surviving partners and the sons of the deceased brought a suit against the mortgagor firm to recover rent which accrued due after the deaths of the deceased partners. The Judge held that the plaintiffs could not proceed with the suit without a certificate under the Succession Certificate Act VII of 1889.

Held, reversing the order, that as the rent sued upon became due after the deaths of the deceased partners, it formed no part of their estates at the time of their respective deaths, and no certificate was, therefore, necessary under the Succession Certificate Act VII of 1889.

Ranchordas Nathubhai v Bhagubhai Parmanandas. P J 1893, p. 229; 18 Bom 394.

Notes.—Ref: 36 Cal 936 F B; 13 C W N 966 F B; 10 C L J 180 F B.

75.—Suit on a mortgage bond by an heir—A person who has taken out a certificate continues a suit as a substitute of the plaintiff.

One J who had taken out a certificate to collect the debts due to the former and instituted a suit on a mortgage-bond in which he asked for both, sale of the mortgage property and a personal decree against the defendant. During the pendency of the suit J died and S was substituted for J.

Held—the suit was maintainable although no certificate is taken out by S. It is doubtful

Certificate of Administration-*Contd.*

(3) Right to sue or execute decree without certificate—*Contd.*

whether the act would apply at all to the case of a person who is substituted as a plaintiff for one who having taken out a certificate, has died pending the suit.

Baid Nath Das v Shamanand Das. 22 Cal 43.

Notes.—Fol: 26 Cal 839; 28 Bom 630; 6 Bom L R 582; 4 C W N 558; 29 Cal 43. Ref: 2 C W N 234; 20 Mad 232; 29 Mad 77; 7 C L J 658=12 C W N 145.

76.—S. 4—Debt—Suit for the value of moveables belonging to the deceased.

Where the plaintiff's husband had left some moveables with the defendant and died, and after his death the defendant promised to pay their value to the plaintiff and the plaintiff thereupon applied to the District Court for a certificate of heirship for the amount.

Held, that there was no 'debt' due to the deceased within the meaning of the Act for which a certificate could be granted.

Subbamma v Meenakka. 18 Mad 457.

Notes.—Ref: 12 C W N 145=7 C L J 658.

77.—Succession Certificate Act—Refund of purchase money-Debt.

A suit for the refund of the price alleged to have been paid for goods sold but not delivered is a suit for the recovery of a debt within the meaning of Act VII of 1889, and the heir of the vendee suing for such refund must produce a Succession Certificate.

Penta Reddi v Anki Reddi. 22 Mad 144 Note.

Notes.—Ex: 22 Mad 139 Foot Note. Appr: 32 Cal 418.

78.-Debt-Suit for account of share of deceased partner-Unliquidated claim.

A Mahomedan, being the son of a deceased member of a firm, brought a suit as his legal representative against the surviving partners praying for an account of the partnership assets and for payment to him of the amount which might be found due to the share of the deceased. The plaintiff had neither letters of administration nor a succession certificate. *Held* that the plaintiff's claim, being unliquidated, was not a debt within the meaning of Succession Certificate Act, VII of 1889, s.4, sub-s.1 (*a*). 22 Mad 144 note, distinguished. **Sabju Sahib v Noordin Sahib. 22 Mad 139.**

Notes.—Ref: 32 Cal 418; 12 C W N 145=7 C L J 658; 10 C L J 180 F B; 36 Cal 936 F B; 13 C W N 966 F B.

79.-Meaning of "debt"—Suit for rent-Certificate of succession.

According to s. 4 of the succession certificate act rent is not a debt and therefore no succession certificate is necessary before bringing a suit for rent. **Nagendra Nath Basu v Satadal Basini Basu. 26 Cal 536: 3 C W N 294.**

Notes-Fol: 27 Cal 535.

80.—Collection of debt on succession-Certificate of heirship-Act XXVII of 1860, s.2-Right of succeeding trustee to collect.

In a suit brought by a widow who had succeeded her husband as trustee of an endowment for a debt due thereto,-*Held* that she was not suing as being entitled to the effects of her deceased husband, or for payment of a debt due to the estate which had been his, but that she was suing as representing the endowment in the capacity of a trustee of its money. Accordingly, neither Act XXVII of 1860, s. 2 nor Act VII of 1889, s. 4, was applicable to her claim, and the fact of her not having obtained a certificate of heirship to her husband's estate did not disentitle her to a decree.

Yarlagadda Mallikarjun v Makerla Sridevamma. 20 Mad 162=L R 24 I A 73=1 C W N 497.

Notes.-Ref: 5 Bom L R 932.

81—Succession Certificate Act VII of 1889, Sec. 4—Joint family-Suit for family debt—No necessity for certificate—Hindu Law—Evidence -Presumption as to nature of property where the family is joint.—

Under the Succession Certificate Act VII of 1889 a plaintiff does not require a certificate where his claim is for family property by right of survivorship. **Jagmohandas v Allu Maria Duskal. P J 1894 P 163; 19 Bom 338.**

Notes:—Fol: 17 All 578, Ref: 21 Bom 53.

82—Joint Hindu family-Suit by survivor for debt due to,-

Certificate of Administration-*Contd.*

(3) Right to sue or execute decree without certificate—*Contd.*

Where a debt is advanced from the funds of a joint Hindu family and is due to that family, no certificate is necessary to enable the survivor of such family to recover the debt. **Pateshuri Partab Narain Singh v Bhagwati Prasad. 17 All 578.**

Notes:—Ref: 12 C W N 145=7 C L J 658.

83—Hindu law-joint family property-survivor-ship-Letters of administration-Reviving suit-C. P. Code s. 372.

A plaintiff died and his sons, members of a joint Hindu family governed by the Mitakshara law, of which the deceased plaintiff was a manager, applied for the revival of the suit—*Held*, it was not necessary that either letters of administration or certificate under act VII of 1889 should be obtained to entitle the applicants to ask that they may be permitted to proceed with the suit. **Beejraj v Bhyropersaud. 23 Cal 912. Bissenchand Dhudhuria v Chatrapat Singh. 1 C W N 32.**

Notes—Ref: 12 C W N 145; 7 C L J 658= 12 C W N 145.

84.—Suit by person claiming property of undivided family by right of survivorship.

Where a plaintiff claimed by right of survivorship to recover money due on a mortgage bond which had been executed by the defendants in favour of the former managing member of the plaintiff's undivided family.—*Held* that the Succession Certificate Act did not apply, and that plaintiff need not produce a succession certificate under that Act. **Pallamraju v. Bapanna. 22 Mad 380.**

Notes:—Ref: 12 C W N 145=7 C L J 658.

85.—S. 4:—Suit by undivided son of deceased creditor—Debt of joint family.

A Hindu is entitled to sue on a bond executed in favour of his undivided father, deceased, without the production of a certificate under Act VII of 1889, provided the debt for which the bond was executed is a joint family debt. For this purpose it is not necessary that the joint nature of the debt should appear on the face of the bond; it may be admitted or otherwise proved.

Certificate of Administration-*Contd.*

(3) Right to sue or execute decree without certificate—*Concld.*

14 Mad; 377, referred to and explained. The conflict between 22 Cal 143, and 16 All, 259, noticed. **Subramanian Chetty v. Rakku Servai. 100; 20 Mad 232.**

Notes:—Fol: 22 Mad 380.

86.—Curator-Act XIX of 1841.

A curator appointed under the Curator's Act (XIX of 1841) is not a person claiming to be entitled to the effects of the deceased person whose estate he is appointed to manage, and is not required to take out a certificate under s. 4 of the Succession Certificate Act (VII of 1889) before he can obtain a decree. **Babasab v. Narsappa. 20 Bom 437.**

87.—" Debt," Meaning.

The Succession Certificate Act refers only to such debts as the deceased could sue upon. So for debts falling due after death an heir may sue without certificate. **Nemdhari Roy v. Bissessari Umari. 2 C W N 591.**

Notes:—Ref 12 C W N 145=7 C L J 658. Diss: 30 All 315=(1908) W N 113=5 A L J 598.

4. ISSUE OF AND RIGHT TO CERTIFICATE.

(1) Issue of Certificate.

88.—Time for issuing.

A certificate under Act XXVII of 1860 should be issued directly it is granted, provided the proper stamp prescribed for such certificate be furnished. **Dhunput Singh Doogur v. Government. 17 W R, 489.**

89.—Jurisdiction-Person with no fixed residence—Act XXVII of 1860, s. 3.

Where a person had no fixed place of residence at the time of his death, the Judge of the district in which his debts are has authority to grant a certificate under Act. XXVII of 1860. **Gholam Sobhan alias Saboo Meah v Mahomed Rouf. 20 W R 286.**

90.—Order in recognition of two wills—Act XXVII of 1860.

Under Act XXVII of 1860, an order cannot be obtained from the Court in recognition of two wills. **Bemola Moyee Debea v Kishtomonee Debea, W R; 1864, Mis; 10.**

Certificate of Administration-*Contd.*

(4) Issue of, and right to, certificate-*Contd.*

91.—Certificate for collection of debts of endowment—Act XXVII of 1860.

A District Judge was held to have rightly refused a certificate under Act XXVII of 1860 for the collection of the debts of an endowment. **Bhyrub Bharuttee** **21 W R 340.**

92.—Act XXVII of 1860-Karnavan of tarwad property—Debt due by karnavan.

A certificate to collect debts under act XXVII of 1860 may properly be refused to a karnavan of a Malabar tarwad, when the bulk of the debt to be collected is found to be due by the karnavan himself under a decree obtained against him by his predecessor. **Madhava Panikar v. Govinda Panikar.** **5 Mad; 4.**

93.—(Act XXVII of 1860.)

Held that the effect of a certificate, under Act XXVII of 1860, is to entitle the person so obtaining the certificate to the right of collecting debts and to give full receipts to the debtors of the deceased. Such right is purely personal and cannot be subjected to the law of inheritance. **Bansi v Tika.** **7 W N 248.**

94.—*Held* that a certificate granted under Act XX of 1841 did not establish the right of inheritance of the party to whom it was granted, but simply empowered to collect debts due to the estate of the deceased. The title of plaintiff or her father could not, under the circumstances, be questioned by a co sharer after its public acknowledgment and practical effect given to that acknowledgment during a long period of years. **A. Skinner Manager Of Skinner's Estate v. Victoria Skineer.** **2 Agra Rep: A C 128.**

(2) Discretion of court to grant certificate.

95.—Act XL of 1858, Section 7-Discretion of Court to grant certificate.

Held, that Section 7, Act XL of 1858, does not render the grant of a certificate for the administration of the property of a minor to a near relative compulsory. The words of the Section are not imperative, and it is left to the Court to grant a certificate or not, as it thinks proper under the circumstances of the particular case. **Mussammat Khem Kour v. Gujar Mal P R 23 of 1878.**

II C. C. 80

Certificate of Administration-*Contd.*

(4) Issue of, and right to, certificate-*Contd.*

(3) Right to Certificate.

96.—Heir Act XXVII of 1860.

As a general rule, the heir is the person who should have a certificate to collect the debts and manage the estate of a deceased person under Act XXVII of 1860. If he as heir is entitled to the whole surplus of the estate, the fact of his having been hostile to the deceased is immaterial. When there are several heirs and no disputes amongst them, he who is entitled to the largest share may, in the absence of other disqualifying circumstances and in the discretion of the Court, be entrusted with the duty. **Abdool Ali v Abidunnissa Khatoon.** **W R 1864 Mis 41.**

97.—Heir.

The certificate to collect debts should ordinarily be granted to the person entitled to the inheritance. **Jckna v Bhugwanee.** **3 N W 320.**

98.—Heir.

Where the will set up by objectors to an application by the natural heir for a certificate of administration is not sufficiently proved, a Court is justified in looking on the natural heir as the party entitled to the certificate, **Dinobundhoo Chowdry v Rajmohinee Chowdrain.** **15 W. R; 73.**

99.-Persons prima facie entitled-Act XXVII of 1860-Order in respect of property of deceased.

When application is made for a certificate under Act XXVII of 1860, a Judge should determine who is entitled, and should grant the certificate accordingly. He has no power to make an order in respect of the property of the deceased. **Oheed Khan v Collector Of Shahabad.** **9 W R 502.**

100.—Prima facie right-Enquiry of intricate questions—Points to be decided.

Courts need not go into intricate questions of Law or fact in administering the provisions of Act XXVII of 1860 but they are bound to see that the person who asks for a certificate has *prima facie* got the clearest title to succession as natural heir. **Surfoji v Kamakshiamba.** **7 Mad 452.**

Certificate of Administration-*Contd.*

(4) Issue of, and right to, certificate-*Contd.*

Notes.—Dist: 15 Cal 574. Con: 23 Cal 431. Ref: 5 M L J 36.

101.—Persons to whom certificate should be granted.

The certificate under this Act, does not determine any question of heirship, but merely protects debtors of a deceased person from liability for payments made to a certificate holder. If it be found that such certificate-holder was not the rightful heir, the question of heirship may be tried in a regular suit, notwithstanding the grant of a certificate.

The certificate to collect debts should nevertheless ordinarily be granted to the person entitled to the inheritance. **Musammat Jokna v. Musammat Bhugwanee. 3 N W 320.**

102.—Selection where there are several claimants—Act XXVII of 1860.

If there are several applicants for a certificate under Act XXVII of 1860, the heir of the person or persons having the largest interest in the estate are entitled to the certificate, in preference to others whose interests are less considerable. If the court thinks any small interest not sufficiently protected, it may call upon the party taking the certificate to give security to the extent requisite for the protection of such interest.

Azeem Khan v. Ameerun. 12 W R 38.

Notes.—Fol: 13 W R 143.

103.—Joint certificate—Duty of Judge—(Act XXVII of 1860.).

This Act (an Act for facilitating the collection of debts on successions) gives a Judge no power to grant a joint certificate to two persons; his duty is to determine which of the applicants has the better right. **Musammat Goura v. Kekree. 4 N W 60.**

104.—Heiress.

An heiress was held entitled to a certificate under Act XXVII of 1860, although the owner of the property had died nine years previously, and the property had been previously managed by a third party. **Pulash Monee Dossee v. Anund Moyee Dossee. 8 W R 398.**

Notes.—Ref: 2 B L R Appx. 26.

105.—Daughter in-law as heiress-Ground for opposing certificate,

Certificate of Administration-*Contd.*

(4) Issue of, and right to, certificate-*Contd.*

An application by a daughter-in-law under Act XXVII of 1860 for a certificate as heiress would be properly rejected upon the sole ground that the applicant was not the heiress. **Bandam Settah v Bandam Mahalakshmy. 4 Mad H C R 180.**

Notes.—Ref: 19 Mad 35

106—Trustee of Government securities—Act XXVII of 1860.—

A trustee who had been appointed by will to act in respect of Government securities belonging to an estate having demised, and the minor heir having come of age, the parties entitled applied for a certificate under Act XXVII of 1860 to enable them to draw interest on the securities. Upon this, the Judge recorded an order that they might apply for a certificate in respect of the deceased trustee's estate. *Held* that the applicants had nothing to do with the trustee's estate and that it was the duty of the Judge to grant the application if no person showed a better right. **Preonath Sircar. 13 W R 325.**

107—Executor—Act XXVII of 1860—

The executor under a will, if, it be not contested, has an undoubted right to a certificate under Act XXVII of 1860, though he be not the legal heir. If the will be contested, the Judge should enquire into its validity, and, if he consider it proved, should give a certificate, leaving the parties dissatisfied to set it aside by a regular suit. **Bidhoo Bhooshun Mukerjee v Issur Chunder Roy Chowdhry. W R 1864 Mis 4**

108—Claimant under will—Failure to prove will.—

In an application for a certificate under act XXVII of 1860, where applicant's title was based upon a will to which the signatures of the witnesses were found to have been affixed previously to that of the testator, the Court held that the deed was inoperative as a will; but inasmuch as it expressed fully the testator's wishes regarding the management of his affairs, and was very distinct as to the confidence reposed in the applicant (the second wife), the Court decided that she was the proper person to have the certificate. **Khuttun Kooer v Poona Kooer. 24 W R 322.**

Certificate of Administration-*Contd.*

(4) Issue of, and right to, certificate—*Contd.*

109—Executor and legal representative.

A person was trustee of "wuqf" or trust propery. He had also some other propety (how much was not clear) of his own. He made a will relating only to the trust-property, and appointed an executor. *Held* that the executor mentioned in the will was entitled to a certificate under Act XXVII of 1860 with regard to the trust-property, and the legal personal representative of the deceased was entitled to a certificate under the same Act with respect to any other property of which he died possessed. **Daud Ali v Nadir Hossein.**
3 B L R., A C., 46: 11 W R., 388.

110—Members of joint Hindu family.

Certain members (*N* and *A*) of a joint Hindu family having commenced a suit to set aside an adoption by one of the family (C), a compromise was effected by which the several parties took separate shares of the family property. C having died, N and *A* applied for a certificate to collect the debts due to his estate. but were opposed in a joint petition made by the widow and adopted son. *Held* that the applicants could not be entitled to the certificate which might, however, be given to the son with the consent of the widow.
Munbasee Kooer v. Nowrungee Lall
15 W R., 135.

111—Member of joint family—Separate members.

Where a certificate of administration was granted to certain applicants who asked it with reference to a particular debt putting in a bond of the judgment-debtor, and showing that they were joint in estate with the deceased, the certificate was held to have been rightly granted, and to have been properly refused to another member of the family who had separated from the deceased.
Ram Gholam Sahoo v Jankee Pershad Sahoo. 25 W R., 31.

112—Member of joint Hindu family—Act XXVII of 1860, ss. 2 and 3.

A certificate under Act XXVII of 1860 cannot be refused merely because the deceased was a member of a joint Hindu family. Ordinarily the managing member would be the person best entitled to the certificate, but this would not be the case where the members had fallen out.
Chowdhry Krippa Sindhoo Dass v. Radha Churn Dass. 23 W R., 234.

Certificate of Administration-*Contd.*

(4) Issue of, and right to, certificate-*Contd.*

113—Minor—Joint family (Mitakshara) Act XL of 1858 Act XXVII of 1860—Certificate to collect debts—Act X of 1877 Chap. XXXI Leave to mother to bring suit for partition.

The interest of a minor brother in an undivided joint Hindu Family governed by Mistakshara law is not such a property as is capable of being taken charge of under a certificate of administration granted under Act XL of 1858.

To enable a mother of such a minor to bring a suit for partition on his behalf, it is not necessary for her to be furnished with a certificate under that Act, nor is it necessary for her to obtain the permission of the Court under Chap XXXI of the Code of Civil Procedure (Act X of 1877.)

The eldest son not being a minor is the proper person to collect the debts due to the deceased father.

21 W R 143, and 23 W R 208 cited and followed. 4 B L R 171 distinguished. **Gourah Koeri v Gajadhur Pershad. 5 Cal 219=4 C L R 398.**

Notes.—Fol ; 7 Cal 369. Dist: 13 C L R 86.

114—Minor by next friend.—Semble.

A certificate to collect debts under Act XXVII of 1860 may be granted to a minor by his next friend. **Kali Koomar Chatterjee v. Tara Prosono Mookerjee. 5 C L R., 517.**

Notes—Diss: 15 Cal 574; 23 Cal 431. Doub: 6 Cal 303. Ap: 20 All 352.

115—ss. 6 & 7.—Grant of certificate to minor,

Held that a certificate of succession may be granted under Act VII of 1889 to a minor through his next friend. (5 C L R 517) referred to.
Ram Kuar v. Sardar Singh.
20 All 352; 18 W N 64.

Notes—Ref: 28 Bom 344.

116—Sister's son—Half brother.

Held that the certificate in this case was given to the party best entitled to it with reference to the object of Act XXVII of 1860, *i.e.*, the deceased's full sister's son, who was the party in possession, in preference to the deceased's half brother.
Lall Mahomed v. Buzlool Hossein.
17 W R., 562.

Certificate of Administration-*Contd.*

(4) Issue of, and right to, certificate—*Contd.*

117—Spiritual benefit——Father's brother's daughter's son—Father's father's brother's son-Act XXVII of 1860.

The father's father's brother's son of a deceased person is a nearer heir than the father's brother's daughter's son and therefore on the death of the deceased person's widow is entitled to a certificate under act XXVII of 1860 to collect the debts due to the estate. **Gopal Chunder Nath Coondoo v Haridas Chini. 11 Cal 343.**

Notes.—Fol. 15 Cal 780.

118—Proximity of relationship and residence. —Spiritual benefit—Father's brother's grandson.

At the time of granting a certificate under act XXVII of 1860 a judge should not give preference to proximity of relationship and residence over the better title to the ownership of the debts. A father's brother's grandson has a right to obtain a certificate in preference to a brother's daughter's son. **Oodoychurn Mitter. 4 Cal 411.**

Notes.—Appl: 6 Cal 303. Fol . 11 Cal 343 ; 15 Cal 780.

119—Nephew—Spiritual benefit.

A nephew is entitled to a certificate of administration in preference to a deceased son's daughter's son. **Aree Murdun Bhuggut v. Jannath Bhuggut. 15 W R 328.**

120—Nephew—Act XXVII of 1860—Act XL of 1858.

Where a will appointed the nephews of the testator to manage 4 annas of the property (the subject of the will)in their own right and 12 annas as guardians of a minor son,—*Held* that the nephews were entitled to one certificate under Act XXVII of 1860 to collect the debts of the whole estate,and to another certificate under Act XL of 1858 to take charge of the minor's 12 annas. **Makhun Chunder Shaha v. Chand Monee Dassee. 8 W R 105.**

121—Nephew—certificate of uncle's property.

Whether a nephew takes his uncle's share by mere survivorship or by inheritance. if he takes on the ground of their having been joint in estate, he "succeeds to," and "becomes entitled to the effects of," the deceased within the meaning of Act XXVII of 1860. **Jusoda Koonwar v. Gouree Byjnath Sahae Singh. 6 W R 139.**

Notes—Diss: 8 W R 82 Fol 13 W R 199. Ref. 4 B H C R O 150; 7 W R 488, 17 W R 102.

122—Disciple—Certificate to estate of Hindu devotee—Mental incapacity to succeed.

The person entitled to a certificate enabling him to collect the debts due to the estate of a deceased ascetic or devotee must be the disciple, or spiritual brother or preceptor of the deceased; and such person should not be deprived of his right, even though mentally incapable of succeeding to the office of the deceased. **Gureeb Doss v Mungul Doss. 14 W R 383.**

123—Mohunt, Representative of—Certificate of administration Act XXVII of 1850.

The person entitled to represent a deceased Mohunt for the purpose of collecting his personal debts, is the spiritual son and not the spiritual brother of the deceased, and such spiritual son is entitled to a certificate of administration under Act XXVII of 1860. 21 W R 340, distinguished. **Dhukharam Bharti v Luchmun Bharti. 4 Cal 954=4 C L R 49.**

124—Illegitimate sons.

There being evidence in this case of the deceased having assigned his property to his illegitimate sons and acknowledged them as his sons, a certificate under Act XXVII of 1860 to administer to his estate was granted to them in preference to the childless widows of his brother and nephew. **Prodhan Ram v Jeria Kooer, 17 W R 189,**

125—Adopted son——Act XXVII of 1860—Title under adoption.

An adoption *de facto* must be supposed valid until it is set aside, and a party so adopted is entitled to object to other parties receiving a certificate under Act XXVII of 1860 in respect of the property he takes under the adoption. In granting such a certificate, a Judge must look to fitness as well as to propinquity. **Nunkoo Singh v Purm Dhun Singh. 12 W R 356.**

Certificate of Administration-*Contd.*

(4) Issue of, and right to, certificate—*Contd.*

126—Adopted son's right to certificate—Adoption after the death of the adoptive father.

A son validly adopted after the death of the adoptive father does not require & cannot obtain a certificate under Act XXVII of 1860, to collect debts due to the property of his adoptive father which accrued due while the property was under the management of the adoptive mother. Immediately on the valid adoption, the estate vests in the adopted son ; and debts due to it, if they accrued due after the death of the adoptive father, are debts recoverable by the adopted son in his own right and not as representative of the adoptive father **Narain Mal v Kooer Narain Mytee. 5 Cal 251.**

127—Grandmother—Act XXVII of 1860—Act XL of 1858.

Where the grandmother of minors applied for certificates under Act XL of 1858 and XXVII of 1860, the father consenting and approving, it was held that there was nothing in the law to prevent the certificates being granted if the applicant was competent and willing to take them. **Oomro Doolhaen v Aga Meer. 12 W R 119.**

128—Mother-in-law—Act XXVII of 1860.

The circumstances of a deceased party having on the day of his death informed his debtor that he had given the whole of the moneys due to him to his mother-in-law was held to be a sufficient indication (whether the gift was valid or not) that she was the proper person to receive the money due to the deceased and the certificate under Act XXVII of 1860. In cases under Act XXVII of 1860, Judges should always certify whether the certificate has been actually granted. **Zeemutoonissa Rhanum v Khutoo Begum 12 W R 239.**

129—Mother—Husband.

A mother is not entitled to a certificate under Act XXVII of 1860 to collect debts due to her deceased daughter in preference to the husband of the deceased. Such certificate, however, will not authorize the husband's interference with the mother's possession of the landed property which she claims as her own. **Mohun Soondur Koonwar v Ramanoogro Narain. 3 W R Mis 3.**

Certificate of Administration-*Contd.*

(4) Issue of, and right to, certificate—*Contd.*

130—Mother of adopted son.

The mother of a deceased adopted minor son is his legal representative, and entitled to a certificate under Act XXVII of 1860 as his legal heir. **Deeno Moyee Dossee v Doorga Pershad Mitter. 3 W R Mis 6.**

Deeno Moyee Dossee v Tarachurn Coondoo Chowdhry. 3 W R Mis 7 note ; Bourke A O C 48.

131—Widow disputed adoption.

When the title of a person claiming as adopted son of the deceased is disputed, the certificate may properly be granted to the widow of the deceased. **Dirg Paul Singh v Gainda Koonwar. 1 Agra Mis 13.**

132—Widow—Act XXVII of 1860, s 3—Act XL of 1858, s. 3.—A as widow of B and guardian under a will of his minor son, obtained a certificate under s. 3 of Act XL of 1858. C, another widow of B, subsequently applied for a certificate under s. 3 of Act XXVII of 1860. The Judge summarily rejected C's application on the ground that the grant of a certificate to her would lead to confusion. *Held*, on appeal that the Judge ought to have issued notices and proceeded under s 3 of Act XXVII of 1860. **Raisunnissa Begum. 2 B L R A C 129 : 10 W R 62.**

133—Widow—Certificate as guardian after grant of certificate of administration.

Two certificates of administration cannot run together. So a widow who fails to appear and contest the grant of a certificate to another party, made prior to her own application cannot claim one for herself afterwards, but she may be allowed a certificate to act as guardian of her minor (adopted) son. **Sham Manna v Ramdyal Goohoo. 1 W R Mis: 3.**

134—Widow—Widow as guardian of son.

A certificate may be granted to a widow, as guardian of her minor son, to collect the debts due to her deceased husband, notwithstanding that the adoption of the huband may have been set aside. **Nitto Kallee Debee v Obhoy Gobind Chowdhry. 5 W R Mis 10.**

Notes.—Ap: 20 W R 53 , 8 W R 137.

Certificate of Administration-*Contd.*

(4) Issue of and right to, certificate—*Contd.*

135—Widow—Cousin and partner.

A widow is entitled (in preference to a cousin who also claimed as surviving partner) to a certificate to collect the debts, joint as well as separate, of her late husband. **Shib Golam Sahoo v Gunga Koonwaree. 1 W R Mis 32.**

136—Widow—Claims of objectors on application for certificate.

The allegation of objectors who claim the property of a deceased person under a tukseemnamah transferring the property from the widow to them should be enquired into; and if it is proved to be genuine, the objectors are entitled to a certificate, instead of the widow, as legal heir of the deceased. **Deb Pershad v Monga Koonwar. 4 W R Mis 19**

137.—Widow—Certificate of husband's property.

The petitioner, a Hindu widow, applied for a certificate under Act XXVII of 1860 of her deceased husband's estate, and stated in her petition that her husband possessed, at the time of his death, self-acquired property, besides the property he had inherited from his brother The opposing parties set up a will of the deceased's father, under which a certain share of the testator's estate was given to the petitioner's husband, and in the event of his death without children to his mother, and after her death to his brother. *Held* that it was not necessary for the purpose of the application to decide on the validity or otherwise of the will, as the widow was entitled to a certificate in respect of her husband's property; and further that the will, which purported, in certain events, to give to the testator's widow that share of the property which he bequeathed to his son (the petitioner's husband), could not affect her claim to the certificate in respect of her husband's self-acquired property. **Khoodoomoney Dabee v. Goluckmoney Dabee 1 Ind Jur O S 36.**

138.—Widow—Failure of objector to prove title.—

Where a Judge, holding that the special title put forward by an objector had not been proved, decided that the widow of the deceased was best entitled to a certificate under Act XXVII of 1860, the decision was held to be correct, inasmuch as the Judge was not deciding upon the general right and title of the parties to the property, but under a special law for the collection of debts and for the protection of debtors. **Protap Narain Doss v. Poorno Mashee Daye 14 W R 415**

Notes.—Ref: 17 W R 102.

139.—Widow—Application for certificate to enable widow to receive sale-proceeds of estate sold after death of husband.

Where the widow of a deceased applied for a certificate, without which she was refused some sale-proceeds of an estate of the deceased sold after his death for arrears of revenue, and the Judge rejected her application on the ground that the case did not come within the scope of the Act, as "the sum in deposit was not in any sense a debt due to the deceased at the time of his death,"—*Held* that as the sale-proceeds were payable to the estate of the deceased, there was nothing in the law to prevent the Judge from entertaining the application. **Tripoora Soonduree. 22 W R 45.**

Notes.—Ex: 24 W R 203.

140.—Mussammat Luchmi was the widow of Nadhur Mul, who died before his father, Bunsi Lal; and upon the death of Bunsi Lal, his heir (Mukhan Lal) caused mutation of names to be effected in favour of Mussammat Luchmi and Massammat Mawa (Bunsi Lal's widow). *Held*, that Luchmi was not entitled to a certificate under Act XXVII of 1860, as her husband had pre-deceased his father; notwithstanding this mutation of names. **Mukhun Lal v. Mussammat Luchmi P R 20 of 1872.**

141.—Guardian of a Hindu widow—certificate of administration under act XL of 1858.

The relations of the husband of a widow have a preferential right of guardianship of the widow over the paternal relations of the widow.

Therefore a certificate under act XL of 1858 will be granted to the former in preference to the latter. **Khudiram Mookerjee v Bonwari Lall Roy 16 Cal 584.**

142.—Succession Certificate Act VII of 1889, Sec. 4, cl. (*a*)—Preamble—Representative of a

Certificate of Administration-*Contd.*

(4) Issue of, and right to, certificate-*Contd.*

deceased person—Person claiming to be entitled to the effects of the deceased—Purchaser at sale in execution of a decree against a deceased person.—

A certain debt due to P (deceased) was sold in execution of a decree against him and was purchased by M. In order to enable him to recover the said debt, M applied to the District Judge for a certificate under the Succession Certificate Act VII of 1889. The Judge rejected the application on the ground that the applicant was not a representative of the deceased.

Held, reversing the decree, that the applicant having purchased at the auction-sale the debt as part of the deceased's effects, which was sold as such by the Court, was entitled to a certificate under Sec. 4, clause (*a*) of the Succession Certificate Act VII of 1889.

Mancharam Pranjivan v. Bai Mahali.
P J 1893 P 174=18 Bom 315.

143.—Succession Certificate Act VII of 1889 Secs. 1, cl (4), 6 cl. (d) and 7 cl (l)—Will, application for a certificate under—Validity of will—Hindu wills Act XXI of 1770.—

Clause (4) of Sec. 1 of the Succession Certificate Act VII of 1889 does not preclude an applicant from obtaining a certificate under the will of the deceased.

A will having been held to be genuine in a contest between the parties, and there being no suggestion that the will was one to which the Hindu wills Act XXI of 1870 applied:—

Held, that the Court could not refuse to grant the certificate. **Dave Kashiram Liladhar v Bai Parvati.** **P J 1893 p 438; 18 Bom 608.**

Notes.—Ref' 2 A L J 136.

(4) Separate certificate to several heirs

144.— Separate certificate to several heirs.

Under Act VII of 1889 a separate certificate cannot be applied for and granted to each and every heir to a fractional share in the estate of a deceased person so as to qualify him to separately recover his share from the creditor or creditors of the deceased. **Shamshunnissa v. Wajid Ali.** **10 W N 91.**

Certificate of Administration-*Contd.*

(4) Issue of, and right to, certificate-*Contd.*

(5) Brother's widow

145.—Brother's widow.

In this case the district Court, relying on the ruling of the Privy Council in L R 7 Ind app 239 granted a certificate under Act XXVII of 1860 to the brother's widow of the deceased in preference to his second male cousin. *Held* that the view expressed in that case by their Lordships of the Privy Council had reference to the law of inheritance recognised in the presidency of Bombay, and not to that followed on this side of India. The law as recognised in these provinces was to be found in the ruling of this Court in 3 All 45. **Kalka Prasad v Gaura.** **2 W N 79.**

5. NATURE AND FORM OF CERTIFICATE.

(1) Certificate for portion of property.

146—The Act does not authorize the grant of a certificate for a portion of the property or debts, whether such portion be separate and defined or not. **Beychan Sahoo v. Ganesh Sahoo** **2 N W 439.**

(2) Limited certificate.

147.—A certificate under Act XXVII of 1860 cannot be limited to particular debts. **Pran Khan** **17 W R 238.**

(3) Certificate to collect fractional share of debts.

148.—Certificates to collect fractional parts of debts due to a deceased cannot be granted to different heirs according to their respective shares in the inheritance, but one certificate to collect debts should be granted to all or such of the heirs as would consent to act in concert.

Amirunissa Barkat v Affiattunissa
3 B L R A C 404: 12 W R 307.

149.—The appellant was the son by the first wife of the deceased the respondent, the second wife of the deceased applied for a certificate for herself and on behalf of her minor sons, the Judge gave her a certificate for a 12-anna share. *Held*, on appeal that the certificate should be granted jointly to the appellant and respondent. The granting of a certificate does not determine any question of

Certificate of Administration-*Contd.*

(5) Nature and form of certificate—*Contd.*

title, or decide what property does or does not belong to the estate of the deceased. It merely enable the person to whom it is granted to collect the assets of the deceased. and is conclusive of her representative title against all debtors to the deceased. A certificate cannot be granted for the collection of fractions of the debts of the deceased. **Waselun Hak v Gowhurunnissa Bibi. I B L R S N 7; 10 W R 105**

150.—Act XXVII of 1860 does not contemplate division of the certificate, or a power to collect fractional shares of debt **Bhoodun v Jan Khan 13 W R 265.**

151.—Succession Certificate Act (VII of 1889), sec. 7—Grant of certificate not to be partial.

A District Court acting under s. 7 of Act VII of 1889 must, if there are several applicants, elect to which, if any, a certificate should be granted. It is not competent to such Court to grant separate certificates to different persons for partial collection of the debts in respect of which a certificate is sought. **Shitab Dei v Debi Prasad 16 All, 21=13 W N 191.**

Notes :—Ref: 19 Mad 497.

152.—Succession Certificate Act (VII of 1889), s. 6—Certificate not necessarily to collect all the debts of the deceased.

A Court may legally grant to an applicant, under Act VII of 1889, a certificate for the collection of a specified debt or specified debts of a deceased person. The Court is not bound to grant a certificate only for the collection of the whole of the debts of the deceased. **Indarman. 18 All 45= 15 W N 152.**

153.—Succession Certificate Act (VII of 1889) S 4, collection of a portion only of a debt —Certificate.

A certificate for collection of debts under Act VII of 1889 may be given for the collection of any one or more separate debts of the deceased ; but not for the collection of part only of a debt. Where, however, a portion of a debt in respect of which a certificate is sought has been paid off it is not necessary for the applicant to pay duty on more than the unsatisfied portion of the debt. **Muhammed Ali Khan v Puttan Begum. 19 All 129=16 W N 198.**

(4) Joint Certificate.

154.—Ground for appeal against order.

It is no ground for appeal against an order granting a certificate that the Judge joined with the appellant another person who had an interest in the debts to be collected. **Pran Khan. 17 W R; 238.**

155.—Rival claimants—Discretion of Judge. Where there are rival claimants for a certificate to collect the debts of a deceased person. the Judge has, under s. 3, Act XXVII of 1860, a discretion to present it to such person as, under the circumstances of the case, shall appear best entitled to it. *Quære* - Has he power, under the Act, to grant them a joint or separate certificate? **Raisunnissa Begum v Khujjunissa. 4 B L R, A C, 149=13 W R 143.**

156.—Power of Judge.

Act XXVII of 1860 gives a Judge no power to grant a joint certificate to two persons, his duty being to determine which of the applicants has the better right to a certificate. **Seetaram Gowra v Kekree Singh. 4 N W 60.**

But **See Ead Ali Khan v Wahad Ali Khan. 23 W R 25.**

Notes:—Fol : 5 All 195.

157.—S. 7 (4).—Joint certificate to several claimants—(Act XXVII of 1860)

A certificate under Act XXVII of 1860 should not be granted to several persons jointly, but, where there are claimants to the certificate, the District Court should determine which of such person has the best title to the certificate, and grant the same accordingly. **Madan Mohan v Ram Dial. 5 All 195=2 W N 215.**

Notes : -Fol 15 Bom 684.

158.—Succession Certificate Act VII of 1889.—

A joint certificate cannot be granted under Act VII of 1889. **Lonachand v Uttamchand P J 1896, p 57 ; 15 Bom 684.**

Certificate of Administration-*Contd.*

(5) Nature and form of certificate—*Contd.*

Notes :—Fol· 6 M L J 90. Ref : 19 Mad 497.

159.—Succession Certificate Act (VII of 1889) s. 7-Adverse claimants.

It is not illegal to grant a joint certificate to two persons who claim adversely to each other to be entitled to collect the debts due to the estate of the deceased under Succession Certificate Act VII of 1889. **Narayanasami v Kuppusami 19 Mad 497=6 M L J 112.**

160.—Widows of deceased.

Where the widows of an intestate applied for administration to the estate of the deceased.—*Held*, that the District Judge, before whom the application was made, was right in following the usual practice (which was declared to be a reasonable practice) of his Court in refusing to grant such administration to the widows jointly.

Nittye Kali Debia v Kader Nath Chatterjee 5 C L R 368.

161.—Joint certificate to widows of two sons of owner of estate.

R and his sons, L and S, were members of an undivided family. S predeceased R, who subsequently died, leaving L him surviving, and on the death of L, the widows of L and S applied for a joint certificate of heirship to the estate of R. Before their application was heard, L's widow repudiated the joint application, and prayed for the grant of a certificate to her alone. The District Judge, however, ordered a joint certificate to be issued to the two widows. On appeal from this order by L's widow,—*Held* that, under Act XXVII of 1860, a joint certificate could not be granted. S having predeceased R, his interest in the family property and sacra reverted to R and L, and after L's death the estates vested in L's widow, who had, therefore, a better claim to be entrusted with getting in the debts. The order of the lower Court was varied by directing the certificate to go to L's widow alone on her giving security for half the amount of the outstandings. **Jamnabai v Hastubai. 11 Bom 179.**

Notes:—Fol: 15 Bom 684.

II C. C. 81

Certificate of Administration-*Contd.*

(5) Nature and form of certificate—*Concld.*

(5) Fresh certificate—Act XXVII of 1860 S. 60.

162—The fresh certificate referred to in s. 6 of Act XXVII of 1860 means a certificate granted to person other than the person to whom the first certificate was granted. Where, therefore, a person to whom the District Court had granted a certificate appealed to the High Court on the ground that the District Court should not have made the grant of certificate conditional, upon her giving security to another person *Held* no appeal lay to the High Court. **Naurangi Kunwar v Raghubansi. 9 All 231.**

6. PROCEDURE.

(1) Evidence improperly taken.

163—In an application for a certificate of administration, the District Judge having delegated the examination of the witnesses in the case to the Nazir of the Court and having on the evidence so taken made an order granting the certificate,—*Held*, that the procedure was illegal, and that the order as passed must be annulled, and further proceedings for the investigation of the title directed, in which the witnesses should be examined by the Judge himself.

Lukshmibai Ram Sanshedappa v Rudrappa bin Gangoppa. 2 Bom H C R, 2nd Ed 382.

(2) Enquiry as to right

164—Evidence of right.

Although no question of title is judicially determined as the result of an enquiry under Act XXVII of 1860, yet the Court is bound under the Act to give the certificate to the person who makes out a title, and for that purpose, when parites are not agreed as to the facts, to try the issues in the ordinary way by the aid of evidence.

Anundee Kooer v Bachoo Singh. 20 W R 476.

165—Ground for refusal.

A Hindu woman applied for a certificate of administration under Act XXVII of 1860 to the estate of her brother, who had died seven years before and whose property had since been in the possession of his so-called heir-at-law. The applicant alleged that at the time of her brother's death she was pregnant, and subsequently gave birth to a son, who died in infancy. As represen-

Certificate of Administration-*Contd.*

(6) Procedure—*Contd.*

tative of that son, who was deceased's legal heir, she asked for the certificate. The lower Court summarily rejected her application on the ground of lapse of time. *Held* that this was not a sufficient reason for rejecting the application, and that the Judge must proceed to an enquiry under the Act. **Durgadasi Dabi v Judunauth Mookerjee. 2 B L R Ap 26.**

166—Application for succession certificate—Order for costs of adjournment against opposing party—Effect of non-compliance with such order-Civil Procedure Code s, 158.

A widow applied for a succession certificate to her late husband. The application was opposed by his brother, who claimed to have been undivided from him. The matter came on for hearing but was adjourned on his application, he being ordered to pay the costs. He failed to pay the costs, and the certificate was issued to the widow. *Held* that s. 158 of the Civil Procedure Code was inapplicable to the case in the absence of a specific order making the payment of costs a condition precedent to the hearing of the evidence of the party in default. **Virabhadrappa Chetti v Chinnamma, 21 Mad 403.**

167—Question of legitimacy.

On an application for a certificate of administration under Act XXVII of 1860. where the applicant claimed as heir of the deceased and impugned his marriage,—*Held* that the Judge was bound to enquire summarily into the question of the marriage of the deceased and the consequent legitimacy of his children. **Taylor v Nundu Jan. W R 1864 Mis 25.**

168—Question of validity of will.

An application having been made by the widow of a deceased proprietor for a certificate under Act XXVII of 1860 on the ground that she was entitled in right of inheritance (her husband having separated himself from his brother, the objector), and a will also having been set up which gave her extensive rights over the estate, the Judge granted the application without going into the validity of the will. *Held*, that, for the purposes of the Act, it was quite sufficient to decide the case upon the question whether the estates of the two brothers were joint or separate at the

Certificate of Administration-*Contd.*

(6) Procedure—*Contd.*

time of the death of the applicant's husband. **Sookraj Bahadoor v Jureena Bibee. 11 W R 341.**

169—Claim under will.

When a party claims a certificate under Act XXVII of 1860 by reason of a will said to have been executed by the deceased, the Judge should decide upon the issue raised by him and say whether under the will he has a preferable right, instead of granting a certificate to the widow of the deceased upon her giving security to satisfy any claims which may be brought, should the will be proved to be a genuine document in a Civil Court. **Juggut Chunder Roy v Chunder Monee Shaha. 17 W R 277.**

Notes:—Fol. 15 Cal 574.

170—Succession Certificate Act VII of 1889, Sec. I, cl. (4).

Kalidas Fakirchand and Karsandas Amirchand applied to the District Court for a certificate of administration under Sec. 6 of Act VII of 1889 to enable them to collect the debts due to one Punja Jagjivan deceased. They alleged that Punja had made a will appointing them trustees to collect his debts. Bai Mahali also applied for a certificate on the ground that she was Punja's heir. She disputed the genuineness of the alleged will. The District Judge rejected both the applications on the ground that the validity of the will could not be settled in a summary proceeding. On appeal the High Court remanded the matter for rehearing, holding that the District Judge had jurisdiction to decide upon the genuineness of the will. At the re-hearing Bai Mahali withdrew her application but the Judge held that as Kalidas and Karsandas claimed a certificate as executors of the will and not as heirs they should take out probate of the will. He, therefore, refused their application on appeal to the High Court.

Held, that the duty of the District Judge in carrying out the remand order of the High Court, was confined exclusively to determining whether the applicant or the heir was entitled to the certificate and that he could not refuse the certificate simply because the applicant might have asked for probate, as the case did not fall under clause (4) of Sec 1 of Act VII of 1889, **Kalidas Fakirchand v Bai Mahali,. P J 1892, p 4; 18 Bom 712.**

Certificate of Administration-*Contd.*

(6) Procedure—*Contd.*

Notes—Ref: 22 Mad 9; 18 Bom 608; 19 Bom 821.

171—Act XXVII of 1860—Certificate—Rival claims to—Procedure—Title.

Where the title of one of two claimants to a certificate under Act XXVII of 1860 is not admitted, the Court must determine which of them has the preferential right to the certificate.

5 C L R 517, considered; 20 W R 476, 4 Cal 411; 36 Cal 618, referred to.

Sheetanath Mookerjee v Promothonath Mookerjee. 6 Cal 303=7 C L R 475.

Notes—Appl: 15 Cal 574. Ref: 23 Cal 431.

172—Act XXVII of 1863—Title.

Courts will not grant a certificate to collect the debts of the testator, where the *prima facie* presumption is that the debts of the deceased are time-barred. The question of title cannot be determined in an application under Act XXVII of 1860, and such a question must be determined by a regular suit. **Koonj Behari Chowdhry v Gocool Chunder Chowdhry, 3 Cal 616**

Notes—Appr: 15 Cal 574. Appl: 6 Cal 303.

173—Succession Certificate Act (VII of 1889) S. 7 (3) Prima facie title to certificate—Inquiry—Question of law or fact.

The aim of s. 7 cl. 3 of Act VII of 1889 is not to save the trouble of the Court to make inquiry as to title while granting a certificate to an applicant who is not heir to the deceased but it allows a *prima facie* title to certificate prevail & does not grapple with questions of law or fact difficult to be determined in a summary proceeding.
Sivamma v Subbamma. 17 Mad 477.

Notes.—Fol: 23 Cal 431. Ex: 5 C W N 494 Ref: 21 Bom 53.

174—Act XXVII of 1860-Rival claimants for certificate—Question of title.

Where the question as to a certificate is between two parties, one of whom according to certain given facts would be the heir and the other a total stranger, those facts must be gone into and determined, although such procedure involves to a certain extent the trial of a question of title.
Asgar Reza v Abdul Hossein. 15 Cal 574.

Notes—Ref: 23 Cal 431.

Certificate of Administration-*Contd.*

(6) Procedure—*Contd.*

175—Succession Certificate Act (VII of 1889) s. 7 sub s (3) Nature of inquiry—Title.

S. 7 sub-s (3) of the Succession Certificate Act (VII of 1889) requires some inquiry into the title set up by the applicant before the disposal of his application. 5 C L R 517 dissented from; 7 Mad 452 distinguished. 6 Cal 303, 15 Cal 574, 17 Mad 477 referred to. **Harri Krishna Panda v Balabhadra Panda. 23 Cal 431.**

Notes—Ex: 5 C W N 494. Rel: 8 C W N 51 Ref: 25 Cal 320. Ap: 31 Cal 133.

176—Succession Certificate Act (VII of 1889) s. 7, cl. 3—Obligation of Court to decide the right to the certificate.

Under cl, 3, s. 7 of the Succession Certificate Act (VII of 1889), the District Court must decide in a summary way an application for a succession certificate, even if the question at issue between applicant and opponent be as to the status of the family to which deceased belonged.
Dharmaya Sangappa v Sayana Malapa. 21 Bom 53=1895 P J 345.

Notes.—Ex: 5 C W N 494.

177—Inquiry before granting certificate.

Before granting certificate under Act XXVII of 1860 courts should take at least some evidence showing the *prima facie* title of the deceased to the property in respect of which the certificate is sought. **Radha Rani Dasi v Brindabun Chunder Basak. 25 Cal 320, 2 C W N 59.**

Notes:- Ex; 5 C W N 494 Ref: 26 All 173.

178—Act XXVII of 1860, s. 5—Discretion of Court—Security.

Under Act XXVII of 1860, s 65, the Court granting a certificate has a discretion to determine whether or not it will require security to be given by the person to whom it grants it. The High Court will not, on appeal or review, interfere with the exercise of such discretion by the lower Courts.
Mhalsabai v Vithoba Khandappa Gulve. 7 Bom H C R Ap. 26.

Notes:—Not Fol: 12 B H C R 364. Con: 19 Bom 790, 7 C W N 875. Rel: 30 Cal 965; 7 C W N 871. Ref: 3 Bom 273; 14 Bom

Certificate of Administration-*Contd.*

(6) Procedure—*Contd.*

249 F B; 19 Bom 428; 23 Bom 250. 1 Bom L R 144.

179—Power of Judge where order for security is made by High Court—Return of security.

Where security has been taken by an order of the High Court from the holder of a certificate under Act XXVII of 1860, a Zillah Judge is not competent of his own motion to realise the money and give it back. If he thinks the time for doing so has arrived, it is for him to report the circumstances to the High Court for orders. Security taken from the holder of a certificate of administration should not be returned till the time allowed for an opposing claimant has expired. **Gour Soondur Paray v Kristo Kant Mahaton.** **15 W R 108.**

(3) Succession certificate, want of—Objection first raised on appeal:—

179A—Succession certificate, want of-Objection first raised on appeal:—An appellate court should not for the first time on appeal entertain an objection for want of succession certificate without giving the plaintiff an opportunity to meet it by producing the certificate. **Umesh Chandra Pramanik v Mathura Mohan Haldar.** **5 C W N 607=28 Cal 246.**

(4) Suit by son of deceased usufructuary mortgagee for amount due on mortgage—Certificate of heirship not necessary:

179 B—'Debt'—Suit by son of deceased usufructuary mortgagee for amount due on mortgage—Certificate of heirship not necessary:—

A, a usufructuary mortgagee, died leaving B, an adopted son, and two widows. The widows assigned the mortgage without consideration. The mortgagor sold the equity of redemption to a buyer who paid off the mortgage to the widow's assignee. The adopted son then sued all these persons to recover the amount due under the mortgage, or for possession of the lands till the mortgage amount should be paid. He did not produce a certificate of heirship. The Munsif decreed the amount sued for the same to be recovered by sale of the mortgaged property on default in payment. *Held*, that he was entitled to recover against the mortgaged property. The decree is not for money due under a contract, but is the assessment in money by the

Certificate of Administration-*Contd.*

(6) Procedure-*Contd.*

District Munsif of the value of the plaintiff's mortgage interest. B was entitled in strictness to the land itself, and it was only by his consent that money was awarded in lieu of the land. So the amount is not a 'debt' within the meaning of the Succession Certificate Act, and so no heirship certificate is necessary. **Arumugam Pillai v Valura Koundan.** **24 Mad 22.**

7: EFFECT OF CERTIFICATE.

(1) Indemnity of debtors paying debts.

180.—The effect of a certificate under Act XXVII of 1860 is that it is conclusive of the representative title against all debtors to the deceased, and affords full indemnity to all debtors paying their debts to the persons to whom the certificate has been granted. **Bhugobutty Kooer v Bholanth Thakoor.** **8 W R; 317.**

181.—Certificate for collection of debts—Effect of certificate against debtors—Cause of action—Act XXVII of 1860, s. 4.

A judgment debtor sued for a declaration that the son of the deceased decree-holder, to whom a certificate had been granted under Act XXVII of 1860 in respect of the debts due to his father's estate, was not competent to apply for execution of the decree, as, being illegitimate, he was not the legal representative of the deceased decree-holder. *Held*, that the suit was not maintainable, the certificate under Act XXVII of 1860 being, under s.4 of the Act, conclusive of the defendant's representative character, and a full indemnity to all persons paying their debts to him. **Gaura v Gayadin.** **4 All 355=2 W N 66.**

(2) Right of co-heir against holder of certificate.

182.—Misappropriation of property of deceased.

A co-heir is entitled to follow property of the deceased into the hands of any person who has misappropriated it, and such right is not taken away by the certificate of administration granted under Act XXVII of 1860. **Nga Tha Ya v. Mi Khan Mhaw.** **5 B L R 371: 13 W R 443.**

(3) Adjudication of title.

183.—Protection of debtors—Act XXVII of 1860.

Certificate of Administration-*Contd.*

(7) Effect of certificate-*Contd.*

The certificate under Act XXVII of 1860 does not determine any question of heirship, but merely protects debtors of a deceased person from liability for payments made to a certificate holder. If it be found that such certificate-holder was not the rightful heir, the question of heirship may be tried in a regular suit, notwithstanding the grant of a certificate. **Jokna v Bhugwanee.** **3 N W; 320.**

184.—Possession.

The grant of a certificate of administration under Act XXVII of 1860 does not decide any question of title to possession of land. **Dhunraj Giri Goswami v. Sripati Giri Goswami.** **2 B L R A Cr; 27.**

Queen v Sreeputt Giri Gossain. **11 W R Cr; 23.**

Obilashery Debia. **9 W R Cr; 18.**

Notes:—See 11 W R 151.

185.—Protection of debtors.

Act XXVII of 1860 does not provide for an adjudication of the rights of parties to succeed to property, or their actual title to it, its whole object being the security of debtors paying debts due to the estates of deceased persons. **Mahomad Eunoos v Lalla Jamarad Lall.** **13 W R 356.**

Jhanjoo Kooer v Dameenah Kooer. **17 W R; 343.**

Chundro Monee Debia v. Rash Beshary Chowdhry. **21 W R 24.**

Hurro Kisto Doss v Ramanundo Doss. **22 W.R; 274.**

Ramprotab Misser v Abhilak Misser. **3 C L R; 170.**

186.—Under Act XXVII of 1860, no question of title to any specific property can properly be tried. A party seeking to raise such a point should be referred to a regular suit. **Imamun v Nunnoo.** **17 W R; 193.**

Notes:—Ref 14 Mad 277,

187.—Act XX of 1841.

Held, that a certificate granted under Act XX of 1841 did not establish the right of inheritance of the party to whom it was granted, but simply empowered him to collect debts due to the estate of the deceased. The title of plaintiff or her father could not, under the circumstances, be questioned by a co-sharer after its public acknowledgment and practical effect given to that acknowledgment during a long period of years. **Skinner v Skinner.** **2 Agra, 128**

Certificate of Administration-*Contd.*

(7) Effect of certificate—*Contd.*

188.—Right to receive certificate-Act XXVII of 1860.

In a proceeding to obtain a certificate under Act XXVII of 1860, for the collection of debts payable to the representatives of deceased persons the Court determines merely that the applicant is entitled to receive a certificate, and not his title as heir or legal representative of the deceased. The rights as between each other of several persons claiming to be interested in the property of the deceased, are not for consideration and determination in such a proceeding. **Beychan Sahoo v Ganesh Sahoo.** **2 N W 439.**

189—Act XXVII of 1860—Right of succession.

A certificate under Act XXVII of 1860 gives no title to the property in succession to the deceased, neither does it authorize the holder to sue for and collect debts which have accrued due at the death of the deceased to persons who have subsequently become owners of his property. **Gouree Byjnath Pershad v. Lochun Kooer.** **22 W R., 102.**

190—Act XXVII of 1860.

Certificates under Act XXVII of 1860 can only be granted to persons claiming to be representatives of deceased persons to enable them to recover debts and receive interest or dividends; but such certificates include only the debtors of the estate and the procedure given by the Act was not intended to apply to the decision of any right to succeed to the estate of a deceased person. **Rau Narasinga.** **2 Mad., H C R 164.**

Notes—Ap: 8 C W N 545.

(4) Effect of certificate in subsequent suit.

191—A certificate under Act XXVII of 1860, obtained on the allegation of being heir of the deceased, does not preclude a suitor from showing that the relationship, certified to, did not exist. **Bundhoo Bhugut v. Mahomed Hossein.** **2 W R., 70.**

Certificate of Administration-*Contd.*

(7) Effect of certificate-*Contd.*

(5) Decision as to validity of will.

192—Suit to contest will.

A decision as to the validity of a will under the provisions of Act XXVII of 1860 will not bar a regular suit under Act VIII of 1859, between the same parties, to contest the validity of the same will. **Anund Chunder Mitter v Baney Madhur Mitter.** **11 W R., 127.**

Kalee Chunder Surma v. Gobind Pershad Surma. **12 W R., 454**

193—Act XXVII of 1860, Effect of decision under.

A decision under Act XXVII of 1860 does not in any way preclude the unsuccessful party from contesting the validity of the will in a regular suit. **Aunund Mohun Mullick v Indro Monee Chowdrain.** **16 W R, 214.**

Sookho Soonduree Dabia v. Wooma Soonduree Dabia **18 W R, 255.**

Notes.—Fol; 12 C L R 148; 1 All 360. Con; 4 M L J 183 F B. Ref; 4 Mad 204,23 Bom 486.

(6) Decision under Act XXVII of 1860, Effect of.

194—Subsequent regular suit.

When the question of granting a certificate under Act XXVII of 1860 is dealt with by the Court with all the available evidence before it just as in a regular suit, and the matter of the certificate is decided upon after full deliberation, the position of the parties becomes very different from what it is at the conclusion of a really summary proceeding. Technically, there may still be right to bring a regular suit, but the regular suit in such a case is a re-hearing, and the Court is bound to pay due respect to the judgment already arrived at. **Greedharee Singh v. Fooljhuree Koer.** **24 W R., 173.**

(7) Power to negotiate Government securities.

195—Act XXVII of 1860, ss, 8 and 21.

A Judge can, under ss.1 and 21 of Act XXVII of 1860, empower the holders of a certificate under that Act to negotiate a Government security mentioned in the will.

Bhuggobutty Debia. **3 W R.. Mis., 18.**

Certificate of Administration-*Contd.*

(7) Effect of certificate-*Concld.*

(8) Effect of certificate on title enacted by will.

196—Succession Act, s. 187.

The grant of a certificate under Act XXVII of 1860 on the title afforded by a will, which gives the grantee the estate in respect of which the debts accrued, does not establish a right as executor or legatee within the meaning of the words of s. 187 of the Succession Act. **Kristo Chunder Mookerjee v. Chundee Pershad Banerjee.** **23 W R., 252.**

197—Succession Certificate Act (VII of 1889), ss. 17 and 20—Certificate of heirship—Grant of certificate by Political Agent—Irregularities in making grant—Jurisdiction of Civil Court.

A District Judge cannot treat a certificate of heirship granted by the Political Agent in a Native State as invalid because the applicant had not given to him the requisite information as to the other members of the family, and no notices had been issued to them. These irregularities of procedure may be a reason for the Political Agent to cancel the grant, but they do not enable the District Court to treat it as a nullity. A certificate of heirship stamped with the proper stamp, and granted by the Political Agent of a Native State, must be recognized by the Civil Courts in British India "as having the same effect in British India as a certificate granted under this Act" as provided by s. 17 of Act VII of 1889, and under s. 20 precludes the granting of a certificate by a Civil Court. **Annapurnabai v. Lakshman Bhikaji Vakharkar** **19 Bom., 145.**

8. CANCELMENT & RECALL OF CERTIFICATE.

(1) Act XXVII of 1860.

198—Grant of certificate by High Court—(Act XXVII of 1860).

Held, that the High Court may grant a certificate for the collection of debts due to a deceased person in supersession of a certificate granted by the District Judge and this the High Court can do both on appeal from the order of the District Judge or on petition. **Gangia v Rangi Singh** **9 All 173; 7 W N 9.**

Certificate of Administration-*Contd.*

(8) Cancelment & recall of certificate-*Contd.*

(2) Application for Cancelment.

199—Act XXVII of 1860, s. 6—Cancelling certificate.—S. 6 of Act XXVII of 1860 contemplates the application for cancellation being made to the High Court **Susman Gossain v Ram Churn Bhukut.** **5 W R Mis., 48.**

(3) Refusal to recall certificate.

200.—Act XXVII of 1860.

Held that the lower Appellate Court properly exercised its discretion in refusing to recall a certificate under Act XXVII of 1860, because there was an heir in a nearer degree to the deceased than the person to whom the certificate was granted; the object of that Act being to give facilities to debtors and not to assist parties in establishing a disputed right or title.

Kubeer Chunder Bundo v Ramkanye Doss Biswas. **17 W R 174.**

(4) Jurisdiction to recall.

201.—Judge sitting on Original Side, Power of.

Norman, J., ruled that, sitting on the Original Side of the Court, he could not grant a certificate of administration in supersession of one which had been granted by the Judge of the 24 Pergunnahs under Act XXVII of 1860.

Shamlal Dass **5 B L R Ap. 21.**

Notes.—Dist: 11 Cal 451. Ref· 2 Bom 148 F B, 17 All 218 F B.

(5) Recall of certificate granted without jurisdiction.

202.—The High Court on appeal remanded a case for enquiry as to an allegation that a certificate granted under Act XXVII of 1860 had been granted without jurisdiction, and ordered that, if found to have been granted without jurisdiction, it should be recalled.

Jageswar Das. **6 L B R Ap. 128.**

S. C. Juggessur Dhur v Bhugobutty Dassee. **14 W R 464.**

(6) Recall of certificate of administration fraudulently obtained.

203.—A certificate of administration granted under Act XXVII of 1860 may be recalled, if it has been obtained by a false and fraudulent statement. **Bhabada Dasi.** **8 B L R Ap., 13.**

204.—Where, after a certificate has been granted under Act XXVII of 1860, an application is made by a party claiming to be the rightful heir, with a distinct allegation of fraud having been committed in obtaining the certificate, it is the duty of the Judge to call upon the opposite party to substantiate their allegation that the claimant was disqualified from inheriting.

Khetter Monee Dabee v Madhub Chunder Roy. **13 W R 160.**

205.—Power of Judge to recall-Enquiry, Extension of.

Whether or not a Judge has power to recall a certificate granted under Act XXVII of 1860, he has power, where there are charges made that a certificate has been obtained by fraud, to institute an enquiry, and, if necessary, to refuse an extension of the certificate, or to refuse to grant a fresh one according to the form of the application.

Bhikun v Elahi Khanum. **8 B L R Ap. 14 note: 11 W R 153.**

Notes.—See 11 W R 153.

206.-Succession Certificate Act (VII of 1889), s. 18, cls. (b) and (c)—Certificate granted under mistake, the applicant concealing circumstance which he should have disclosed-District Judge, Jurisdiction of.

P died in 1889, leaving behind him his daughter, *B*. *P*, it was alleged, had made a will appointing certain persons his executors. The executors applied for a certificate under the Succession Certificate Act (VII of 1869) to recover a debt due to the deceased's estate from one *N*. *B* opposed this application and claimed the certificate for herself by a separate application. The District Judge rejected *B*'s application, and issued a certificate to the executors on 14th September 1892 In the meantime, one *M* obtained a decree against *B* as legal representative of *P*, and in execution bought *P*'s right, title, and interest in the debt due from *N*. On 12th September 1892, *M* applied for certificate, under Act VII of 1889, to recover his debt. The District Judge rejected this application. *M* appealed to the High Court. To this appeal the executors

Certificate of Administration-*Contd.*

(8) Cancelment & recall of certificate-*Contd.*

were made parties at their own request. The High Court reversed the District Judge's order, and remanded the case for disposal on the merits. Upon the remand the executors did not appear before the District Judge to contest M's application, and the District Judge granted him a certificate. Thereupon he applied for revocation of the certificate previously granted to the executors, and the executors in their turn applied for a revocation of the certificate granted to him. The District Judge revoked M's certificate on the ground that he had fraudulently concealed from the Court the previous grant of a certificate to the executors.

Against this order M appealed to the High Court contending, *inter alia*, that the executors, not having resisted his application for a certificate after the case had been remanded by the High Court, were estopped, on the principle of *res judicata*, from applying for a revocation of the certificate granted to him.

Held, that the executors were not estopped. The executors having applied to be made parties to the appeal-proceedings, were bound to appear in the Court below, and their failure to do so disabled them from pleading objections, such as the collusive character of the decree and Mahali's want of title, but it did not operate as *res judicata*, especially when there was reason to suspect fraud on the part of Manchharam. The order obtained by him could not have the effect of *res judicata*, unless the executors being called on to dispute it, had failed to do so.

A party to a proceeding is never disabled from showing that a judgment or order has been obtained by the adverse party by fraud.

Held also, that the District Judge had a right, under Sec. 18, clause (b) or (c), of Act VII of 1889, to revoke the certificate he had granted under a mistake of fact to M. **Manchharam v Kalidas. P J 1894, p. 370; 19 Bom 821.**

Notes—Ap: 3 C W N 650. Dist. 27 Cal 11.

(7) Power to recall certificate obtained by fraud & misrepresentation.

277.—In a case in which a Judge refused, on the ground of want of competency, to entertain a petition which asked him to recall a certificate granted by him under Act XXVII of 1860, as having been obtained by fraud, it was held that it is a power inherent in every Court of Justice, on finding that an order has been obtained from it by fraud and misrepresentation, and that, if the real facts had been known to the Court it would not have acted in the matter, to recall the order made in ignorance of the true circumstances by reason of the misrepresentation alleged. **Hameeda Bibee v Now Bibee. 9 W R 394.**

Sheo Purshun Chobey v Collector of Sarun 13 W R 256.

Notes—Fol: 11 W R 153; 24 W R 376: 8 B L R Appx 13; 1 Cal 101. Ref: 8 C W N 468. Dist: 17 W R 174, 2 C L J 306.

(8) District Court, Power of, to cancel certificate granted.

208.—Jurisdiction of District Court to cancel a certificate granted.—Act XXVII of 1860.

A District Judge has no power to cancel a certificate granted in order to collect the debts of the deceased under Act XXVII of 1860. **Venkatamma v Chengalrayappa 7 Mad 555.**

(9) Succession or recall of certificate.

209.—Act XXVII of 1860, s. 6—Omission to file schedule of debts.

The High Court, under s. 6, Act XXVII of 1860, suspended a certificate which had been wrongly granted in a case where there was no list of debts due to the estate of the deceased. **Fayz Ali v Taleb Ali. 18 W R 330.**

Notes.—Ex: 20 W R 412. Ref: 24 W R 211.

(10) Recall of certificate granted without list of debts being filed.

210—It is not necessary, as a general rule, that a list of debts should be filed before a certificate can be granted under the provisions of Act XXVII of 1860. **Radhika Churn Sen v Judoonath Gossamee. 20 W R 412.**

Notes.—Ref: 24 W R 211.

Certificate of Administration-*Contd.*

(8) Cancelment and recall of certificate— *Concld.*

(11) Recalling or cancelling certificate, ground for.

211—Non-appearance to object to grant.

A certificate under Act XXVII of 1860 having been granted to the widow of a deceased party, his sister's son subsequently represented that he was entitled to the estate under a will, and prayed that the certificate might be cancelled. *Held*, that, as notice had been issued and the petitioner did not appear and object to the widow obtaining the certificate, the Judge was right in refusing to cancel the certificate and in referring him to a regular suit. **Manick Chunder alias Protap Chunder Roy v Raj Lackhee Dossee. 19 W R 252.**

Notes.—Dist; 18 Cal 520. Ref. 25 Mad 507 ; 27 Bom 515.

(12) Cancelling grant empowering person to deal with securities claimed by another.

212—If a Civil Court is proceeding under s. 8 of Act XXVII of 1860 to grant or has granted a certificate authorizing a person to deal with Government securities which are claimed by a third person as his property, that is a ground on which such third person may come into Court to oppose the grant of a certificate or to seek for its cancelment. **Bandam Settah v Bandam Maha Lakshmy. 4 Mad H C R 180.**

Notes:—Ref: 19 Mad 35.

9. BOMAY MINOR'S ACT (XX OF 1864),

(1) Mother of minor.

213—Bombay Minor's Act XX of 1864—Unwillingness to act as guardian—Default in appearance to order for issue of certificate.

An order for the issue of a certificate of administration to a particular individual ought not to be made until it is ascertained whether that individual is willing to take it. A certificate of administration ought not to be forced upon the mother of a minor unwilling to take it. Where an order for the issue of such a certificate to the mother of an infant was made, on the default of the mother to appear and show cause why it should not be issued to her,—*Held* that such default in appearance ought not to have been accepted as her assent to the issuing of the certificate to her. Course pointed out where no relative or friend of a minor can be found willing to take such a certificate. **Babaji bin Kusaji v. Maruti. 11 Bom H C R 182.**

Notes.—See 5 Bom 310.

Certificate of Administration-*Contd.*

(9) Bombay Minor's Act XX of 1864-*Contd.*

(2) Joint Hindu family,

214—Joint Hindu Family—Minor's Act XX of 1864.

Neither a certificte of guardianship nor administratorship can be granted as respects the minor sons of A, deceased when the property, of which administration is sought, is the undivided property of A and A's father G who is alive. But if A left separately acquired property, a certificate of administration limited to such property, may be granted. So also under the same circumstances, a guardian of the person of the minor may be appoint-ed. **Guracharya v Swamirayacharya. P J (1879) 396=3 Bom 431.**

Notes.—Ref: 8 Bom 395 ; 19 Bom 309 F B ; 6 Bom L R 966 ; 28 Bom 644.

215—Undivided Hindu Family—Ascertainment of share in property belonging to—Minor's Act XX of 1864;

The court may grant a certificate of administration, under Act XX of 1864. for the share of a minor in an undivided Hindu Family Property. The District Court has no jurisdiction to attach such property, in order to determine and divide off the minor's share therein even when a certificate of administration has been granted. Such share can be determined and divided off only in a regular suit for that purpose. **Babaji v Sheshgiri. 6 Bom 593=1882 P J 258.**

Notes:—Ref: 19 Bom 309 F B.

(3) Certificate granted to Collector.

216—Form of certificate—Act XX of 1864, s. 11—Effect of certificate—Moveable property.

Where the Court, under s. 11 of Act XX of 1864, directs a certificate of administration to the estate of a minor to be granted to the Collector of a district, such certificate should extend to the

11 C.C. 82

Certificate of Administration-*Concld.*

(9) Bombay Minor's Act XX of 1864-*Concld.*

moveable as well as the immoveable estate of the minor. **Lakshmibai v Ganesh Antaji, 4 Bom H C R A C 129.**

(4) Effect of Certificate on adoption.

217—Certificate of administration—Effect on adoption—Minor's Act XX of 1864.

By a deed of adoption a Hindu widow adopted a minor son, the deed stipulating that, until such minor attained majority, the widow was to manage the property. It subsequently appeared that she was incompetent to manage the property, and the natural father of the minor having applied for a certificate of administration, the lower Court granted one to him. On appeal by the widow to the High Court against the decision of the lower Court.

Held that the order of the District Judge granting the certiffcate should be confirmed The certificate did not alter the rights and interests of the minor or of the widow in the property. Any right of property or possession that could properly be asserted against the minor before the certificate was granted could be asserted equally after it was granted. **Gurupadva v Putapa. P J (1884) 173=8 Bom 599.**

Certificate of administration-Certificates under Bombay Regulation VIII of 1827 &c.

See Estoppel-Statements and pleadings. **1876 P J 209.**

1—Property in different districts.

A separate certificate under Bombay Regulation VIII, of 1827 is necessary, obtained in each district where the estate of a deceased person may be, for the purpose of enabling its holder to deal with the estate in that district. **Hayad Bibi v Turaibi. 1875 P J 71.**

Certificate of Collector.

1—Under the Pensions Act.

Effect of certificate of Collector. **Krishnaji v Anant. 5 Bom L R 950=28 Bom 241**

2—Revocation by Revenue Commissioner.

Revocation of certificate of a Collector is not permissible to the Revenue Commissioner. **Bhimbhat v Bhikambhat, 1 Bom L R 184 =23 Bom 676.**

3—Suit on agreement for maintenance from cash allowance—Necessity of certificate.

Certificate of a Collector is required in a suit based on an agreement to allow maintenance out of cash allowance. **Damodar v Satyabhama-Bai. 9 Bom L R 889=31 Bom 512.**

Certificate of the Conciliator.

See cases under:—

—Dekhan Agriculturists' Relief Act, Bom Act XVII of 1879, s. 47, **10 Bom L R 505= 32 Bom 375.**

Certificate of Guardianship.

See cases nnder:—

(1) Act XL of 1858.
(2) Evidence Act s, 35.
(3) Guardian's Appointmnt.
(4) Hindu Law—Guardianship.
(5) Probate—Effect of Probate.

1—Revocation—Regular suit.

It is not necessary to institute a regular civil suit in order to obtain the revocation of a certificate of guardianship. **Mahomed Nukshund Mhan v Musst. Afzul Begam. 3 N W P 149.**

Certificate of Insurance.

See Stamp Act.

Certificate of Nationality.

1—Marriage—Essentials to raise presumption.

Before applying the presumption of marriage arising from cohabitation with habit and repute, it is necessary to make sure that the conditions necessary for its existence do exist. First of all, there must be some body of neighours, many or few, or some sort of public, large or small, before repute can arise. Secondly, the habit and repute, which alone is effective, is habit and repute of that particular status which, in the country in question, is lawful marriage. The difference between English and Oriental customs about the relations of the sexes makes such caution especially necessary. Among most Eng-

Certificate of Nationality-*Concld.*

lish people, open co-habitation without marriage is so uncommon that the fact of co-habitation in many classes of society of itself sets up, as a matter of fact, a repute of marriage. But in countries where customs are different it is necessary to be more discriminating, more especially owing to the laxity with which the word "wife" is used by witnesses in regard to connections not reprobated by opinion, but not constituting marriage. **Ma Wun Di v Ma Kin. 18 M L J 3; 5 A L J 63; 7 C L J 112; 12 C W N 220; 35 Cal 232; 35 I A 41 P C.**

See also cases under:—

(1) Marriage.
(2) Hindu Law Marriage.
(3) Evidence.

Certificate of Sale (1-10).

(1) Construction (1-3).
(2) Power of Court to amend certificate (4).
(3) Inaccuracy in sale certificate (5).
(4) Grant of certificate of sale (6).
(5) Sale certificate granted by collector (7).
(6) Limitation (8).
(7) Cause of action—Suit for exclusive possession of lands (9).
(8) Suit to set aside—Limitation Act (10).

See also cases under:—

(1) Civil Procedure Code, 1882, s. 316 = C P C (1908), s. 65 & O. 21 r. 94.
(2) C P C (1908), Order 21
(3) Limitation Act, 1877, Arts. 120, 142 & 178.
(4) Possession—Nature of Possession.
(5) Practice—Civil Cases—Certificate of Sale.
(6) Registration Act, 1877, s. 17, cl. (*o*) (1871, s. 17; 1866, s. 17).
(7) Registration Act, 1877, s. 49, (1871, s. 49).
(8) Sale in Execution of Decree—Purchasers, Title of—Certificate of Sale.
(9) Stamp Act, 1879, s. 24.
(10) Stamp Act, 1879, sch. I, art. 16.

(1) Construction.

1—Misdescription—Intention of parties.—

Mere inaccuracy of language or misdescription will not vitiate a sale certificate. The intention of the parties must be looked to. **Moula Buksh v Kuruck Lall, 7 W R 245. Manson v. Golam Kebria Moonshee, 15 W R 490. Taranath Chuckerbutty v. Joy Soonduree Dabee, 21 W R 93.**

2—Misdescription of land.—

Where a sale certificate declares the sale of the rights of a particular party in land of which the identity is not in dispute, the mere fact that the right thus transferred is called by mistake jote dakhali instead of some other term nearly importing the same thing does not constitute a difficulty in the way of giving the purchaser possession. **Kuleemooddeen Darogah v Ashruf Ali Khan, 19 W R 276.**

3—Power to go behind certificate.—

The Court in construing a sale certificate refused to go into facts lying behind it for the purpose of contradicting its terms. **Lalla Bissessur Dyal v. Doolar Chand Sahoo, 22 W R 181. See Pearee Mohun Mookerjee v. Gosto Behary Dey, 26 W R 104.**

Notes:—Ref: 27 Bom 334.

(2) Power of Court to amend certificate.

4—Civil Procedure Code, 1859, s. 259.—

A Court is not legally competent to make an *ex-parte* order amending a sale certificate granted under Act VIII of 1859, s. 259. **Rughoo Nundun Singh v. Wilson, 23 W R 301.**

(3) Inaccuracy in sale certificate.

5—Extraneous evidence.—

Where a sale certificate, though containing errors, was accurate as to any part of the description of the subject of sale, and could be used to identify it, with the assistance of extraneous evidence, such evidence could be received to show what was intended to be dealt with. **Maleebun v. Rasheeda, 25 W R 401.**

(4) Grant of certificate of sale.

6—Grant of—Certificate of sale ordered to be granted where the auction purchaser who entered into possession laid out great sums of money on the property of purchaser. **1 Bom L R 446.**

Certificate of Sale-*Contd.*

(1) Construction—*Concld.*

Certificate of Sale-*Contd.*

(5) Sale certificate granted by Collector.

7—Granted by Collector in accordance with the Rules issued by the Board of Revenue after sale of " B Class " lands — Transfer of title—Registration. **35 Cal 614.**

(6) Limitation.

8—Limitation Act, Sch. II, Art. 178—Execution of decree—Limitation—Terminus a quo:—

Although the grant of a certificate is a necessary preliminary to an application under S. 318, C. P. C., such application will be barred under Art. 178 of the Limitation Act, if not made within three years of the date of the certificate, that is to say, the date of the confirmation of sale. 3 Bom 133 and 17 Bom 228 diss from; 1883 W N p. 262 ref. to.—**Ranjit Singh v. Baldeo Singh, (1908) A W N 162.**

(7) Cause of action—Suit for exclusive possession of lands.

9—C P C O 2 r. 2 (1882 S. 43) 10—Possession—Certificate of sale—Suit to recover share in joint land.

Per Chandavarkar and Aston JJ.—Where the purchaser at a Court sale sues to recover exclusive possession of certain lands belonging to the judgment-debtors, and on the termination of the proceedings in his favour, he institutes another suit to recover by partition the share of the judgment-debtors in other lands which are held by them jointly with their co-parceners, his second suit is not barred by the provisions of S. 43 of the Civil Procedure Code, although he bases his claims in both the suits upon the self-same certificate of sale issued to him by the Court.

Per Crowe J. (dissenting)—Both in this suit and the previous litigation plaintiff has relied on the title as evidenced by the certificate of sale. He may be entitled to more than one remedy in respect of the same cause of action. and he may sue for all or any of his remedies, but if he omits (without leave of a Court obtained before the first hearing) to sue for any of such remedies he shall not afterwards sue for the remedy so omitted. **Narayan v. Shamrao, 5 Bom L R 233 =27 Bom 379.**

Notes:—Fol: 7 C L J 384.

Certificate of Sale-*Concld.*

(8) Suit to set aside—Limitation Act.

10—Suit to set aside Limitation Act, Arts, 12, 120, 142—Notice not served.

Where it is found that notice has not been served-under S. 10 of the Act, and a suit is brought to set aside the sale and to recover possession of the property sold, Art. 142 and not Art. 12 of Sch. II, Limitation Act, is applicable. In such a suit, the plaintiff need not ask the sale to be set aside; he is entitled to recover possession upon the footing that the sale has not affected his title. **Purna Chandra Chattopadhya v Dinabandhu Mukhopadhya. 11 C W N 756; 5 C L J 926; 34 Cal 811; F B.**

See also cases under:—

Limitation Act, Art. 142 & Art. 178.

Certificate of Sale, Amendment of.

See Appeal—Sale in execution of decree. Case No. (1086). **23 All 476= A W N 1901, 156.**

Certificate of Will-Suit for maintainability.

1—Suit for maintainability during lifetime of testator:—Will. **1904 A W N 150= 1 A L J 468.**

Certificate to collect debts.

See Certificate of Administration.

1—Act XXVII of 1860, Section 3—Court failing to adjudicate upon the rights of the respective claimants.

Where the lower Court in a proceeding under Act XXVII of 1860, after ordering a preliminary enquiry, simply expressed its dissent from the opinion of the officer who held the enquiry, and dismissed the application without stating any reasons for arriving at this conclusion, *held*, with reference to Section 3 of the Act, that there had been no proper adjudication of the rights of the parties, and that the case must be remanded to the lower Court in order that it might determine which of the rival claimants was entitled to the

Certificate to collect debts-*Concld.*

certificate and grant it accordingly. **Baga Singh v Khera** **P R 58 of 1883.**

Certificate under Bengal Act VII of 1880.

See (1) Limitation Act, 1877, s. 14.
(2) Public Demands Recovery Act.

Certificate under Bombay Regulation.

See Certificate of Administration.

Certified Copy.

—of a registered instrument.

See (1) Evidence Act Ss. 65—76.
(2) Land Revenue Act Section 83.

Certified Purchaser.

See Benami Transactions-Certified purchaser.

Certiorari writ of.

1—Removal of case from Small Cause Court-Letters Patent, cl. 13—Inability of Small Cause Court to issue commission.—

The Bombay Court of Small Causes is subject to the superintendence of the High Court within the meaning of cl. 15 of the Letters Patent of the High Court. and the latter has, therefore, power for purposes of justice, to remove a case from the Small Couse Court and itself to try and determine such case. The inability of the Small Cause Court to issue a commission to examine for the defence witnesses residing outside its jurisdiction, though not in general, may, under peculiar circumstances, be a good ground for granting an order to remove a case from the Small Cause Court into the High Court. Terms upon which such order will be granted set out. **Pirbhai Khimji v Bombay, Baroda and Centaral India Railway Company. 8 Bom H C R O C 59.**

Notes:—Ref: 20 Bom 480 F B; Rel: 27 Bom 575.

2—Act IX of 1850, s. 54.—

A writ of certiorari lay, as of course, to remove, before judgment, all cases commenced in the Calcutta Court of Small Causes, subject to the limitation imposed by s. 54 of Act IX of 1850, unless such cases fell within the usual exceptions recognized in English practice, so far as such exceptions may be applicable to the High Court. **Pillans v Peninsular and Oriental Steamship Company. 1 Ind Jur O S 68.**

Certiorari, writ of-*Contd.*

3—Act XXVI of 1864, s 7.

It is no ground for removal of a cause by certiorari from the Court of Small Causes that a difficult point of law is likely to be involved in it. The proper course is to apply to the lower Court under s. 7 of Act XXVI of 1864. **Madhub Kissen Sett v Gour Soonder. Sett.** **Cor. 90.**

4—Police Act XIII of 1856, s. III —Conviction on merits—Error in decision on merits—Affidavits, Use of.—

S. III of the Police Act (XIII of 1856) did not give jurisdiction to the High Court, when a case was brought before it on certiorari, to enquire whether the Magistrate had come to a correct conclusion as to the guilt or innocence of the prisoner. The object of that section was to limit the objections to a conviction to some substantial meritorious ground, such as want of jurisdiction or the like, and to prevent a conviction from being quashed on a mere error of form or of procedure. But the section did not give the High Court any right to interfere on the ground that the Magistrate had come to a wrong conclusion on the question of the guilt or innocence of the accused person. Though affidavits may be used to show a want of jurisdiction in a Magistrate, even though such affidavits contradict for this purpose the finding of the Magistrate, they cannot be used as affording materials for reviewing the Magistrate's decision on the merits.

Reg v Natholal Pitambar. 10 Bom H C R 102
Reg. v Sakharam Anatoba. 10 Bom H C R 109 note.

5.—High Court's Criminal Procedure Act X of 1875.

The power of the High Court to issue a writ of *certiorari* was not taken away by section 147 of the High Court's Criminal Procedure Act, X of 1875. **Reg v Ramdas Samaldas. 12 Bom. H C R 217.**

Certiorari, writ of-*Concld.*

6—Rule nisi to quash conviction-Practice.—

Where a writ of certiorari is granted to bring up a conviction of Justices, in order to quash it, and a rule *nisi* to quash the conviction moved for, the certiorari should be returned into Court before the motion for the rule *nisi* is made. **Reg. v Justices of the Peace. 1 Ind Jur N S 293.**

Notes:—Ap: 9 W R 325.

7—Power of High Court to quash conviction. —Bengal Act IV of 1876, ss. 88, 104, and 117—Municipal Commissioners, their jurisdiction—Power of the High Court.—

The power of the High Court to quash proceedings on certiorari, is not affected by the provisions of s. 117 of the Municipal Act, and if it should appear either on the face of the proceedings or upon affidavits that the Commissioners have acted without or in excess of jurisdiction, the Court will interfere. **Nundo Lal Bose v Corporation for the Town of Calcutta. 11 Calc 275.**

Notes:—Ref: 7 C L J 631=35 Cal 859=12 C W N 709.

Certifying Counsel.

Certifying Counsel—Practice. **7 Bom L R 753.**

Cess-decree as to.

Cess—decree as to—Effect of, as regards cess in subsequent years:—Res Judicata. **28 Cal 109.**

Cess (1-41).

1 Liability to pay cess 1-2.
2 Cess not sanctioned or taken into account in fixing Government revenue 3.
3 Alteration of rent by paying in different coinage 4.
4 Payment of rent in kind 4 A
5 Right to levy cess 5-7.
6 Assignees not entitled to cesses 7A.
7 Superior holder--Native chief—Village given by way of maintenance—Payment of cess 7B
8 Cess on debutter Lands 8.

Cess-*Contd.*

9 Abwabs paid before permanent Settlement 9-18,
10 Payment on marriages whether ground-rent or cess. 18-A.
11 Cess suit for 19.
12 Cess muhtarfa-Whether rent or cess 20.
13 Batta usual, Dastur, Hazzatnama, Sonari, Salami, Percentage 21.
14 Abwab-Punja expenses 21A.
15 Abwabs—Zemindary salami Mokarari lease—Rent—whether recoverable 22.
16 Compony's Batta 23-25.
17 Collection charges, Rent for abwab 26.
18 Power to levy separate cess—Deligation-Validity 27-28.
19 Revaluation-Increased cesses payable by whom 29.
20 Not land revenue 30.
21 Legality 31.
22 Suit to set aside sale for arrears of cess 32.
23 Suit for recovery of illegally collected cess not maintainable 32 A.
24 Levy of summary cess 33.
25 Liability of Babuana for cess. 34.
26 Cess under fear of distraint 35.
27 Water cess 36.
28 Contracting out-Construction of deed-Cess liability to pay mokurari lease 37.
29 Construction of document-House tax-Cess-Rent 38.
30 Annual Value-Rent-Tenure-holder 39.
31 Valuation roll, publication of—Condition precedent 40.
32 Rent suit might and ought 41.

See also cases under:—

(1) Contract Act, s. 23—Illegal Contracts--Illegal Cesses.
(2) Custom.
(3) Small Cause Court, Mofussil—Jurisdiction—Cess.
(4) Right of suit.
(5) Bengal Tenancy Act (VIII of 1885), S. 52, 74 Case No. (219). **16 C W N 360.**
(6) Bengal Tenancy Act (VIII of 1885), S. 74. Case No. (293). **8 C W N 529=33 Cal 834.**

Cess-*Contd.*

(7) Abwab.

(8) Appeal—Acts—Bengal Tenancy Act.
Case No (44). **20 Cal 254.**
Case No (329). **21 Cal 132.**

(9) Bengal Cess Acts.

(10) Bombay Local Funds Act, 1869, s.8.
Case No. (1). **4 Bom 643.**
Case No. (2). **17 Bom 54, 422.**

(11) Bengal Tenancy Act (VIII of 1885) S. 179. Case No. (62).
12 C W N 175.

(12) Bengal Tenancy Act (VIII of 1885) s. 74. Case No. (12)
10 C W N 527=4 C L J 527.

(1) Liability to pay Cess

1.—Holders under biswadar—Contract to pay.—

Held, that if the biswadars were not liable to cesses claimed those holding under them could not be liable to plaintiff's claim; and that the liability of the defendants, whether they be lessees or mortgagees under the biswadars, must depend, firstly, on the liability of the biswadars themselves; and, scondly, on the terms of the lease or mortgage under which they are found to be in possession. **Dhunee Ram v Moorlee Dhur 2 Agra 325.**

2.—Contract to pay.

Where the talukhdar has engaged to pay certain cesses for roads, schools, etc., he cannot recover them from the biswadars, unless they are bound to pay them by some positive law, or have engaged or have consented to do so; nor is any individual biswadar bound to pay merely because his co-partners have agreed to pay or have paid them. **Dhunee Ram v Moorlee Dhur 2 Agra 326.**

(2) Cess not sanctioned or taken into account in fixing Government revenue

3.—Right of suit.

A suit cannot be maintained for a cess which was not avowed nor sanctioned nor taken into account in fixing the Government revenue at the settlement. **Bisharut Ally v. Seetul Misser 1 N W 40.**

Cess-*Contd.*

(3) Alteration of rent by paying in different coinage.

4.—Extra or illegal cess.—

Rent is not altered by being paid in a different coin,-*viz.*, in kuldar, instead of sicca, rupees; and the apparent addition of one anna per rupee (the difference in value between the two kinds of rupees) is not a real addition to the rent, nor is it an extra cess of an arbitrary nature or an illegal character. **Roocha Ram Misser v Naga Doss 2 N W 92.**

(4) Payment of rent in kind

4A.—Payment of rent in kind.—

U P Act XIX of 1873, s. 66, **A W N 1885, 320.**
U P Act III of 1878, s. 8. **A W N 1899, 187.**

(5) Right to levy cess.

5.—Absence of any contract to pay.

A Government lessee is not entitled to sue for a declaration of his right to levy a cess upon a jotedar who grazes his cattle on his own jote within the precincts of the lessee's mehal, there being no contract between them whereby defendant is bound to pay such a cess. **Bhugeeruth Shikdar v. Ramnarain Mundur 9 W R 299.**

6.—Consent of raiyat to pay abwab or cess.—

If a zamindar demands a cess over and above the original rent, and the raiyat consents and contracts to pay it, this demand and the old rent form a new rent lawfully claimable under the contract. **Jeeatoollah Paramanick v. Jugodindro Narain Roy 22 W R 12**

7.—Madras Rent Recovery Act s. 11—Water-cess—Tenants—Cultivation improved by water taken from landlord's tank.—

A landlord has a right to charge water-cess when his tenant cultivates a wet crop on dry land or a second wet crop on wet land by means of water taken fram the landlord's tank.
Thayammal v. Muttia 10 Mad 282.

Notes:—Ref 12 M L J 22.

(6) Assignees not entitled to cesses

7A.—Local Rates Act (III of 1878)—Kanungo and Patwaris Act (IX of 1889)—Cess—

Cess-*Contd.*

(6) Assignees not entitled to cesses—*Concld.*

Assignment of Government revenue—Assignees not entitled to cesses. *Held*, that an assignee of the Government revenue assessed on a certain patti was not entitled to receive Patwari rates and local cesses from the Zamindar: such rates and cesses have to be paid by the Zemindar to the Government. **Kesho Das v Narain Singh. 1901 A W N 160=23 All 505.**

(7) Superior holder--Native Chief—Village given by way of maintenance--Payment of Cess.

7B.—Local Funds Act (Bom Act III of 1869), Sec 8—Bombay Local Act (Bom Act I of 1884)—Bombay Land Revenue Code Bom Act V of 1879 Jivakdars-Indian Contract Act (IX of 1872), Ss.69, 70

The plaintiff's ancestors as the ruling Chiefs of Patdi, granted to defendants' ancestors, the village of Kamijala as "Jawak grass". When in 1869 the Act III of 1869 was passed, which empowered Government to levy from all lands the local fund cess, it was decided that as Kamijala was one of the villages of the Patdi State, the cess upon it was fixed on the old Kamal rate. Since that time down to 1884 the revenue officers levied the cess in the first place from the Patdi Chief, who in his turn levied it from the defendants. In 1884 the Local Boards Act was passed, and then disputes arose as to whether assistance was to be given to the plaintiff in recovering the local fund cess from the defendants; this resulted in the decision of the Bombay Government, that the defendant and not the plaintiff must be held to be superior holders responsible to Government for the local fund cess. This decision was communicated to plaintiff on the 24th April 1888, and was afterwards upheld by the Secretary of State. Plaintiff, thereupon, filed the suit for a declaration that defendants were the superior holders, and had no right to pay the local fund cess direct to Government and that he was entitled to pay the same to Government and recover it from the defendants and for recovery of the cess which he paid from 1888 to 1895.

Held, (1) that the plaintiff was not an "occupant" either generally or under the Bombay Land Revenue Code, for he was not in occupation of the land, and the term under the Bombay Land Revenue Code is applicable to unalienated land; nor was plaintiff "superior holder"

Cess-*Contd.*

(7) Superior holder-Native Chief-Village given by way of maintenance—Payment of Cess—*Concld.*

under the Bombay Land Revenue Code, since the words at the end of the second paragraph of s. 8 Bom Act III of 1869 do not control the preceding portion of the paragraph; and the word "all" before "superior holdor" does not extend the meaning of the latter term.

(2) That plaintiff was not entitled to recover the cess already paid by him from 1888 to 1895, for since 1885 Government had ruled that plaintiff was not primarily responsible for the cess and that though he was interested in the village, the defendants being always anxious to pay the same ss. 69 and 70 of the Contract Act did not apply and that under the circumstances the notice given by the Mamlatdar to the plaintiff to pay the cess was not sufficient to bring the case within the operation of s 69 of the Indian Contract Act. **Gordhanlal v Surajmalji 4 Bom L R 299=26 Bom 504.**

(8) Cess on debutter Land.

8.—'Owner and holder" s. 56—Bengal Act IX of 1860.

Beng. Act IX of 1860 contemplates payment of cesses by persons beneficially interested in the lands on which the cesses are levied. The words 'owner and holder' are not restricted to any one person and it is not necessary that the owner should be in possession. The plaintiff a patnidar had paid certain cesses in respect of certain debutter lakhiraj land and sued the defendant to recover the amount of such cesses.

The defendant admitted the proprietorship of the estate in which the lands were situated but denied his liability for the cesses. *Held* that the defendant was not liable to pay the amount of the cesses but the person liable was the idol through its shebait or some person receiving the rents and profits of the lands or some one in actual possession of the land. **Gopal Chunder Sircar v. Adhiraj Aftab Chand Mahtab 10 Cal. 743.**

(9) Abwabs paid before Permanent Settlement.

9.—Bengal Reg. VIII of 1793 S. 45—Bengal reg IV of 1794—Beng reg V of 1812, s. 3 Beng Act VIII of 1869 s. 11, Act X of 1859 s. 10—Contract Act s 23,

Cess-*Contd.*

(9) Abwabs paid before Permanent Settlement—*Contd.*

A landlord is not legally entitled to recover abwabs from the raiyats when it is not proved that abwabs have been paid or were payable before the Permanent Settlement A claim for the recovery of abwabs existing before the Permanent Settlement will not be enforced.

Chultan Mahton v Tilukdari Singh. 11 Calc, 175.

Notes:—Ref: 15 Cal 828, 8 C W N 529 ; 17 Cal 726 F B ; 7 C L J 251. Dist : 31 Cal 834.

10.—Abwabs not paid before the Permanent Settlemeut—*Held*, by the Privy Council—that payment over and above the rent and described as abwabs in the Zamindari accounts, for which the tenant was sued, were rightly treated as abwabs and not as part of the rent fixed. They were not recoverable from the tenant although they have paid for a period of unknown length and according to a long standing practice, not having been, if payable at the time of Permanent Settlement, consolidated with the rent, as they should have been if then payable, under sec 54 of Regulation VIII of 1793. Not having been so consolidated, they could not be recovered under s. 61. If not payable at the time of the Parmanent Settlement, they came under the term of new abwabs and in that case were illegal under s. 55. **Talukdari Singh v Chulhan Mahtan. 17 Cal 131=16 I A 152.**

Notes:—Fol: 17 Cal 726 F B. Dist 22 Cal 680. Ref 16 Bom 1.

11.—Abwabs—Illegal cess—Bengal Tenancy Act Ss. 74, 179—Beng Reg VIII of 1793 s.54, V of 1812 Ss 2 and 3, XVIII of 1812, s 2.

The fact of abwab or not abwab must be determined by the circumstances of each case. According to 11 Cal 175—Where the holder of mokurari tenure agreed to pay a certain sum as rent and also certain other items called tehwari and salami, it was held that they were not illegal cesses because they were not uncertain and arbitrary in their character but were specific sums which the tenant agreed to pay to his landlord, and the payment of which formed part of the consideration on which the tenancy was created,

Cess-*Contd.*

(9) Abwabs paid before Permanent Settlement—*Contd.*

They are therefore recoverable under Reg V of 1812, **Pudmanund Singh Bahadur v Baij Nath Singh. 15 Cal 828.**

Notes :—Diss : 17 Cal 726 F B.

11A.—Illegal cess, what is—

10 Ind Cas 465.

12.—Cess Act—(Bengal Act IX of 1880) Public Demands Recovery Act (Bengal Act VII of 1880), s. 10—Personal debt—Recovery of cess—Property of a person not recorded as a proprietor.

Amount due on account of cesses under the Bengal Cess Act 1880, is only a personal debt and therefore cannot be recovered under the Public Demands Recovery Act 1880 from the property on which it is assessed when the property belongs to a third person who is not recorded as a proprietor under Bengal Act VII of 1876.

Shekaat Hosain v Sasi kar. 19 Cal 783.

Notes :—Fol: 30 Cal 778, 6 C W N 302 ; 8 C W N 357 ; 2 C L J 311. Appr: 36 Cal 753. Ref: 13 C W N 750 ; 10 C L J 201.

13.—Construction of Act XIX of 1844, abolishing cesses on trades—Bombay town duties.

On a question whether a cess of two annas per candy on all cotton bought in, and exported from Broach, paid by the buyer, according to usage from time immemorial, to a temple in that town, was abolished by Act XIX of 1844. *Held* that it was a cess of a mixed kind, local and indirect upon the trade of a cotton buyer carried on in Broach, attaching when he bought cotton in that town for exportation, and that it fell within the meaning of that Act, so that the right to claim it had been thereby abolished.

Kalsyanraiji v Mofussil Company. 14 Bom 526=17 I A 103.

Notes :—Ref : 5 Bom L R 703.

14.—Illegal cess—Asul and Abwab.

In a suit for rent at the rate of Rs. 22-2 per annum, the defence was that the annual rent was not Rs.22-2 but was Rs.18-0-6 the difference being made up of certain illegal cesses i. e. sarak, neg

Cess-*Contd.*

(9) Abwabs paid before Permanent Settlement—*Contd*

&c which had been paid for a long time without specification in the rent receipts

Held, that the amounts sued for under the heads of sarak, neg &c being abwabs were not recoverable and an agreement to pay them is void (15 Cal 820 dissented from)

Radha Prosad Singh v Bal Konwar Koeri 17 Cal 726

Notes—Dist 22 Cal 680, 31 Cal 834 Ref 28 Cal 17, 8 C W N 529, 10 C W N 527 =4 C L J 527 7 C L J 231

15-16—Abwabs—Chowkidari tax-Village Chowkidars Act (Bengal Act VI of 1870)—Suit for arrears of Chowkidari tax—Rent—Bengal Tenancy Act VIII of 1885 Ss 3 (5) and 74—Ben Reg VIII of 1793 ss 54, 55

A Patnidar was sued for arrears of chowkidari tax His defence was that being an illegal tax it could not be legally recovered *Held*—the payment of the tax being one of the terms of the patni settlement itself entered into by parties competent to contract and for a valuable consideration and as the amount which the patni is agreed to pay as chowkidari tax was paid quite as much on account of the occupation of the property as that which was expressly called the rent, and was part of the ground rent as much as the latter, it was not an abwab and was therefore recoverable 4 Cal 576 followed 17 Cal 726 distinguished 15 cal 828 referred to

Assanulla Khan Bahadur v Tirthabasini 22 Cal 680

17—Bengal Tenancy Act-Stipulation to pay abwab permanent tenure holder

The defendant, a darpatnidar, agreed to pay annually Rs 4 in lieu of certain quantities of jack fruit, bamboos, and fish This agreement was contained in a clause quite distinct from that containing the payment of rent *Held* the stipulation is a stipulation to pay the abwab Such a stipulation for the payment of an abwab under a permanent mokurari lease is valid and S 74 of Bengal Tenancy Act does not control S 179 of the Act. 22 Cal 680 2 C W N 543 referred to and followed 26 Cal 130 distinguished

Krishna Chandra Sen v Sushila Soondury Dassee 26 Cal 611=3 C W N 608

Notes—Ref, 3 C L J 337, 13 C W N 9,

Cess-*Contd.*

(9) Abwabs paid before Permanent Settlement—*Concld*

18—Agreement to pay cesses—Rent—Bengal Tenancy Act s 3 cl 5, Ss 179, 195

A patni lease contained a stipulation that the patnidar was to pay two sums of money on behalf of the Zamindar one sum as cesses upon the property to the Collector and another sum as expenses for the maintenance of the Masjid on the property to the person who conducted the expenses of the Masjid respectively *Held*—that the two sums of money are lawfully payable on account of the use and occupation of the land, and are therefore rent (22 Cal 680, 11 Cal 221 distinguished). **Mohebut Ali v Mahomed Faizullah. 2 C W N 455**

Basanta Kumari Debya v Ashutosh Chuckerbutti 27 Cal 67, 4 C W N 3.

Notes—Ap 27 Cal 67 F B

(10) Payment on marriages whether ground rent or cess

18 A payments made to Zamindar by occupiers of village *abrat* on marriages whether ground rent or cess **11 Ind Cas 217.**

(11) Cess suit for

19—*Held* that a suit for a declaration of the plaintiff's right as a *mundal* to half the produce and wood of a certain grove based on the custom of the village was not a suit for rent but for a cess **Ablakh Rai v Ram Saran Singh. 12 W N 10.**

(12) Cess Muhtarfa whether rent or Cess.

20—Rent—Cess—Wajibulariz—Interpretation of—Cess and rent—Non-agricultural tenants—Abadi

Plaintiffs zemindars, sued for muhtarfa or rent of certain plots of land in the use and occupation of the defendant, a Chhipi who was a non agricultural rayat residing in the abadi, and who carried on the business of calico printing the defendant pleaded that the payment demanded was a cess, and not being sanctioned, could not be recovered

Held that the payment in question was not a cess and was therefore, recoverable as rent

The primary notion of a cess is a payment not for the benefit of the landlord but a payment

Cess-*Contd.*

(12) Cess Muhtarfa whether rent or cess —*Concld.*

for some purpose of public convenience, such as sanitation, police and the like The words rent, cess and the like must be interpreted with reference to the meaning attached to them at the time for which the payments are claimed and the period during wh ch a wajibulraz is the authority for village customs **Muhammad Abdul Hai v Nathu** 1 A L J 537—27 All 183=1904 A W N 204

Notes—*Ref* W N (1907) 247

(13) Batta usual Dustur Hazzatnama Sonari, Salami Percentage

21—The Batta usual, Dustur Hazzatnama, Sonari Chanda Salami and *p nt ja* are abwabs

If the tenancy was created before 1836, batta *company* is *prima facie* not an abwab but if the creation of the tenancy is of subsequent date it is *prima facie* an abwab **Mir Tapurah Hossein v Gopi Narayan** 7 C L J 251

(14) Abwab -Puja expenses

21 A—Puja Kharch or expenses for a puja agreed to be paid in excess of the rent is an abwab and cannot be enforced hence cess is not abwab within the meaning of S. 74 of the Bengal Tenancy Act (4 Cal 576 3 C L J 437 Ref 22 Cal 214 Expl) **Narandra Kumar Ghose v Gora Chand Joddar** 3 C L J 391=33 Cal 683

Notes—*Ref* 12 C W N 154 8 C L J 525

But **see**—**Ashutoshdar v Amir Mollah** 3 C L J 397

(15) Abwabs—Zamindary Salami Mokarari lease Rent-whether recoverable.

22—In a *mokarari* lease there was an agreement to pay a certain sum as rent and as certain additional sum as *Zemindari salami* expenses, which were arbitrary and extra charges imposed on the tenants on account of work done in the *Zemindary sherista* and for other purposes

Held, that they were *Abwabs* and could not be recovered by the *Zemindar* from the tenant 10 C W N 527 4 C L J 527, Rel, 31 Cal 834 Dist 17 Cal 726 (F B), Fol. **Bipin Behary Mitter v Sarat Chandra Sirkar,** 7 Ind Cas 760

Cess-*Contd.*

(15) Abwabs Zamindary, Salami, Mokarari lease Rent whether recoverable—*Concld.*

See also cases under

(1) Landlord & Tenant
(2) Lease

(16) Company's Batta

23—Abwab:—A claim for Company s Batta is not necessarily a claim for abwab. If the rent was fixed in *Sicca* rupees and *batta* is claimed so as to make demand equivalent in current coin, the demand is illegal **Ram Saran Singh v Gyan Sing** 6 C L J 637

24—A claim for Company's Batta which represents the conversion of *sicca* into Company s rupees is not an abwab but properly forms a part of the rent

If it is proved that the Company s *Batta* has been paid without dispute for many years and its legality is questioned by the tenant, the *onus* is not upon the landlord to prove that the rent was originally fixed in *sicca* rupees **Ram Khelwan Singh v Kumar Rai.** 6 C L J 667.

See also cases under—

Landlord & Tenant

25—A claim for *batta* being a claim in excess of rent is not enforceable at law

Batta is not *abwab*, if it is merely an allowance for the exchange of sicca rupees into Company s rupees, the latter of which was introduced by Act XVII of 1835 and the former ceased to be legal tender by Act XIII of 1836 If the rent claimed has been fixed before 1836, *batta* is *prima facie* not an *abwab*, but if it has been fixed subsequently, it is *prima facie* an abwab **Rameshar Koer alias Dulpin Saheba v Gobardhan Lal** 7 C L J 202

Notes—Comp 7 C L J 615 Ref 7 C L J 251

(17) Collection charges, Rent for abwab.

26—On the construction of a lease *Held*—that a certain sum described as collection charges as forming part of the consideration of the lease, was part of the rent and was not an *abwab* 17 Cal 726 foll 8 Cal 730 dist **Radha Churn Roychaudhuri v Golapchandra Ghose.** 8 C W N 529=31 Cal 834.

Cess-*Contd.*

(18) Power to levy separate cess-Deligation —Validity.

27—28—S. 1—Statutory powers.

Where a statute empowers Government to levy a separate cess for water supplied for irrigation, and enables them to prescribe the rules under which and the rates at which such water-cess shall be levied, the Government have no right to delegate to the Collector the statutory authority and a rule empowering the Collector to impose the prohibitive rates when water is taken without permission is a delegation not warranted by the Act. **Kamulammal v The Secretary of State for India in Council. 8 M L T 171= 7 Ind Cas 402.**

(19) Re-valuation—Increased cesses payable by whom.

29—Covenant—Construction of—"Road and Public" Works Cesses as levied at present.

Where the lessors agreed with the tenants that the latter were to pay, in addition to the fixed rent, Road and Public Works Cesses at half anna per rupee, as was levied at the time, according to the instalments given at the foot of the instrument.

Held, that the lessees were to pay Road and Public Works Cesses at half anna per rupee as was levied in accordance with the statutory provision of the subject, and that the effect of the covenant was not to impose the liability for any additional cesses upon the landlords. **Krishna Chundra Basu v Mohendra Nath Basu. 13 C L J 212=9 Ind Cas 704.**

(20) Not Land Revenue.

30—Act XVII of 1876.

A cess is not land-revenue within the meaning of the U P Act XVII of 1876. **Janki Barsaran v Ramkumar Das. 3 O C 325.**

(21) Legality.

31—Levying of market dues—U P Act III of 1901, ss. 56, 86. **7 A L J 176=5 Ind Cas 288 =32 All 193.**

(22) Suit to set aside sale for arrears of cess.

32—Suit to set aside sale for arrears of cesses

Cess-*Concld.*

(22) Suit to set aside sale for arrears of cess—*Concld.*

on the ground that no notice was issued under s. 10, maintainable—Ben Act I of 1895.

28 Cal 813=6 C W N 331.

(23) Suit for recovery of illegally collected cess—not maintainable.

32A—Suit against President, District Board, for recovery of land cess illegally collected from inamdar not maintainable. A suit was not maintainable against the President of the District Board, to whom the Collector who, according to plaintiff, illegally collected land cess from him, an inmdar, and paid it over: because the assessment and the collection of which plaintiff complained were not by the defendant, who could not be called upon to make good the amount said to have been wrongly collected, merely because it had been eventually paid over to the credit of the District Board. **Harischandra Devu v President, District Board, Ganjam. 24 Mad 114.**

(24) Levy of—Summary cess.

33—Interest in immoveable property—Impeachment of—Limitation. **13 Bom L R 1047.**

(25) Liability of Babuana for cess.

34—Liability of Babuana property for cesses **13 C W N 118=4 Ind Cas 331.**

(26) Cess under fear of distraint.

35—Cess paid under fear of distraint, if can be recovered. **6 M L T 242=19 M L J 470= 32 Mad 456=3 Ind Cas 456.**

(27) Water-Cess.

36—Water-cess—*Isara* pattadar's liability to pay. **10 M L T 452.**

(28) Contracting out—Construction of deed —Cess liability to pay—Mokurari lease.

37—Landlord & tenant—*Mokurari* lease.

It is open to the zemindar and the tenure-holder to contract themselves out of the provisions of sec 41 of the Bengal Cess Act. Where in a perpetual *mokurari* lease the rent was fixed by a clause which runs thus:—"At varying *jamas*, to wit, at an annual uniform *jama* of Rs. 1,580 from 1284 to 1291 (*Fasli*) and at an annual uniform consolidated *jama* of Rs. 1,585 of the current coin from 1292 (*Fasli*) together with *abwab* such as

Cess-*Contd.*

(28) Contracting out-Construction of deed-Cess, liability to pay-Mokurari lease- *Concld*

selami for Dusserah and Holi, Purkha, Sair, Road-cess, Public Works-cess, &c, all of which are included in that very sum of Rs. 1,585," *Held*—That the contract does not provide for the contingency which happened in this case, namely, an increase in the amount of cesses levied by the State. That if any additional cess is imposed or if the amount of cess is increased, the incidence of the new burden must be regulated according to the statute. **Mahanand Sahai v. Mussmat Sayedunissa Bibi 12 C W N 154.**

(29) Construction of document—House tax—Cess—Rent.

38—Under the wajib-ul-arz of a village called Radhakund the zamindar was declared to be entitled to one *taka* (six pies) per month for every house from the occupants of the village and also from the owners of shops and temples. *Held* that this payment (which was called "jharghanna") was not a house-tax, or cess, but merely ground-rent and did not require special sanction. **Balwant Singh v Sankar. 1908 A W N 95.**

(30) Annual value—Rent—Tenure—holder.

39—*Mela*, profits of, if assessable with road-cess—Stall-holders and vendors at *mela*, if tenants or mere licensees—"Immoveable property," *mela* if—Levy of cess over and above income-tax, if legal.

It cannot be affirmed as a general proposition that the liability to pay income-tax carries with it as a necessary consequence exemption from Road and Public Works Cesses. 28 Cal 637 (1901), considered and explained. A *mela* is annually held for 20 days from the 5th to the 25th Falgun on lands which are included in the *jotes* or holdings of agricultural tenants (but on which no crops are standing at the time the fair is held) under an arrangement between the Zemindar and the holders of the *mela* to which the tenants are not parties. The Collector assessed Road and Public Works cess not only on the rents paid to the Zemindar by the raiyats but also on the profits realised by certain *ijardars* under the *mela*-holders from the stall-holders and vendors of live-stock, etc., at the *mela*. *Held*—that these profits are not *rent* payable by either cultivating raiyats or by other persons in the actual use or occupation of land within the definition of 'annual value'

Cess-*Contd.*

30 Annual value-Rent-Tenure-holder —*Concld.*

in sec. 4 of the Cess Act and cannot be assessed with road-cess. *Per* Rampini, C J.—The profits of a *mela* may come within the definition of rent paid for the actual use and occupation of land by persons other than cultivators or of immoveable property as definied in sec. 4 of the Cess Act. But whether in any particular case they do so or not, will depend on the terms of the lease in that case. *Per* Brett and Woodroefe, JJ—A *mela* or fair does not come within the definition of immoveable property in sec. 4 of the Cess Act. The holders of the *mela* in this case or the *ijardars* under them are licensees and not tenure-holders within the Act. *Per* Rampini, C J.—The definition of tenure-holders in the Act is very wide and may include persons in the enjoyment of the profits of a *mela*. But whether in any particular case such persons are tenure-holders or not will depend on the terms of the lease. *Per* Brett and Woodroffe, JJ. (Rampini, C J. and Mookerjee, J *contra*).-The definition of "annual value" contemplates that the rent shall be payable by persons in occupation *during the year*, not by persons occupying the land for 20 days during each year. *Per* Mookerjee, J —The stall-holders and other persons attending the *mela* for the purpose of selling articles of merchandise are licensees and not tenants. *Per* Rampini, C J.—The sums payable by stall keepers may come within the definition of rent. **The Secretary of State for India in Council v Karuna Kanta Chowdhury (F B). 6 C W N 1053.**

(31) Valuation roll, publication of—Condition precedent.

40—Looking to the provisions of Ss. 36 and 41, the publication of a valuation roll is not a condition precedent to the attaching of liability to pay road cess for rent-paying lands. **Ricketts v Rameswar Malia. 28 Cal 109.**

(32) Rent suit might and ought.

41—Mamuli—Previous suit for rent including mamuli—Decree for consolidated sum including mamuli—No question raised as to the legality of mamuli—Heard and finally decided'-Question as to legality of mamuli raised in second suit—*Res judicata*.

Explanation II to s. 13 C P C only says that questions which might and ought to have been raised must be deemed to have been substanti-

Cess-*Contd.*

(32) Rent suit might & ought —*Concld.*

ally in issue in the previous suit But to operate as *res judicata* the question ought to have been heard and finally decided also. Explanation II does not produce that effect if there had been no adjudication expressed or implied. Where a person sued for rent and mamuli due under a kabuliyat, and the question was raised that the mamuli was an illegal cess under S. 74, Bengal Tenancy Act, the decision in a previous suit that the landlord was entitled to a consolidated sum made up of rent and mamuli, as rent when no question was raised as to the legality of the mamuli does not operate as *res judicata*. 24 Cal 711 foll. **Woomesh Chandra Maita v Baroda Das Maita. 28 Cal 17.**

Notes—Appr: 1 C L J 387 Ref: 12 C W N 862=35 Cal 979=8 C L J 82, 55 P R 1907 =96 P W R 1907=65 P L R 1908. Fol: 107 P R 1906=76 P L R 1907.

Cess Act.

See:—(1) Bengal Cess Acts.
(2) Cess.

Cession of British Territory in India.

1.—Evidence of cession-Transfer or re-arrangement of jurisdiction in British territory—Statutes 3 & 4 Will. IV. c. 85, s. 43—Statutes 24 & 25 Vic, c. 67, s. 22-Statutes 24 & 25 Vic; c 104 s. 9—Evidence Act, s. 113—Effect of cession of territorial jurisdiction.

The power to cede territory was not one of the powers to which the Secretary for India in Council succeeded under 21 & 22 Vic; c 106, when the Government of India was by that statute transferred to Her Majesty, inasmuch as such a power was not possessed by the East India Company. **Damodar Gordhan v Ganesh Deoram 10 Bom, H C R 37.**

2.—*Held*, on appeal to the Privy Council, as follows —*Semble*—That the general and abstract doctrine laid down by the High Court at Bombay that it is beyoned the power of the British Crown without the consent of the Imperial Parliament, to make a cession of territory within the jurisdiction of any of the British Courts in India, in time of peace, to a foreign power, is erroneous. Where an objection is

Cession of British Territory in India-*Contd.*

taken to the territorial jurisdiction of a British Court, on the ground that the territory over which the jurisdiction of the Court extended has been ceded to a foreign power, such a cession must be regularly proved, and cannot be established by uncertain inferences from equivocal acts. An agreement on the part of the Government of India purporting to transfer certain villages, forming part of a Regulation province within the Bombay Presidency, and subject to ordinary British jurisdiction, to the extraordinary jurisdiction of the Political Agency of a Native State, does not constitute a cession of territory. A rearrangement of jurisdiction within British territory in India, by the exclusion of a certain district from the Regulations and Codes there in force, and from the jurisdiction of all the High Courts, with a view to the establishment therein of a native jurisdiction under British supervision and control, cannot be carried out except by legislation, under the provisions of the Imperial Statutes 3 & 4 Will IV, c 85, s. 43; 24 & 25 Vic; c. 67, s 22, and 24 & 25 Vic c. 104, s 9 The Governor General in Council being precluded by the Act 24 & 25 Vic; c 67, s. 22, from legislating directly as to the sovereignty or dominion of the Crown over any part of its territory in India, or as to the allegiance of British subjects, cannot, by any legislative Act (*e, g*; by "The Evidence Act of 1872," s. 113) purporting to make a notification in the Government Gazette conclusive evidence of a cession of territory, exclude judicial enquiry as to the nature and lawfulness of that cession. Where the foundation of the jurisdiction of a British Court over the subject-matter of a suit and the parties thereto is territorial, and the territory by a valid cession ceases to be British, the jurisdiction of the Court can no longer be exercised, whatever be the stage or condition of the litigation at the time of such cession. **Damodhar Gordhan v. Devram Kanji. 1 Bom 367; 25 W R 261; L R 3, I A 102.**

Notes—Fol 2 All 1. Con: 5 Bom 249. Ref 8 Cal 985, Ex 33 Cal 219 P C=10 C W N 361=3 C L J 395=8 Bom L R 129=3 A L J 250=16 M L J 115=33 I A 1.

3.—Power of Crown to cede.

Held.—that the British Crown has the power without the intervention of the Imperial Parlia-

Cession of British Territory in India—*Concld.*

ment to make a cession of territory within British India to a foreign prince or feudatory. The opinion expressed by the Privy Council in Bom 367 followed. Question as to what amount to a cession in sovereignty discussed. **Lachmi Narain v. Partab Singh.** **2 All; 1**

Cestui Que Trust

See (1) Trustee
(2) Trust Act
(3) Executors.

1.—Scope of—Cestui que trust being created trustee for himself and others-Equity in favor of person paying off subsisting charges on the property.

S. 53 of the Trusts Act, 1882, strikes at transactions entered into by a trustee for his own profit after he has accepted the trust and while he is performing the duties of the office. But it does not render void a mortgage in favour of a person created before he becomes trustee of the property by the deed of trust itself as a condition of the trust imposed by the settlor—Where there is a subsisting charge on certain property paid off by the person in possession, it is equitable that when the plaintiff reclaims the estate, credit should be given to that person for the payment of the mortgage which the plaintiff would have had to meet L R 2, 1 A. 7 (1893) P, J 30 and (1894) P. J. 39 followed. There is nothing in the Trusts Act 1882 that a *cestui que trust* shall not be appointed a trustee. He is not as such incapacitated from being a trustee for himself and others, but as a general rule he is not an altogether fit person for the office in consequence of the probability of a conflict between his interest and his duty.
Ashibbai v. Abdulla. **8 Bom L R 653.**

Ceylon legislative enactments.

1—Foreign judgment,suit on—judgment passed *exparte*, whether can be enforced in the *forum* of another country subject to the same Sovereign—Private International Law, rules of—Authority of British Parliament recognising jurisdiction must be clear and express—Charter of 1833 (Ceylon), S. 24—Ceylon Ordinance II of 1889. Ss. 9, 704 —"Appear or defend the action" meaning of--Obtaining of leave to defend action, whether amounts to voluntary submission to the

Ceylon legislative enactments-*Contd.*

jurisdiction of the Court—Decision of the foreign Court otherwise than on the merits of the case—Effect on its enforcement in a Court in British India.—

Appellant obtained a decree against the respondent, in a suit instituted by him in a Court in Ceylon, on a pro note. The suit having been instituted under the summary procedure provided by Chapter LIII of the Ceylon Ordinance II of 1889 (analogous to section 532 of Act XIV of 1882), defendant appeared by an attorney and applied for leave to defend the suit. Leave was granted to him on condition of his furnishing security. The respondent did not furnish security, and did not appear at the trial, when judgment was passed against him during his absence. The respondent having left Ceylon and settled in British India, appellant brought the present suit against him in a British Indian Court. The respondent pleaded want of jurisdiction, as (1) under the rules of private International Law, the judgment of a foreign Court passed *in absentem* Could not be enforced in a Britsh Indian Court, (2) the respondant did not appear at the trial and there was no decision on the merits.

Held,(1)that though Ceylon and British India owed allegiance to the same Sovereign,the enforceability of the judgments of the Courts of either country on those of the other was guided by the Rule of Private International Law, *viz*, that the judgment of foreign Court passed against the defendant in *absentem* cannot be enforced against him in a Court in British India.

(2) That neither by section 23 of the Charter of 1833. nor by S. 9 of Ordinance No II of 1889 (Ceylon Legislative Enactments, Vol II, p. 276), are the Ceylon Courts empowered by the British Parliament to adjudicate in a matter, in which the cause of action arose within their jurisdiction so as to bind by their decree a defendant who is a resident of British India and a subject of the British Crown, although he never resided in Ceylon at the time of the action or submitted himself to the jurisdiction of the Ceylon Court. Such jurisdiction, having regard to the principles of International Law, would only be recognised in British India, if it was conferred by the supreme Legislature, by express and clear words.

(3) That a decree based on a contract imposing personal obligation upon an absent foreigner is not countenanced by the comity of nations, only because the defendant entered into the con-

Ceylon legislative enactments-*Concld.*

tract in the territory of the *forum* which passed the decree.

(4) That the defendant, though he wae *exparte* at the trial, must be deemed to have voluntarily submitted to the jurisdiction of the Ceylon Court, as he applied for leave to defend the action,

(5) The words "*appear to defend*" in s.704 of the Ceylon Ordinance II of 1889 are the equivalent of " appear and defend " and clearly refer to appearance for the purpose of defending the action in accordance with the leave granted, and do not imply that appearance for the purpose of obtaining leave is not to be deemed appearance in the action at all.

(6) It is not even necessary that the submission must be by an act done in the course of the action itself, for it can be constituted by a contract to that effect, entered into between the plaintiff and the defendant previously to the action.

(7) a judgment of a foreign Court, which does not decide upon the merits of the dispute, for instance, if a suit is dismissed as being barred by the law for limitation of suits prevailing in that Court, cannot be pleaded as a bar to a suit instituted in the Court of the plaintiff's domicile on the same cause of action. (22 Cal 232=21 I A 171; 28 Cal 641, Dist; 29 Cal 509; (1908) 1 K B 302=77 L J K B 180; 98 L T 304, 24 T L R 85, Halsbury's Laws of England, Vol. VI, P. 291, Ref 22 Cal 222=21 I A 171, (1908))1 K B 302=77 L J K B 180, 98 L T 340; 24 T L R 85, Ref. 22 Cal 222=21 I A 171; 29 Mad 69. 29 Mad 259 at p. 279; 1 M L T 71, 16 M L J 238; Ref. (1908) 1 K B 302; 77 L J K B 180; 98 L T 304; 24 T L R 85; 55 L J N S (Q B D) p. 39; 2 Mad 407; 18 Mad 327, Ref, 1 P D 393; (1904) p 41; 73 L J P 2; 89 L T 481; 9 Asp. M C 497 Ref). **Shaik Atham Sahib v. Daoud Sahib. 3 Ind Cas 190=32 Mad 469=19 M L J 459.**

Chairman.

See Cases under:—

Company—Meetings and Voting.

—Chairman of Municipality.

See Cases under.—

(1) Bengal Municipal Act, 1884, s. 45,

Chairman-*Concld.*

(2) Calcutta Municipal Consolidation Act s, 31.
(3) Limitation Act 1877, art 36,
(4) Special Relief Act s. 45.
(5) Damages suit for. **34 Cal 863.**

Chakran Land.

See Resumed Ryoti interest if can be acquired in. **13 C L J 271.**

See (1) Village Chaukidars Act.
(2) Chaukidari Act.
(3) Chaukidari Chakran land.

1—Chakran land, resumption of, by Chakran Commissioner, effect of—Order of Chakran Commissioner, if necessary to be set aside—Location of land if neeessary in a suit for joint possession.

Where the plaintiff has not asked for exclusive possession but only joint possession of the land in dispute with the defendants, it is necessary for the plaintiff to locate the land which formed only a portion of the entire area of the land, part of which only was resumed by the *chakran* Commissioner as *chakran* land, nor to ask to have the order of the *chakran* Commissioner set aside. 7 Cal 414, 33 Cal 1201; Ref and Fol. 28 Cal 223 Dist. **Nityananda Hazra v Bakkeswar Ta. 10 C L J 103=3 Ind Cas 399.**

See also Cases under.

Bengal Act (Chaukidari Act).

Chalgeni or mulgeni Tenure.

See (1) Landlord and tenant. **30 Mad 528.**
(2) Land Tenures.

Chamber Judge.

See (1) Guardian & Wards Act. **31 Bom 590**
(2) High Court Rules.

Chambers.

See Receiver.

Champerty & Maintenance (1-45).

1 Assignment of debutter land in consideration of defendant ejecting, by suit at his own cost, the Brahmins &c., 1

2 Bond given to secure money for litigation 2

3 Transfer of property for purpose of litigation 3

4 Law in Bengal 4

5 Assignment of interest for purpose of litigation 5

6-7 Maintenance 6-7

8 Agreement to carry on land suit 8

9 Invalidity of contract on ground of maintenance 9

10 Contract with a litigant to supply funds on security of property in dispute 10-11

11 Purchaser joining in suit to recover property 12

12 Speculative purchase of right of appeal 13

13 Suit by assignee against assignor 14

14 Alienation by Hindu widow 15

15 Operation of conveyance pendente lite 16

16 Suit against public policy 17

17 Bond executed by Hindu widows 18

18 Agreement against public policy. 19-21-21A

19 Suit for specific performance 22

20 Agreement of a right to sue 23

21 Party having a speculative interest in suit 24

22 Sale dependent on success in suit 25-28

23 Law of prevailing in this country 29

24 Maintenance & champerty—Agreement to carry on litigation not *per se* opposed to public policy 30-31

25 Champerty—Maintenance—Wager 32-34

26 Suit on assignment of equity of redemption—Public policy—Assignment—Unopposed 35

27 Champerty contract to participate in fruits of suit in consideration of supplying funds not void 36

28 Interest in litigation—Unconscionable bargain 37

29 Inequitable agreements—Discretion of court 38

30 Unconscionable bargain 39—40

31 Champertous agreement between legal practitioner & client—Grossly improper conduct in discharge of professional duty 40 A

Champerty & Maintenance-*Contd.*

32 Pleader & Advocate—Professional misconduct—Champertous agreement by way of—Relation of pleader and client 40B

33 Purchase of property to which adverse claims exist, legality of—Purchase merely for litigation illegal 41

34 Public policy—Stranger in possession—Sale by next collateral, of moiety-Voidable transaction 42

35 Hindu widow-Alienation for legal necessity—champertous agreement 43

36 Agreement to convey property after decree in lieu of expenses of litigation-Wagering transaction 44

37 Property subject-matter of suit—Sale of share 45

See also Cases under:—

(1) Contract Act, s. 23—Illegal Contracts—Against Public Policy,
(2) Contract Act, s. 23-Illegal Contracts —Generally.
(3) Right of suit. **9 C W N 477.**

(1) Assignment of debutter land in consideration of defendant ejecting by suit, at his own cost the Brahmins, etc.

1--A Hindu widow, together with the next heir, joined in assigning to the defendant a debutter estate, in consideration of the defendant conducting, at his owu cost, proceedings for the ejection of Brahmins and Banias then in occupation as poojaries to conduct the worship of the idols ; and upon the condition that he should thereafter conduct such worship, and out of the proceeds and offerings retain three-fourths for his own purposes and for hospitality, and pay the remaining fourth for the maintenance of the widow and the heir. *Held* that the assignment was valid, the purpose for which the lands were dedicated being provided for ; and that although the transaction amounted to champerty, that was no ground for treating it as invalid. An assignment between Hindus of property the subject-matter of litigation, on conditions which constitute champerty, is not on that ground invalid.
Jadubindu Odhikaree v Lokenauth Geree, Marsh 303 : 2 Hay 160.

Notes.—Ap: 9 W R 343 ; 13 W R 200. Ref: 8 B H C R O 1.

Champerty & Maintenance-*Contd.*

(2) Bond given to secure money for litigation.

2—A suit will lie on a bond given for the purpose of securing money to be expended in carrying on law proceedings. **Nobeen Chunder Ghose v Ramgogernath Gope. W R 1864, 63.**

(3) Transfer of property for purpose of litigation.

3—The Courts will not interfere when a transfer is completed at once,-*e. g.*, when a party buys a certain share of a litigant's risk and stands or falls by his purchase, having only the right to recover his share from the party suing if the latter wins his case,and having no claim at all if the Courts decide against him. *Quære*—Whether in the present state of the law in India (1864), champerty can be pleaded at all?

Punchanun Muzoomdar v Doorga Nath Roy W R 1864, 300.

(4) Law in Bengal.

4—*Held*, by Glover, J. (Macpherson, J., dissenting), that there is no law against champerty or maintenance in Bengal. **Panch Cowree Mahtoon v. Kalee Churn, 9 W R 490.**

Notes:—Ref: 8 B H C R 1; 2 Cal 233, P C.

(5) Assignment of interest for purpose of litigation.

5—*Quære*—Whether champerty or maintenance, according to English law, is forbidden by the law of India. Where A sues in respect of his own interest for the violation of a contract made for him by B as agent only, the assignment of B's interest in the agreement, in order to enable A to bring his suit, is not champerty or maintenance. **Fischer v. Kamala Naicker, 3 W R, P C 33=8 Moore's I A 170. Jugmohun Lal v. Buddun Koer, 9 W R 243.**

Champerty & Maintenance-*Contd.*

(6-7) Maintenance.

6-7—Application of law of champerty—Duty of Court—Specific performance of lease savouring of champerty.—

The law of England as to the offences of maintenance and champerty does not apply to natives of India. In dealing with objections to their contracts, on the ground of maintenance and champerty, the Court must look to the general principles regarding public policy and the administration of justice upon which that law at present rests To constitute "maintenance", improper litigation must have been stirred up with a bad motive for purposes contrary to public policy and justice. "Champerty" is a species of "maintenance" and of the same character, but with the additional feature of a condition or bargain providing for a participation in the subject-matter of the litigation. Specific performance decreed of a lease, though the lease formed part of an arrangement whereby, as a consideration for the lease, the plaintiff was to lend the defendant money to enable him (*inter alia*) to commence proceedings against the then tenant of the subject-matter of the intended lease. **Pitchakutti Chetti v Kamala Nayakkan, 1 Mad H C 153.**

Notes:—Ref: 8 B H C R O 1;13 W R F B 15; 2 Cal 233 P C.

(8) Agreement to carry on land suit.

8—Public policy.—

One M H, being apprehensive that (in consequence of an action of trespass in the Supreme Court which M R and A R had brought against P P) he was in danger of being deprived of a piece of land of which he was then possessed, entered into an agreement with K N that he, K N, should conduct the pending case at his own costs and necessary expenses, and that after M H

Champerty & Maintenance-*Contd.*

(8) Agreement to carry on land suit-*Concld.*

should have proved that the piece of land was his sole property, K N and M H should erect a building on it at their joint expense,and that the rents and profits of such building should be enjoyed by K N and M H jointly during the lifetime of M H, after whose death the property, with the building, was to be the sole and absolute property of K N. *Held*, that the above agreement (when considered in connection with its surrounding circumstances) did not savour of maintenance or champerty, nor was it void as being against public policy. The question as to how far the English law relating to maintenance and champerty is applicable to Hindus in the presidency towns considered. *Quære* Whether that law was ever applicable to cases where pecuniary assistance is afforded to defendants? **Damodhar Madhavji v. Kahandas Naranda. 8 Bom H O C 1.**

Notes:—Ref: 2 Cal 233 P C.

(9) Invalidity of contract on ground of maintenance.

9—Agreement against public policy.—

A commissariat officer named M had a butler named L, who was employed to put forward with the money of M, or his own, various large contracts. Two accounts were opened in several houses of agency in the names of M and L. To secure himself,M caused L to execute a will leaving his whole estate to M. Testator and legatee perished together in the *Persia* steam-ship in 1864. The Administrator General of Madras administered to L's estate.but the personal representatives of M contested the right of the Administrator General to pay over the fund to those of L. The result was that L s representatives were recommended by their attorney, C, to apply to one J (the present plaintiff), who was also a client of C's, for the necessary funds. J consented to advance money for the purpose of the suit, and on the 28th July 1869 a so-called deed of mortgage, drawn up by C, was executed between the present defendants as mortgagors and the plaintiff, J, as mortgagee, whereby, in consideration of an advance of the sum of Rs. 5,000 (the receipt of Rs. 1,800 of which was by the instrument acknowledged) to be made by J to such attorney as he should select, before the 31st of December 1869, the defendants mortgaged everything which they might be entitled to recover by suit, the mortgage to be defeasible on payment

Champerty & Maintenance-*Contd.*

(9) Invalidity of contract on ground of maintenance—*Concld.*

of 50 per cent. of what they might recover by suit, and a further 50 per cent. upon all to which they might be entitled as the persons entitled to L's estate. They also covenanted to repay the money lent with interest. The present defendants succeeded in their suit against the Administrator General, and this suit was brought by J to recover a commission of 50 per cent. on the sum recovered, and the sums advanced, with interest. Defendants denied that plaintiff had fulfilled his part of the agreement, and alleged that in consequence of his neglecting to supply funds they had been compelled to borrow of a third party. They also pleaded that the agreement was void for champerty and maintenance. *Held* that by the law of England, which prevailed in the present suit, this contract was clearly void, being contrary to the plain provision of the common and statute law against maintenance, and that it was also void as being contrary to public policy. The Court further found that the plaintiff had failed to fulfil his part of the contract, but allowed him to recover the sum really advanced by him *viz*, Rs. 2200, with interest. **Mulla Jaffarji Tyeb Ali v. Yacali Kadar Bi, 7 Mad H C R 128.**

Notes:—Ap: 20 W R 446. Dist: 22 W R 535.
Ref: 2 Cal 233 P C.

(10) Contract with a litigant to supply funds on security of property in dispute.

10—Maintenance.—

A contract made in good faith by a person with a litigant to supply him with funds to carry on the suit on the security of the property in dispute will be enforced. Such a contract is distinguishable from an officious intermeddling in the suits of other persons, or acts tending to prevent unnecessary litigation. *Quære*— Whether contracts involving maintenance and champerty, as those offences are defined by English Law, will be enforced. **Nathoo Lall v. Budree Pershad 1 N W 1.**

11—Contracts—Supply of Funds—Litigant to carry on suit—Security—Officious intermeddling —Good faith.

A contract made in good faith by a person with a litigant to supply him with funds to carry on the suit on the security of the property in dispute will be enforced.

Champerty & Maintenance–*Contd.*

(10) Contract with a litigant to supply funds on security of property in dispute—*Concld.*

Such a contract is distinguishable from an officious intermeddling in the suits of other persons or act tending to promote unnecessary litigation. **Nathoo Lal v. Budree Pershad, 1 N W P 1.**

(11) Purchaser joining in suit to recover property.

12—Where the purchaser of a share of land joins his vendor in a suit to recover his own property, his action cannot be termed "champerty." **Munirakhun Singh v Bhodoy Singh. 12 W R 133.**

(12) Speculative purchase of right of appeal.

13—*Quære*—Ought the speculative purchase of a right of appeal to be recognized by a Court of Justice? **Troyluckonath Banerjee v Brindabun Chunder Sirkar Chowdhry. 18 W R 438.**

(13) Suit by assignee against assignor.

14.—Maintenance.

An assignee of property is not entitled to recover against his assignor on the footing of a champertous contract. An assignee of property whose assignor was not in possession when the assignment was made, can only recover, even from the hands of third persons, upon showing that he would have had a right to enforce specific performance of his contract against his assignor if the property were come back to the hands of the assignor. **Boodhun Singh v Luteefun. 22 W R 535**

Notes.—Dist: 1 Cal 297. Ref: 11 All 57.

(14) Alienation by Hindu widow.

15.—*K D*, a Hindu widow, having applied to H *S* to aid her in leaving the family dwelling-house of her late husband, *G C C*, where she alleged she was improperly treated and placed under restraint by the plaintiff, her husband's sole surviving brother, H *S*, at his own cost, enabled her to do so. She then applied to H *S* to advance funds for the payment of certain debts incurred by her in consequence of the

Champerty & Maintenance–*Contd.*

(14) Alienation by Hindu widow—*Concld.*

plaintiff's refusal to pay her any portion of the family estate, to allow her a monthly sum for maintenance, and to manage and conduct for her a suit which she proposed to institute to establish her right to a portion of the joint estate, and H *S* consented to do so upon certain terms, which were embodied in a deed by which *K D* assigned to H *S* all her right, share, and interest as widow of *G C C* in the joint estate and in the accumulations thereof, and in the separate estate of *G C C*, and all benefit to be derived from the intended suit, on trust, first, to repay all the costs of the suit; secondly, to retain, by way of remuneration for managing the suit, one half of what might be recovered therein; and, thirdly, to hold the residue as security for payment, with interest at 12 per cent., of the sums advanced by H *S*: the surplus, after satisfying all such sums, to be paid to *K D*. Then *K D*, with the aid and under the management of H *S*, brought a suit against the plaintiff and other members of the joint family of *G C C* for a declaration of her rights under the will of his father, *R C*, and for the administration of *G C C*'s share of the joint estate. The result of this suit was that *K D* was (among other things) declared entitled as a Hindu widow to Rs 1,01,302-14-10 in respect of the accumulations of the joint property, between the dates of *R C*'s and *G C C*'s deaths. The plaintiff paid the Rs 1,01,302-14-10 into Court, under an order made in the suit. *K D* subsequently obtained an order, under which she took this sum out of Court, notwithstanding that the plaintiff applied for an injunction to restrain her taking it out. Upon her obtaining that order, the plaintiff, as immediate reversionary heir of *G C C*, instituted the present suit against *K D* and H *S*, to restrain *K D* from taking Rs 1,01,302-14-10 out of Court, and to compel her to bring back any portion thereof which she might have already received; and for a declaration that the assignment to H *S* created no valid charge thereon. *Held* (following the decision in the case of 4 B L R O C 1, that the assignment to H *S* was not binding on the reversionary heirs of *G C C*, except as regards the charge on one moiety for expenses incurred and advances made by H *S* whether by way of maintenance or otherwise, with interest thereon at 12 per cent. **Biswanath Chunder v Khantamani Dasi. 3 B L R 76.**

Champerty & Maintenance-*Contd.*

(15) Operation of conveyance pendente lite.

16 —Conditional transfer-Maintenance.

N, claiming to be entitled to certain real and personal property as heir of one *J*, brought a suit under Act XIX of 1841 to obtain possession thereof, and, in order to provide funds to carry on the litigation, executed an ikrarnama, whereby he purported to relinquish and convey to one *K* a moiety of his right, title, and interest in the property, in consideration of the sum of Rs 50, *K* agreeing to take all proper steps and to defray all expenses necessary for the recovery of the property, which was valued in the ikrarnama at Rs 75,000. *K* accordingly carried on the suit and incurred costs to the extent of Rs 1,700, but the suit was ultimately dismissed. The property was afterwards taken possession of by the Court of Wards on behalf of one *S*, who claimed under an alleged adoption by one *A*, the person last in possession. Thereafter *K* sold his interest under the ikrarnama, which he valued at Rs 2,18,000, to the plaintiff for the sum of Rs 1,700. In a suit brought against the Court of Wards as representing *S* for the recovery of a moiety of the property or its value, in which *N* refused to join as plaintiff and was made a defendant,—*Held* that the suit was not maintainable; the conveyance by *N* to *K* did not operate as a present transfer of the property, but only as an agreement to transfer it on conditions which were never fulfilled, the plaintiff was not entitled to recover as against *S*, who was no party to the deed. *Held*, also, that the transaction was void as being contrary to public policy, and one to which effect ought not to be given by the Court. **Tara Soondaree Chowdhrain v Collector of Mymensingh. 13 B L R 495: 20 W R 446.**

See Bhobosoondree Dasseah v Issur Chunder Dutt. 11 B L R 36. 18 W R 140.

Notes.—See 20 W R 446.

(16) Suit against public policy.

17.—Malicious suit by assignee of right to sue —Maintenance.

In the case of a person who, having been defeated in a former suit, seeks out from vindictive feelings others who he thinks can establish a claim to the property in dispute, and prevails upon them to assign to him their supposed rights,

Champerty & Maintenance-*Contd.*

(16) Suit against public policy—*Concld.*

it would be contrary to public policy to allow such a suit to be maintained. **Bishonath Dey Roy v Chunder Mohun Dutt Biswas. 23 W R 165.**

Notes —Fol 25 W R 223. Dist 1 Cal 297. Ref, 2 Bom 299.

(17) Bond executed by Hindu widows.

18.—Maintenance—Fraud—Undue influence and threats.

The three childless widow of a zamindar instituted a suit against the rightful heir to their husband's estate in which they unsuccessfully disputed his legitimacy. Previously thereto they had obtained advances of money from the present plaintiff, and executed in his favour an agreement and a bond, whereby they secured to him the payment of large sums in case they recovered their husband's estate, and virtually gave to him the entire control of their suit. Subsequently they agreed with the rightful heir to compromise the suit, which compromise, however, was never acted upon, partly owing, it was alleged, to the subsequent conduct of the heir. At the date of the compromise, the heir, who had just attained his majority, and was without proper counsel or assistance, and acted under threats from the plaintiff, a powerful and wealthy banker, that he would carry on the litigation against him *per fas aut nefas*, was induced, contrary to his own judgment and sense of right and without any evidence that the sum claimed was really due to the plaintiff, to execute a bond in his favour, whereby he bound himself to pay a large sum of money claimed by the plaintiff as being due from the widows; the plaintiff on his part agreeing that he would treat such payment as a satisfaction of his claim against the widows, but meanwhile that he would retain the securities which he held from them In a suit brought by the plaintiff against the heir to enforce the last-mentioned bond,—*Held* that the bond was wholly invalid and fraudulent as against the defendant, and that, as there was no privity of contract between the plaintiff and defendant independently of the bond, it could not stand as a security for anything which might be justly due from the widows. *Quære*—Whether the plaintiff could have recovered from the widows, if they had been successfull against the heir, the large sums of money

Champerty & Maintenance-*Contd.*

(17) Bond executed by Hindu widows-*Concld.*

secured by their bond and agreement. The law of champerty and maintenance is not the same in India as in England. The English statute with regard to champerty is not applicable in the mofussil in India. The India Courts in every transaction must decide upon the fact whether it is merely the acquisition of an interest in the subject of litigation *bona fide* entered into. or whether it is an unfair or illegitimate transaction got up for the purpose merely of spoil, or of litigation, disturbing the peace of families, and carried on from a corrupt or other improper motive. **Chedambara Chetty v Renja Krishna Muthu Vira Puchanja Naiker.**

13 B L R P C. 509: L R 1 I A 241, 22 W R 148.

Affirming the decision in the High Court.

7 Mad 85.

Notes.—See 22 W R P C 148.

(18) Agreement against public policy.

19—Maintenance—Malicious prosecution—Reasonable and probable cause—Practice-Security for costs by a person not a party to the suit.-

In a deed, dated 17th July 1867, it was recited that A was entitled to certain property then in possession of D and E and that A, and B her husband. "having no funds to adopt or to commence legal proceedings" for the recovery of the property, had applied to C to assist them in commencing and conducting the necessary suits, and to make all the requisite disbursements connected therewith until their final termination, and that C had agreed to do so; and also as A and B had "no means whatever" to pay to them or the survivor Rs 150 a month until the final termination of the litigation. Then followed the appointment by A and B of C to be their attorney to institute and prosecute all necessary suits to sign all papers and documents, to receive all moneys and take possession of all lands, etc., to which A and B might become entitled under any decree or order that might be made, and to appoint attorneys and vakils. C then covenanted to institute and prosecute the necessary suits, and to make the necessary advances and payments and to pay Rs. 150 a month to A and B. Then it was agreed that out of the moneys or proceeds of lands, etc., recovered, C should, in the first place, retain and reimburse himself all advances

Champerty & Maintenance-*Contd.*

(18) Agreement against public policy-*Contd.*

and payments made by him with interest thereon at 12 percent.; in the second place, retain to himself, by way of remuneration for his trouble and risk, one third of the nett proceeds of the litigation, and in the third place, make over the remaining two thirds to A and B. A and B covenanted not to intermeddle with C in prosecuting the litigation, that they would render him all possible assistance and that the power-of-attorney given by them to C should be irrevocable so long as he prosecuted the litigation and paid the monthly allowance of Rs. 150. It was provided, however, that if B wished to devote all his time thereto, he might have the management of the litigation, but under the control of C; and that A and B might revoke the power-of-attorney on repayment to C of all money advanced by him with interest at 12 per cent, and the sum of Rs. 2,000 by way of liquidated damages. A power was also reserved to A and B to compromise, but only with the consent of C, unless the sum to be received on the compromise should exceed the total amount of C's advances with interest at 12 per cent. In pursuance of this agreement a suit was instituted in the name of A and B against D and E to recover possession of the property. This suit was by the High Court decreed in the plaintiff's favour, but was on appeal dismissed by the Privy Council with costs. While the suit was in the Court of first instance, D and E applied to have C added as a party. This application was refused, and D and E did not appeal from that refusal. Pending the litigation, A and B brought a suit against D and E for wasilat, and obtained a decree. On the 21st September A and B executed a memorandum of agreement, whereby C purchased all their rights in the two suits brought by them against D and E. D and E now brought a suit against C, alleging that they had suffered loss and damage by the litigation instituted by A and B; that C was guilty of champerty and maintenance: that the litigation was commenced and continued maliciously by C in the names of persons who had no legal or equitable right, and without reasonable or probable cause; that the agreement of 17th July 1867 was illegal and contrary to public policy; that the litigation was carried on by C at his own expense and for his own benefit; and that C was the real mover in the proceedings, and illegally used ths procedure of the Court to the damage and injury of

Champerty & Maintenance-*Contd.*

(18) Agreement against public policy-*Contd.*

the plaintiffs. *Held*, in the Court below and on appeal, that there was reasonable and probable cause for the institution of the wasilat suit brought by A and B against D and E. *Held*, by MACPHERSON, J., that the agreement of July 1867 was illegal and against public policy, as also were the subsequent institution and maintaining of the suit against D and E by C; and that the plaintiffs were entitled to recover from C the loss they had sustained by reason of the suits which he (substantially only for his own benefit) had maintained against them. Held, on appeal (reversing the decision of the Court below) that the suit was not maintainable. The English statutes with regard to champerty and maintenance do not apply to India. In England, champerty and maintenance were offences punishable by the Common Law; and the ground on which an action is allowed in England,—viz, that C had been guilty of an offence by which the plaintiff had suffered damage,—does not exist in India. The only ground on which agreements which savor of champerty or maintenance are held to be void in this country is, that they are contrary to public policy. Assuming that the agreement of July 1867 was a valid one, and that C did thereby acquire an interest in the subject-matter of the suit, and supplied the means of carrying it on, such acts did not entitle the plaintiffs to maintain the present suit, or to recover against C the costs of the former suit. C ought to have been made a co-plaintiff with A and B in the former suit or he ought to have been called upon to give security for the costs of that suit. **Chunderkant Mookerjee v. Ramcoomar Koondoo**

113 B L R 530; 22 W R 138

19 A—Assignment-Rights of third party to impeach.

There may be a valid transfer of property for the purpose of financing a suit, upon the terms that the property or the proceeds realised from the litigation shall be divided between the transferor and transferee, irrespective of the fact whether or not there was any agreement for the payment of consideration "win or lose." The duty of the Court in such a case is to determine whether or not the agreement is a fair agreement to supply funds and does not purport to have been made so as to be inequitable or for improper objects, as for the purpose of gambling in litigation or of injuring others by encouraging unrighteous suits. (4 I. A. 23=2 Cal. 233, Fol.). In ordinary cases it is a rule that, where an assignee sues on his assignment and proves it, an adverse party cannot take the objection that there was no consideration, but the rule does not apply where the transferor being a party to the litigation pleads that the assignment was fictitious and without consideration. 12 Bom 686, Fol: **Baldeo Sahai v Harbans.**

8 A L J 652.

20.—*Held* by the Privy Council—that the English laws of champerty and maintenance are not in force in India. Such contracts are held invalid in India on the ground of public policy. Such agreements are not necessarily opposed to public policy but at times may further the ends of justice by enabling a poor person to get his rights determined in a court of law such agreements should not be enforced when they are extortionate, unconscionable or are entered into for improper objects e.g gambling in litigations or injuring others by encouraging unrighteous suits.

In India a champertous agreement is not a punishable offence. No action will be for improperly putting the law in motion inthe name of a third person unless it is alleged and proved that it has been done maliciously and without reasonable and proper cause. In the absence of this proof an action will not lie against a person who is alleged to have been a mover in that suit, but who was not a party to the record since such a state of things creates no privity from which a promise can be implied on which an action on contract can be maintained, nor does it constitute a legal wrong. **Ramcoomer Coondoo v Chunder Kanto Mookerjee.** **2 Cal 233= 4 I A 423.**

Notes.—Appl· 12 Bom 559. Fol 15 Cal 656; 15 All 352 P C; 35 Cal 420 P C=7 C L J 335=12 C W N 393=10 Bom L R 230. Dist 14 Bom 72. Ref 11 C L R 268; 24 Cal 183; 13 Mad 225 F B; 23 Mad 449: 3 Bom 402; 8 Bom 323; 391; 19 Bom 717: 20 Bom 167; 7 All 476; 11 All 57; 13 All 102; 31 Cal 433; 8 C W N 408; 18 M L J 100 P C; Comp: 5 A L J 184 P C.

21.—Agreement to supply money for another person's suit—Excess of the reward rendering such agreement inequitable.—

A fair agreement to supply money to a suitor to carry on a suit, in consideration of the lender's having share of the property sued for, if recovered is not to be regarded as necessarily opposed to

Champerty & Maintenance-*Contd.*

(18) Agreement against public policy-*Concld*

public policy, or, merely on this ground, void. But in agreements of this kind the questions are (*a*) whether the agreement is extortionate and unconscionable so as to be inequitable against the borrower; or (*b*) whether the agreement has been made not with the *bona fide* object of assisting a claim believed to be just and of obtaining reasonable compensation therefor, but for improper objects, as for the purpose of gambling in litigation, or of injuring others, so as to be, for these reasons, contrary to public policy. In either of these cases, effect is not to be given to the agreement. Here, upon the facts, the above case (*b*) did not arise, and this agreement was not contrary to public policy. But this agreement fell within case (*a*), and the judgment of the High Court was affirmed, that the agreement was so extortionate and unconscionable, in regard to the excess of the reward, that it was inequitable, and, therefore, not enforceable against the defendant, 3 Cal 233, 4 I A 23, referred to and followed.

Mohkam Singh v Rup Singh.
15 All 352=20 I A 127.

Notes.—Ref 24 Cal 183; W N (1907) 55: 4 A L J 227; 29 All 303.

21A—Void agreement.—

R entered into an agreement with G that if a suit which was then about to be brought by G for the recovery of certain lands should be decided in favour of G, R was to pay G Rs 85, and G was to make over to R half the land recovered. R was to pay Rs. 50 in certain proportions, which R was to lose if the suit was not decided in favour of G. G recovered the land, and R then sued him upon the above agreement. *Semble*—That the agreement was not void on the ground of champerty; at any rate, that it was capable of explanation by a consideration of the surrounding circumstances, which the plaintiff should have had an opportunity of giving in evidence.

Ramrav Khunderav v. Govind Pandshet,
6 Bom H C R 63.

Notes:—Ref: 11 All 128.

(19) Suit for specific performance.

22.—Purchase by Mahomedan mooktear from Hindu family - Onus probandi.—

Where a mooktear of the Court, a Mahomedan brought a suit for specific performance of an agreement alleged to have been made by him with the members of a Hindu family, which agreement savoured of champerty, it was held

Champerty & Maintenance-*Contd.*

(19) Suit for specific performance—*Concld.*

that the plaintiff must show that the claim was certain, fair, and just in every way. The Courts will not countenance suits of such a description.

Abed Hossein v. Lalla Ramsaran
13 B L R, 516 note=13 W R, 426.

Notes.—See 13 W R 426

(20) Agreement of a right to sue.

23.—Maintenance.

In 1869, P, the liquidator of the N F Co, compromised for Rs. 15,000 the claims of the company against the fourth defendant, M K, which amounted to Rs.1, 61,500. *P* was induced to agree to this compromise in consequence, of representations made to him by the friends of *M K* to the effect that *M K* had no available assets, and could not meet his liabilities. In 1878 the first plaintiff, *G J* alleging that the said compromise had been fraudulently effected, and that the defendant, *M K*, at the time of the compromise, had been and was still possessed of ample property to pay off his liabilities, induced the liquidator of the company to assign to him the company's claim against *M K*, and brought this suit, praying that the compromise with *P* might be declared not binding, and that *M K* might be ordered to pay the plaintiff, as asignee of the N F Co., the sum of Rs. 1,61,500 with interest. *Held* that the assignment to the plaintiff, *G J*, of the claims of the *N F* Co. against *M K* was effected with a view to litigation, and that under the circumstances, the suit was not maintainable. **Goculdas Jagmohands v Lakhmidas Khimji 3 Bom 402.**

Notes.—Fol 13 Bom 42.

(21) Party having a speculative interest in suit.

24.—The plaintiffs sued for possession of certain immoveable property, "by avoidance of a spurious deed of gift" executed by one N, deceased, in favour of the defendant, H, one of the plaintiffs joined in the suit under an agreement with the other plaintiffs that he should defray the costs of the suit from the Court of first instance up to the Privy Council, and that he should then become proprietor of one-half of the property in suit and be entitled to half the costs. *Held* by the Court that H had no right to join in the suit. **Hazari Lal v Jadaun Singh 5 All 76**

Notes.—Ap 16 Mad 311 Fol: 6 All 260. Ref: 23 Cal 460 6 All 75.

Champerty & Maintenance-*Contd.*

(22) Sale dependent on success in suit

25.—Absolute sale.

A sued V and S to establish his right to attach a certain house in execution of a decree obtained by him in a previous suit. In their written statement the defendants alleged that *A* had obtained the decree in question by fraud. Shortly before the present suit V had mortgaged the house to H for Rs 33,000. About three weeks after the suit had been filed, H advanced a further sum of Rs. 5,000 to V on the same security, and on the same day, 12th December 1881, entered into an agreement with V by which H agreed to buy the house for Rs.45000, the sale to be completed immediately after the decision of the present suit. The agreement provided that V should defend the suit but if the result of the suit should be to establish the plaintiff's right to seize the house in execution, then that H should be at liberty to cancel the contract of sale. *Held* that the agreement of 12th December amounted to an absolute sale by V to H of the equity of redemption of the house in question, and that it was not champertous.

Ahmedbhoy Hubibhoy v Vulleebhoy Cassumbhoy 8 Bom 323.

Notes.—Ap: 13 Cal 90.

26.—English law of champerty not in force in India-Contract to divide the subject matter of the suit-Claim for work done and expenses incurred—Agreements not opposed to public policy.—

English law of champerty is not in force in India The claimants of certain property were supplied with funds for the conduct of the suit on condition of the claimants sharing the property with the person providing the funds. Such an agreement is neither opposed to public policy nor necessarily void. General compensation for work done and proper expenses incurred could be awarded in such suits. **Raghunath v Nil Kanth 20 Cal 843**
Kunwar Ramlal v Nil Kanth 20 I A 112
See also 27 All 271=32 I A 113=8 O C 155.

Notes—Ref: 24 Cal 183; 29 All 303; W N (1907) 55; 4 A L J 222; 18 M L J 100. Fol: 10 Bom L R 230=35 Cal 420 P C=7 C L J 335=12 C W N 393, Comp: 5 A L J 184 P C.

II C, C 85

Champerty & Maintenance-*Contd.*

(22) Sale dependent on success in suit-*Concld*

26 A—Champerty—Public Policy.

The English law as to maintenance and champerty is not applicable to India. **Raja Rai Bhagwat Dayal Singh v Debi Dayal Sahu, 12 C W N 393=18 M L J 100=7 C L J 335=5 A L J 184=35 Cal 420=35 I A 48.**

See also.

(1) Contract Act s. 23.
(2) Public Policy.

Notes.—Rel: 13 C W N 201. Fol 8 C L J 458. Con; 14 C W N 106.

27—Alienation—Champerty—Assignment—Validity, if may be questioned by third parties—Consideration made payable upon success of suit—Gambling in litigation—Public Policy-claim for.

In India an agreement cannot avoided on the ground of champerty. (4 . A 23=2 Cal. 233; 20 I. A. 112; 9 C. W. N. 477=32 I. A. 113=27 All. 271, Fol.)

The agreement in this case provided that out of the purchase money which was to be fixed a Rs 52.600, Rs. 600 only was to be paid down and the balance when the property should be recovered.

Held, that the agreement was generally of a champertous character but was not void on that account, nor was it opposed to public policy and void as such by reason of the stipulation relating to the payment of consideration.

An assignment cannot be questioned as unfair and unconscionable by a person who was not a party to the assignment. **Raja Rai Bhagwan Dayal Singh v Debi Dayal Sahu. 12 C W N 393 (P C)=35 Cal 420=7 C L J 335=18 M L J 100=35 I A 48 (P C)**

Notes—Ref: 13 C W N 201. Fol: 8 C L J 458. Con: 14 C W N 106.

See also,

(1) Contract Act s. 23.
(2) Public Policy.

28—An agreement to furnish money for litigation on condition of sharing in the property recovered, is not necessarily void, unless it is got up merely for the purpose of spoil or litigation, disturbing the peace of families, and carried on from a corrupt or improper motive.

Tarachand Amarchand v. Suklal Bagmal Marmade P J (1888) 142=12 Bom 559.

Champerty & Maintenance-*Contd.*

(23) Law of prevailing in this Country.

29—Contingent contract—Present transfer of an actionable claim—Compromise by promisor.

A decree was passed against the present appellant. He had no funds wherewith to appeal to Privy Council and so he contracted with the present respondent to supply him the funds in lieu of having a ten-annas share in the then disputed property in the event of the appellant's success in the Privy Council. The appellant subsequently compromised the original suit with the successful party whereby he got 1,100 bighas of land instead of the property which was valued at Rs. 85,000. No appeal was ever preferred to the Privy Council. The present respondent sued the present appellant to recover from him a share of ten annas in the 1,100 bighas of land. *Held*, that in this country in Courts where the English Law does not prevail, champerty is not *per se* illegal, but that every such arrangement must stand or fall according to the peculiar nature of its conditions. Contingent contracts to do or not to do anything if an uncertain future event happens, cannot be enforced by law, unless and until that event has happened. In the present instance the uncertain future event was the passing of a decree in the appellant's favour by Her Majesty's Privy Council. No such decree had been passed, and the contract contingent on its passing cannot be enforced. The agreement cannot be accepted as an actual deed of present transfer, but is merely an agreement to transfer at a future date.

Roshan Zaman Khan v Rajah Farzand Ali Khan. Book Cir. 13 of 1873.

(24) Maintenance and Champerty—Agreement to carry on litigation not per se opposed to public policy.

30—Extortionate and unconscionable agreement—Question between assignor and assignee—Covenant prohibiting assignor to compromise, valid—Suspicion, Court not to proceed upon—*Benami*, presumption in favour of—*Dasmani* Gossains—Custom of inheritance—*Chela*—Initiation—*Biraja Home*—Age of discretion—Auspicious day—Performance of *Biraja Home* essential to claim by inheritance the estate of *guru*-Rule of succession by nomination or election—*Custom* of lapse, how to be proved.

The English Law of *maintenance and champerty* has not been introduced into India.

A fair agreement to supply funds to carry on a suit, in consideration of having a share in the property if recovered, ought not to be regarded *per se* as opposed to public policy, but when the agreement is found to be extortionate and unconscionable, so as to be inequitable, or to be made not with the *bona fide* object of assisting a claim believed to be just and of obtaining a reasonable recompense therefor, but for improper objects, as for the purpose of gambling in litigation or of injuring or oppressing others by encouraging unrighteous suits so as to be contrary to public policy, effect ought not to be given to it.

But the question whether the transaction is an unfair and unconscionable bargain for an inadequate price, is entirely a question between the assignor and the assignee

Where, in such an agreement, there was a covenant to the effect that it will not be competent to the assignor to enter into any compromise with the defendant, in respect of the subject-matter of any suit instituted for the recovery of properties, and that, if he entered into any such compromise, the transferee would be entitled to prosecute the suit: *Held*, that a covenant of this nature for the protection of the purchaser is valid in law.

The Court must not proceed upon suspicion only, and must not make any presumption against apparent ownership.

In the case of *Dasnami Gossains* or *Sanyasis* the custom is this. When a person intends to enter the sect, some ordinary ceremonies are performed, such as the shaving of the head, bathing of the body, wearing of new clothes and taking of a new name. He then becomes a *Gossain* in a state of probation. After he has remained so for a year or two and made himself familiar with the usages of the order, the ceremony of *Biraja Home* is celebrated by whispering the *Mul Mantra* into his ears, and it is only after the performance of *Biraja Home* that he attains the status of a perfect and completed *Chela*. During the period of probation it is open to the *Chela* to renounce the life of the monastery and to return to his family, but after the performance of the *Biraja Home*, reversion to secular life is an impossibility.

The *Biraja Home* ceremony is not performed till the probationer attains the age of discretion, so as to be able to realize for himself the full significance of the final act of renunciation of the world.

Champerty & Maintenance-*Contd.*

(24) Maintenance and Champerty-Agreement to carry on litigation not per se opposed to public policy—*Contd.*

It is unlikely that the *Biraja Home* ceremony should be reserved for performance on only one day in the year. It is more likely that it should be allowed to be performed on specially auspicious days.

The performance of *Biraja Home* ceremony is essential to entitle a *Chela* to claim by inheritance the estate of his *Guru*; a mere nomination by the *Guru* is not sufficient.

The rule of succession by nomination by the *Guru* or by election by the *mohunts* of the order, is not of universal application.

There is no fixed rule which regulates the relation between the superior and subordinate *Maths*, for even if a *Math* is subordinate to another, it must be governed by its own rules of management.

In order to establish the custom of lapse, it is necessary to prove not merely that, in some instances, the property had passed to the spiritual head of the monastery, but also that this took place in the presence of a *Chela* who would, otherwise, be competent to take by inheritance. (1 M. I. A. 170 (at p. 187), 3 W R 33 (P. C.), 1 I. A. 241 at p 264, 22 W. R 148; 1 B. L. R. 509, 4 I A. 23=2 Cal 233; 20 I. A. 112=20 Cal 843; 20 I. A 127=15 All 352. Fol: 35 I. A 48 =35 Cal 420, Fol. 32 I. A. 113, Fol. 11 M I A. 28; 11 M. I. A. 551. Ref. 7 C W N 145, 10 Mad 375; 13 Mad 524, Ref. 8 C L. J. 499, Fol:, 20 W R 217; 10 Mad 375. Ref:) **Gossain Ramdhan Puri Raj Kumar Thakur v Gossain Dalmir Puri. 2 Ind Cas 385.**

31. Maintenance—Gambling in litigation - Agreement opposed to public policy—Contract Act (IX of 1872), s. 23.

The judgment of the Privy Council in L R 4 I A, 23 ; 2 Cal, 233, shows that while that specific English law of maintenance and champerty has not been introduced into India, and where fair agreements to supply funds to carry on litigation in consideration of having a share of the property if recovered should not be regarded as *per se* opposed to public policy, yet such agreements should be carefully watched, and if extortionate and unconscionable, or made not with the *bona fide* object of assisting, for a reasonable recompense, a claim believed to be just, but for the purpose of gambling in litigation, or of injuring or oppressing others by encouraging unrighteous suits, should be held contrary to public policy, and not enforced. For the purposes of meeting the expenses of an appeal to the High Court, the appellant, on the advice of his legal adviser, executed a bond for Rs 25,000 in consideration of the obligee agreeing to defray such expenses. The obligor agreed to pay the Rs. 25,000 within one year from his recovering possession of the property in suit ; and, at the request of the obligor's pleader, the obligee advanced Rs. 3,700, which was applied to the expenses of the appeal. The High Court dismissed the appeal ; and in a deed executed by the obligor in favour of the obligee and others for the purpose of defraying the expenses of a further appeal to the Privy Council, he admitted his liability under the former bond. The Privy Council decreed his appeal, and he obtained possession of the property in suit, but declined to pay the Rs 25,000, upon which the obligee sued upon the bond. It was found that, apart from the moneys borrowed by the obligor from time to time, he was without even the means of subsistence; that he executed the bond with his eyes open and perfectly understood his position and the effect of both the instruments executed by him ; that no fraud or improper pressure appeared to have been applied to him ; that his legal advisers had acted honestly and to the best of their ability in his interests; that there was nothing to show that, having regard to the risks of the litigation, he could have obtained the assistance necessary for the prosecution of his appeal on better terms than those contained in the bond ; that without such assistance he could not have appealed to the High Court ; and that the obligee gave him such assistance upon his application. *Held*, also, that the obligee could not, under the circumstances, have considered both that the obligor's claim was a just one and reasonably likely to succeed, and that the Rs 25,000 was a reasonable recompense in the event of success for the advance of Rs. 3,700 ; and the bond was therefore a gambling in litigation, which it would be contrary to public policy to enforce. The Court gave the plaintiff a decree for the Rs. 3,700 actually advanced, with simple interest at 20 per cent. per annum from the date of the bond to the date of the decree, with costs in proportion, and interest at 6 per cent. per annum on the Rs. 3,700 inter-

Champerty & Maintenance-*Contd.*

(24) Maintenance and Champerty-Agreement to carry on litigation not per se opposed to public policy—*Concld.*

ests and costs from the date of the decree until payment. **Chuni Kuar v Rup Singh. 11 All 57.**

See Loke Indar Singh v Rup Singh. 11 All 118.

and **Husain Baksh v Rahmat Husain. 11 All 128.**

Notes:—Fol: 11 All 128; Ref: 11 All 118.

(25) Champerty—Maintenance-Wager.

32.—Guarantee-Conditional promise—Agreement to advance money for litigation—Consideration—Public policy—Contract Act (IX of 1892) Secs 23, 30.

An Agreement, by which a person, advancing money for conduct of a litigation, is promised the return of his money without interest and a share in the property, is not opposed to public policy; nor is it of the nature of a wager but ought to be treated as a conditional promise or guarantee 23 W R 148; 1 B L R 509; 1 I A 241; 20 I A 112; 20 Cal 843, Ref. **Niamat Ali v Ilahi Bakhsh. 8 Ind Cas 500**

33.—Champertous transaction, inadequacy of price.

Plaintiff paid defendant Rs 30, who with that money recovered his land from third person in a suit. In consideration of this, defendant sold to the plaintiff, a portion of the land, worth Rs. 200. For some time plaintiff got only the produce of the land and not the possession of it, Plaintiff brought a suit to recover this land. The District Court held that the transaction was champertous and dismissed the suit. *Held*, that inadequacy of the price was not sufficient to make the transaction a champertous one. **Gurusami v Subbaraya. 12 Mad 118.**

34—Purchase for an inadequate consideration—Speculative suit not necessarily champertous.

A suit having been dismissed on the ground that a sale upon which it was based had been made for a consideration so inadequate as to support the belief that it was in the nature of champerty.—*Held* that the elements re-quired to bring the case within the authorities on the law of champertous transactions in this country were wanting. It was not a case in which an improper interest had been acquired in the

Champerty & Maintenance-*Contd.*

(25) Champerty-Maintenance-Wager-*Concld*

unrighteous litigation of other people. The fact that a suit may be speculative does not render it champertous. **Siva Ramayya v Ellamma. 22 Mad 310.**

(26) Suit on Assignment of Equity of Redemption—Public policy-Assignment unopposed.

35—An arrangement between a plaintiff & his assignor who takes no objection to plaintiff's title cannot be impugned as "unconscionable" by the defendant-a mortgagee. A claim based on an assignment, which ignores a bedawa, i. e. release inadmissible for want of registration is not "unrighteous litigation" or champertous Accounts of two mortgages ordered to be taken separately. **Gopal Ramchandra Limaye v Gangaram Anandishet Marwadi. P J (1889) 141; 14 Bom 72,**

Notes:—Fol: 18 Mad 374; 22 Mad 310. Ref: 9 Bom L R 462.

(27) Champerty contract to participate in fruits of suit in consideration of supplying funds not void.

36—A contract disclosing conditions falling within the definition of champerty, as laid down in 8 Moore's Indian Appeals, page 186, is illegal and no action can be maintained upon it in a Court of law. "It must be something against good policy and justice, something tending to promote unnecessary litigation, something that in a legal sense is immoral and to the constitution of which a bad motive in the same sense is necessary."

A contract by which a party in consideration of supplying funds to enable another to prosecute a *bona fide* claim was to participate in the fruits of the suit, is not void. **Gholam Mahomad v Walidad. P R 70 of 1870.**

(28) Interest in litigation—Unconscionable.

37—Registration.

Defendant, being engaged in litigation with third parties regarding a plot of land, agreed to give the plaintiff ¼th share of what might be awarded to him in consideration of the plaintiff supplying funds to meet the costs. It was found

Champerty & Maintenance-*Contd.*

(28) Interest in litigation-Unconscionable-*Concld.*

that the plaintiff had supplied Rs 80 only where as the value of the ¼th share was over Rs. 300. In a suit for specific performance of the agreement.—*Held* that, (a) the agreement not being registered could not affect land of the value of over Rs. 300 ; and (b) specific performance should not be decreed as the plaintiff would thereby reap a grossly unfair advantage. **Jhandu Khan v Barkhurdar. 150 P R 1889.**

(29) Inequitable agreements—Discretion of court.

38-*Held*, that though a Court is not bound to enforce an agreement which is not void for champerty alone and the Court can award reasonable compensation for work done.

20 Calc 843 and 15 All 352, cited. **Dhallu Missar v Jiwan Singh. 79 P R of 1894.**

(30) Unconscionable bargain.

39—Where certain persons (defendants in this suit) who were poor and in needy circumstances and out of possession of 60 velies of lands to which they laid claim, were induced to sell a portion of that property worth Rs. 25,000 for the sum of Rs. 4,000 to be advanced by the plaintiff for the purpose of recovering the property by litigation.

Held, that transaction was an unconscionable bargain and liable to be set aside.

Held further that if plaintiff, who had the successful conduct of the prior litigation, made the bargain with the knowledge that the claim was false, the transaction would be champertous and that if he believed the claim of the defendants to be good, the sale was unconscionable.

Vijayaraghava v Pranal Anne. 1 M L J 340.

40-Where certain persons sold their land worth about Rs. 25,000 for Rs 4,000 as they were in urgent need of funds to conduct a litigation regarding that land and certain other lands and the conduct of the litigation was taken from the hands of the vendors and entrusted to the vendee who was to advance about Rs. 4,000, the sale amount, for the expenses of the litigation,

Champerty & Maintenance-*Contd.*

(30) Unconscionable bargain- *Concld.*

held, that the transaction ought to be relieved against, as unfair advantage was taken of the pressing difficulties and necessitous circumstances of the vendors to force upon them a bargain which was hard and unconscionable. Assuming that plaintiff (vendee) honestly believed that the vendor had a good and honest claim, the offer to secure his advances upon the whole estate was more than ample, and if he did not believe the claim to be a good one, the advance was of a champertous character and for the mere purpose of speculative litigation **Vijayaraghavh v Pranal anne, 1 M L J 340.**

(31) Champertous agreement between legal practitioner and client—Grossly improper conduct in discharge of professional duty.

40A—Legal Practitioners Act, 1879,—Sections 13, 14

One A M., a certificated mukhtar, entered into an agreement with certain clients wherein it was stipulated that A. M. should undertake all the expenses up to final appeal connected with a civil case, to be instituted on behalf of his clients in consideration of receiving half the net proceeds of the litigation. The lower Courts holding that A. M. had thereby been guilty of " grossly improper conduct in the discharge of his professional duty, " within the meaning of Section 13 of the Legal Practitioners Act. 1879, suspended him from practice under Section 14 of the Act.

The matter having been referred by the Divisional Judge to the Chief Court,

Held, that the mere existence of the relation of pleader and client is sufficient for the instant condemnation, as opposed to public policy, of any agreement for the supply of funds for litigation in consideration of a delivery of a share in the property, in suit on recovery and that a legal practitioner entering into such an illegal agreement is, for the same reasons as establish the contract to be opposed to public policy, guilty of "grossly improper conduct in the discharge of his professional duties." **Muhammad, Mukhtar. 111 P. R. 1894.**

Champerty & Maintenance-*Contd.*

(32) Pleader & advocate—Professional misconduct—Champertous agreement by way of—Relation of pleader and client.

40 B.—Legal Practitioner's Act.

It is highly improper and grossly unprofessional conduct on the part of an advocate or a vakil to enter into an agreement with a client to furnish him with funds for a litigation in consideration of his assigning over a part of the property in litigation if recovered to such Advocate or Vakil.

When a Vakil takes an active interest in a case during its pendency in the lower Court and there is an understanding that he will be engaged as vakil when the case comes up to the High Court it cannot be said no relationship of pleader and client existed between himself and the client before the actual execution and acceptance of the Vakalatnama. **Advocate a Vakil, a Pleader and Mukhtear.** **4 C L J 262.**

(33) Purchase of property to which adverse claims exist legality of—Purchase merely for litigation illegal.

41.—T P Act S. 130.

Plaintiffs alleged that one T with the authority of her late husband, adopted S, the first defendant in the suit that they purchased from S, the plaint villages, which S, had inherited from his adoptive father, and that they were resisted by other defendants in obtaining possession of the villages.

The defendants, other than S, pleaded that the plaint sale-deed was a champertous transaction, that no consideration passed for it and that the agreement itself was void, its object being to disturb the peace of the defendant's family and to promote gambling in litigation. Preliminary issues were framed as to whether the sale-deed represented a real and *bona fide* transaction and whether the transaction evidenced by the sale-deed was of a champertous nature and as such, opposed to public policy. On the evidence, the District Judge found that the purchase was speculative, that no consideration passed to S, and that the transaction was entered into mainly with a veiw to harass the defendants and, in the view that the entire transaction was a speculation in litigation rather than a *bona fide* purchase of an actionable claim, he dismissed the suit. *Held*, on appeal, reversing the decision—even if the recital

Champerty & Maintenance-*Contd.*

(33) Purchase of property to which adverse claims exist legality of-Purchase merely for litigation illegal-*Concld.*

in the sale-deed as to the consideration is a false recital and the transaction is one of a highly speculative character, it does not necessarily follow that the agreement would be an offence against the law of champerty or that its objects could be regared as immoral or opposed to public policy.

The question in such cases is whether the real object of the transaction has been to acquire an interest in property of purchaser or merely to speculate in litigation on the account either of the vendor and purchaser jointly or of the purchaser alone. It is not unlawful to purchase an interest in property though adverse claims exist which make litigation necessary for realizing the interest, but it is unlawful to purchase an interest merely for the purpose of litigation. In other words, the sale of an interest to which a right to sue is incident. is good; but the sale of a mere right to sue is bad for champerty. The object of the law is not so much to prevent the purchase or assignment of a matter then in litigation for the purpose of maintaining the action. 8 M 1 A 170, 14 Bom 72; 18 Mad 4, 22 Mad 310; 27 All 271 Ref. **Deoran Gopalji Kunbi v Sadashed.** **2 N L R 17.**

(34) Public policy-Stranger in possession—Sale by next collateral of moiety—Voidable transaction.

42—Estate vests in next collateral-False recital as to consideration—Right of stranger to impeach.

A stranger to a deed is not entitled to show that it is voidable at the option of a party thereto although he will be entitled to rely on its invalidity if it were void. A mere untrue recital in a deed (viz; that consideration has been paid) will not render the transaction evidenced by the deed as champertous or contrary to public policy. Where, upon the death of a daughter the estate which she inherited from her father became vested in the next collateral heir of the father, but the daughter's husband continued to hold the estate and the next collateral, who was in needy circumstance and was unable to recover possession without external assistance entered into an arrangement by which he sold half the estate to the respondent for consideration and there was nothing extortionate or unreasonable in the terms of the bargain but the sale deed recited that a part

Champerty & Maintenance-*Contd.*

(34) Public policy-Stranger in possession-Sale by next collateral of moiety-Voidable transaction—*Concld.*

of the consideration was paid when in fact it was not paid. *Held*, that the transaction was not contrary to public policy, and that there was a present transfer to the respondent of a moiety of the estate giving the latter a good title on which it was competent for him to sue. **Achal Ram v Kazim Husain.**

9 C W N 477=15 M L J 197=27 All 271=32 I A 113 P C.

(35) Hindu widow—Alienation for legal necessity-Champertous agreement.

43.—General prayer for relief in plaint-What relief ought to be granted—Incomplete cause of action—Plea of waste by reversion failing whether he should be allowed to pay off alienee for legal necessity-What expenses chargeable on estate and what payable out of widow's income.

A Hindu widow alienated certain properties which she had inherited from person, it was alleged, without legal necessity. On her death the reversioners who were refused possession by the alienees executed a deed of conveyance in favour of one B, by which they purported to sell their rights in the property, which was worth 3 lakhs of rupees to B for Rs. 52,000 of which however only Rs 600 were paid down, it being provided that the balance was to be paid in proportion to *B*'s success in recovering the alienated properties by suit or otherwise. Upon this agreement B brought a suit to recover possession of the properties alleging that the alternations were not for legal necessity.

Held, that although the English rule against champerty and maintenance does not prevail in this country in its entirety yet the present agreement was void as being an unconscionable and speculative agreement and one opposed to public policy as promoting gambling in litigation, (2 Cal 233; 8 M I A 187 Ref.) **Debi Doyal Sahoo v Thakurai Bhan Partap Singh.**

8 C W N 408=31 Cal 433.

(36) Agreement to convey property after decree in lieu of expenses of litigation-Wagering transaction.

44.—Reversionary heir—Agreements opposed to public policy—Contract for sale.

Where, after the death of a Hindu widow, the reversioner, who was out of possession, entered into an agreement with the plaintiff, under which the latter was to provide the entire expenses of the litigation and in return therefor the former undertook, on obtaining possession of the property in question, to make over one-half of the same to the plaintiff. *Held* that the agreement was not void either on the ground that it was opposed to public policy or that it was of the nature of a wagering transaction

Held, futher, that the agreement did not amount to a sale and did not confer on the plaintiff any interest in the property capable of being enforced by a suit against the parties in possession who were not themselves bound by the terms of the agreement. 20 Cal 843 Ref: 8 O C 155, 11 O C 301 Dist. **Inder Singh v Kesri Singh.**

14 O C 139=10 Ind Cas. 179.

Champerty & Maintenance-*Concld.*

(36) Agreement to convey property after decree in lieu of expenses of litigation—Wagering transaction—*Concld.*

(37) Property subject-matter of suit-Sale of share.

45—Champerty.

Held, that there is no rule of Indian law which prohibits the transfer of a share of property merely because the property is the subject of litigation, **Sadhanmal Lekhraj v Sirdar Bibi.**

2 Sind L R 76.

Chance of Inheritance.

1—Heir apparent—Relinquishment of-Validity.

2 Ind Cas 865.

See also cases under:—

Transfer Property Act s. 6.

Chandu.

See Opium Act (I of 1878) 7.

Change of attorney.

See—Minor-Representation of minor in suits.

28 Cal 264.

Change of Cultivation and nature of Land.

See Landlord and Tenant.

Charge (1-24).

1 Unpaid vendors—Distinction between vendor's lien under English Law and a charge

Charge-*Contd.*

under the Transfer of Property Act s. 55 (1).
2 Sale of immoveable property—Part of Consideration unreal and in fraud of pre-emptors—No sale-charge (2).
3 Lumberdar & Co sharers. (3)
4 On lands—Land Revenue—Payment by Khatedar (4)
5 Maintenance of Hindu widow—Whether charge upon the estate 5.
6 Stipulation to pay and in default to pay twice the amount from the properties—Whether a charge is created 6
7 Co-sharers undertaking to pay mortgage-debt in certain proportion—Agreement to realize the excess from the person and defaulting co-sharers such agreement creates a charge 7
8 Hypothecation of immoveable property 8
9 Endowed property not charged with such payment 9
10 Whether mortgage or charge—Construction 10—10A.
11 Charge on property 11
12 Charge, holder of 12
13 Decree for recovery of land conditional on payment of sum of money—Whether creates charge on land 13
14 Suit to redeem converted into a suit to recover possession on payment of a charge—Adverse possession—Charge Transfer of Property Act s. 100 14
15 Charge on immoveable property 15
16 Mortgage with consent of real owner payment by benamidar—Charge 16
17 Purchase pending appeal—Stranger-purchaser and decree-holder purchaser difference between—Charge 17
18 Charge not excluded by mere contract to defer payment of purchase money—Nor by any contract inconsistent with charge. 18
19 Charge on immoveable property taken in charge for loan not illegal 19
20 Attorney power of, if creates a charge on immoveable property 20
21 To borrow money on a charge on property 21
22 Co-sharer making payment of Government revenue for another 22
23 Sale in Court—auction of property subject to charge. 23

Charge-*Contd.*

24 Sum recoverable by Government, first charge on proceeds of sale 24

Charge.

See also cases under:—

(1) T P Act s. 100 & ss. 5, 82, 88.
(2) Mortgage.
(3) Vendor and purchaser-Vendor rights and liabilities of.
(4) Sale for arrears of rent—Incumbrances.
(5) Trust **28 All 578.**
(6) Charities **7 Ind Cas 79.**
(7) Bengal Tenancy Act s. 465.

(1) Unpaid vendors—Distinction between vendor's lien under English Law and a charge under the Transfer of Property Act s. 55.

1—Chancery Court's practice—Purchase in consideration of a covenant—Purchase in consideration of sum of money.

A mortgagee or chargee, who is in possession of an estate as such and gives up possession to a person entitled to it subject to his charge upon payment of what is then due to him, is not precluded from afterwards asserting his right against the estate when further instalments, or further payments, become due to him.

The charge which the vendor obtains under the Transfer of Property Act is different in its origin and nature from the vendor's lien given by Courts of Equity to an unpaid vendor. The latter is a creation of the Courts of Equity and can be modified to the circumstances of the case by the Court of Equity. As regards the former the law of India knows nothing of the distinction between legal and equitable property in the sense in which that is understood when equity is administered by the Court of Chancery in England, and the Transfer of Property Act gives a statutory charge upon the estate to an unpaid vendor unless it be excluded by contract. Such a charge stands in quite a different position from a vendor's lien. The Court has to find something, either express contract, or at least something from which it is a necessary implication that such

Charge-*Contd.*

(1) Unpaid vendor—Distinction between vendor's lien under English Law and a charge under the Transfer of Property Act S. 55—*Concld.*

a contract exists, in order to exclude the charge given by the statute. The charge is not excluded by a mere personal contract to defer payment of a portion of the purchase money, or to take the purchase-money by instalments, nor it is excluded by any contract, covenant, or agreement with respect to the purchase money which is not inconsistent with the continuance of the charge.

A conveyance or sale in consideration of a covenant to pay a sum of money in the future is different from a sale in consideration of money which the purchaser covenants to pay. The distinction between the two may seem fine one, but it is a real distinction. The former does not give rise to a charge while the latter does.

Webb v Macpherson. 5 Bom L R 838=8 C W N 41=13 M L J 389=31 Cal 57=30 I A 238.

Notes—Ap' 29 Mad 305. Fol: 31 Cal 505 P C. Ref: 8 C W N 225; 14 M L J 105, 27 Mad 435; 6 Bom L R 557; 33 Cal 410=10 C W N 276=4 C L J 103; 30 All 172 F B=(1908) W N 71=5 A L J 243.

(2) Sale of immoveable property—Part of consideration unreal and in fraud of pre emptors—No sale-charge.

2—Duty of Court—Estoppel.

Where, in a sale of immoveable property, a considerable portion of the purchase money was not certainly paid, but was merely inserted to keep off pre-emptors and formed no real part of the price.

Held, that the transaction cannot be maintained as a sale, but can be treated only as a charge on the property to the extent of the money actually paid. **Kesar v Sundar Singh. 27 P R 1909=46 P L R 1909=33 P W R 1909=1 Ind Cas 883.**

(3) Lumberdar & Co-sharers.

3—Charge—Payment of Government revenue by lambardar a charge on the property in the Laws of a subsequent purchaser—Notice to purchaser of such payment.

The heirs of a lambardar who had paid the Government revenue on behalf of certain land, cannot, when seeking to recover the same as a

Charge-*Contd.*

(3) Lumberdar & co sharers—*Concld.*

charge on the property in the hands of subsequent vendees, succeed without proving as against these vendees notice that the Government revenue had been paid by the lambardar, as alleged, on behalf of the land purchased by them. (8 All 384 Ref: 11 M I A 254 Dist). **Khushhal Chand v Nizamun-nissa. A W N (1891), 9.**

(4) On lands—Land Revenue—Payment by khatedar.

4—An unsolicited expenditure in respect of the property of another, even if made for the purpose of its preservation, gives no lien, over the property outside maritime law. Hence, a payment of land revenue by a person of property belonging to another but included in his *khata*, does not create any charge over the property. **Shivrao v Pundlik. 4 Bom L R 90=26 Bom 437.**

Notes:—Diss· 26 Mad 686, F B., A W N 1904 74; Ref., 26 All 407, F B., Dist., 26 All 407, F B.

(5) Maintenance of Hindu widow — Whether charge upon the estate.

5—Hindu law—Mitakshara School—Transfer of estate with intention to defeat right—Fraudulent intention—Purchaser with notice, position of.

When immoveable property from the profits of which a Hindu widow was entitled to receive her maintenance was sold and the sale-deed recited that the amount of maintenance would continue to be paid to the widow by the vendor and that the property sold would not be subject to any charge for it. *Held*,—That this mere recital was not enough for holding that the conveyance was executed with the intention of defeating the right of the maintenance-holder within the meaning of sec. 39 of the Transfer of Property Act. It was necessary to enquire whether at the time of the sale, there was sufficient property left in the hands of the vendor out of which the amount of maintenance could be realised, and if there was not, whether the vendee was aware of the fact. The intention to defeat the right of the maintenance-holder against which provision is made in sec. 39 of the Transfer of Property Act, involves the idea of a fraudulent intention. 22 All 326 (1900), approved. Under the Mitakshara, the maintenance of a widow is not a charge upon

Charge-*Contd.*

(5) Maintenance of Hindu-Widow – Whether charge upon the estate—*Concld.*

the estate of her deceased husband. 2 Bom 494 (1877); 1 Cal 365 (1873); 22 All 326 (1900); 24 All 160 (1901); 12 Bom H C R 69 (1879), relied on. 15 W R 263 (1871); 25 W R 100 (1876), not followed. **Digambari Debi v. Dhan Kumari Bibi, 10 C W N 1074.**

(6) Stipulation to pay, and in default, to pay twice the amount from the properties—Whether a charge is created.

6—In a partition deed it was stipulated that one of the parties should discharge a certain debt, and, in default, it was provided that, if either of th parties should fail to observe any of provisions of the deed, the party in default should pay to the other party, who should have sustained loss, twice the amount from their properties. The question was as to whether the words "pay... the amount from their properties" created a charge. *Held*, that the words "properties" referred to the properties mentioned in the schedules to the deed, and consequently there was no indefiniteness. The words were sufficiently apt to create a charge. *Obiter.*—Even if the language were general (and not specific as in this case) it does not follow that a charge is not created by reason of the fact that the language is general, since a distinction should be drawn between wideness of language and indefiniteness of language. (3 Mad 35, Doubted.). **Manikkam Pillai v. Audinarayana Pillai, 7 M L T 158 = 5 Ind Cas 917 = 20 M L J 407.**

(7) Co-sharers undertaking to pay mortgage-debt in certain proportion—Agreement to realize the excess from the person and defaulting co-sharers—Such agreement creates a charge.

7—Some property, which had previously been mortgaged devolved upon certain persons by inheritance. They agreed to divide the property amongst themselves and to pay the mortgage debt proportionately to their shares. The agreement contained a stipulation that " if for any reason, any of the co-sharers fails to pay the debt, then the co-sharer, who was to pay any amount of the debt in excess of his share shall be entitled to get the same from the person and the property of the defaulting co-sharer".

Charge-*Contd.*

(7) Co-sharers undertaking to pay mortgage debt in certain proportion—Agreement to realize the excess from the person and defaulting co-sharers—Such agreement creates a charge—*Concld.*

Held, that the stipulation in the agreement did not create any charge upon the property of any of the co-sharers in respect of any sum paid by any other co-sharer in excess of his rateable share of the debt.

The co-sharer paying in excess could, however, recover such excess from the defaulting co-sharer by the proper process of law. (14 All 162, Fol:) **Kishen Lal v. Bhawah Kuar, 8 Ind Cas 864.**

(8) Hypothecation of immoveable property.

8—Hypothecation of immoveable property—Mortgage or charge—Construction of Documents. **9 Ind Cas 828.**

(9) Endowed property not charged with such payment.

9—Document reciting that plaintiff should receive certain allowance at a *chatram*—Endowed property not charged with such payment—Charge not created. Construction of Documents. **(1911) 2 M W N 238.**

(10) Whether mortgage or charge—Construction.

10—Deed whether mortgage or charge—Construction—Creation of charge on the happening of a condition. **21 M L J 562.**

10*A*—Decree — Construction — Charge or mortgage. **8 A L J 418.**

(11) Charge on property.

11—Mortgage deed—Construction—Interest. **1 A L J 470.**

(12) Charge holder of.

12—Not a mortgagee:—T. P. A., S. 88. **3 A L J 488.**

(13) Decree for recovery of land conditional on payment of sum of money—Whether creates charge on land.

13—Applicability of Arts 144, 142—Minority.

S and others sued in 1899 for possession of immoveable property, which was sold by their mother during their minority, and obtained a de-

Charge-*Contd.*

(13) Decree for recovery of land conditional on payment of money—Whether creates charge on land—*Concld.*

cree setting aside the sale and granting them possession conditional on payment of Rs 754. No period was fixed for payment and the decree was not executed. The plaintiffs brought the present suit in May 1907 to recover possession from the purchaser who admittedly obtained possession in 1887.

Held, that the conditional decree did not create a mortgage or " judicial hypothec " on the land in suit; and,

That the suit is barred by limitation, being governed either by (*b*) Art. 144 or 142 (*c*) Limitation Act 1877.

The contention that possession against a minor does not become adverse until he attains majority is hopeless and unsupported by authorities.

S. 7 Limitation Act, 1877, does not apply to this case, as the cause of action arose in 1887, and the suit was brought in 1907 long after three years from the time when the youngest son attained majority, which was in the year 1901. 10 P R 1888, 30 P W R 1909, Dist: 5 All 493, Ref: 141 P R 1892, Ref: 8 A W N 152; 8 A W N 256 and 7 M L T 131, Ref: **Shamier v. Ladha Singh, 100 P R 1909=148 P W R 1909.**

(14) Suit to redeem converted into suit to recover possession on payment of a charge —Adverse possession—Charge — Transfer of Property Act, S. 100.

14—Compromise in settlement Court not equivalent to a mortgage—Limitation Act (1877) Sch. II, Art. 144—Recovery of the whole share.

On the basis of a compromise, a decree was passed, in favour of the ancestors of the plaintiff and his co-sharers, by the Settlement Courts, to the effect that they would be entitled to the possession of their share in the property, if they paid their share of the family debts, and if they failed to do so, the defendants would be entitled to take possession of the whole of their shares. It was also added in the compromise, that if, afterwards, the plaintiff and his co-sharers paid the whole of the debt due from them, they would be entitled to recover possession of their shares. The defendants paid the entire amount and took possession of the whole share of the plaintiff and his co-sharers. The plaintiff now sought to redeem his own share, as well as that of his co-sharers,

Charge-*Contd.*

(14) Suit to redeem converted into suit to recover possession on payment of a charge —Adverse possession—Charge—Transfer of Property Act, S. 100—*Concld.*

on the payment of the amount due from him and his co-sharers on account of their share. The defendants pleaded that the suit to redeem was not maintainable and was also barred by limitation, as they had been in possession for more than twelve years. They also pleaded that the plaintiff could not recover more than his own share.

Held, that the above compromise did not create the relationship of mortgagor and mortgagee between the parties to it, and no suit for redemption could lie, but the suit of the plaintiffs should not be dismissed, merely because the plaintiff had stated in his plaint that the above compromise had created such a relationship The suit was actually for recovery of the property on payment of a certain charge and should have been decreed as such. The actual facts were clear from the pleadings, and the defendants were not in any way prejudiced by such a view of the case.

Held, further, that the suit being really one for possession of the property on payment of a charge it was governed by Art. 144 of the second schedule of the Limitation Act, and as the defendants had not succeeded in showing that they had been in adverse possession for more than 12 years before the date, on which the present suit was instituted, it was not barred by limitation.

Held, also, that the plaintiff could recover not only his own share, but also those of his other co sharers, on payment of the amount due from him, as well as from those other co-sharers. **Karim Baksh Khan v. Mehdi Hasan Khan, 10 O C 17.**

(15) Charge on immoveable property.

15—Suit to enforce—Limitation Act, Art. 132.

(16) Mortgage with consent of real owner payment by benamidar—Charge.

16—Where a benamidar executes with the consent of the real owner, a mortgage for a consideration binding upon the real owner, a payment made by the benamidar of the mortgage amount is not an officious and voluntary payment and the benamidar is entitled to a charge upon the property. 15 All (P C) 304 applied and followed. **Subbammal v. Muthu Pathan, 13 M L J 228.**

Charge-*Contd.*

(17) Purchase pending appeal—Stranger—purchaser and decree-holder purchaser differene between—Charge.

17—Modification decree on apperl—Auction purchaser's rights how effected—Practice—Plaint:—

In the case of third parties purchasing at execution sale the subsequent reversal or modification of the decree or order under which the sale took place does not affect their rights, but it is otherwise in the case of decree-holders themselves purchasing and their purchase is subject to the final result of the litigation. This rule applies even when the property is knocked down for a sum equal to or less than that eventually found due 10 All 166 ref. to. *Quære*-Whether the decree-holder purchaser will have any charge upon the property purchased for the amount found due. 27 Cal 810; 19 W R 416 ref, to. If he has the proper remedy for him will be to pray for possession on condition that the defendant fails to pay within a time to be fixed by the Court the amout finally found due. **Syed Nathadu Sahid v Nallu Mudaly. 27 Mad 98.**

(18) Charge not excluded by mere contract to defer payment of purchase money nor by any contract inconsistent with charge.

18-Indian Registration Act (III of 1877)secs. 17, 50—Unregistered conveyance—Transfer of possession—Notice by holder of registered conveyance—Equitable rights—Bona fide purchase—Estoppel.

S & B executed an unregistered agreement covenanting to get the name of N recorded in respect of a certain share which they transferred to him under the same document, in consideration of his procuring evidence in a suit by the decree in which they had received something, either express contract, or at least something from which it is a necessary implication that such a contract exists, in order to exclude the charge given by the statute. The charge is not excluded by a mere personal contract to defer payment of a portion of the purchase-money, or to take the purchase-money by instalments, nor it is excluded by any contract,covenant, or agreement with respect to the purchase money which

Charge-*Contd.*

(18) Charge not excluded by mere contract to defer payment of purchase money nor by any contract inconsistent with charge—*Concld.*

is not inconsistent with the continuance of the charge.

A conveyance or sale in consideration of a covenant to pay a sum of money in the future is different from a sale in consideration of money which the purchaser covenants to pay. The distinction between the two may seem fine one, but it is a real distincation.The former does not give rise to a charge while the latter does.

Webb v. Macpherson. 5 Bom L R 838=8 C W N 41=13 M L J 389=31 Cal 57=30 I A 238.

Notes:—Ap: 29 Mad 305. Fol: 31 Cal 505 P. C. Ref: 8 C W N 225; 14 M L J 105; 27 Mad 435; 6 Bom L R 557; 30 Cal 410=10 C W N 276=4 C L J 102; 30 All 172 F B =(1908) W N 71=5 A L J 243.

(19) Charge on immovable property taken in charge for loan not illegal.

19—Presidency Banks Act (XI of 1876):-It is not illegal for a bank, incorporated under the Presidency Banks Act, 1876, to take a charge on immoveable property as a security for an existing loan. **Turner v. The Bank of Bombay. 2 Bom L R 803=25 Bom 52.**

Notes—Ref: 19 M L J 737.

(20) Attorney power of, if creates a charge on immoveable property.

20—Where a power of attorney was executed by A in favour of B to enable B to recover the rents and profit of the profits of which A was the administrator in order to pay off an amouut advanced by B to A as such administrator: *Held*:-that inasmuch as the document was entered in Book IV instead of Book I, it was not registered according to the provisions of the Registration Act, and therefore could not affect immoveable property. 7 Cal 196. **Indra Bibi v. Jain Sirdar Ahiri. 7 C L J 149; 12 C W N 316; 35 Cal 845.**

(21) To borrow money on a charge on property.

21—Agreement to borrow money on a charge —Agreement creates a valid charge. **14 Bom L R 45.**

Charge-*Concld.*

(20) To borrow money on a charge on property—*Concld.*

Keeping alive of—Intention on date of acquisition. **9 A L J 226.**

(22) Co-sharer making payment of Government revenue for another.

22—One co-sharer making payment of Government revenue for another. **A W N 1886, 269.**

(23) Sale in Court-auction of property subject to.

23—Sale in Court-auction of property subject to—Right of purchaser, in suit by holder of charge, to contest the charge. **1 N L R 150.**

(24) Sum recoverable by Government, first charge on proceeds of sale.

24—Sum recoverable by Government as stamp fees, first charge on proceeds of sale. **25 Mad 733, 12 M L J 405.**

Charge for Dower.

See Mahomedan Law.

Charge of Law, Effect of

See (1) Court Fees Act 1870 S. 7, Sch. II cls. 3, 4.
(2) Practice & Procedure. **27 Mad 131.**
(3) Statutes construction of. **6 M L J 122.**

Chariramna Holdings.

1.—Bengal Tenancy Act (VIII of 1885), s.5 (2)—Notice-Service-Transfer of Property Act (IV of 1882), ss.106, 108 (o). 111 (g).

The question being whether certain holdings situated in the tract known as *chariramna* or pasture lands in Mouzah Basantpur in Zillah Purnea were permanent tenancies, it was proved that sales by private treaty and by auction through Court of such holdings were frequent, that cases of ejectment were uncommon, that such holdings frequently passed to the heirs of the deceased tenants and that mutation of names in the zemindar's *sherista* had been frequently allowed sometimes on payment of *nazarana* and sometimes without: *Held* that the proper inference to be drawn from these circumstances was that the tenants had a permanent right in the holdings and were not liable to ejectment on notice. *Per Doss J.*—That, assuming that the lands were settled with the tenants only for the purpose of

Chariramna Holdings-*Concld.*

grazing cattle, the tenants had acquired a right of occupancy in the lands, before the Bengal Tenancy Act came into force, under s. 6 of Act X of 1859. (11 W R 231, Fol.). That it was not reasonable to hold that, at the inception of tenancies, it was intended by the parties that the lands were never to be used for cultivation, and tenants were raiyats within the meaning of s. 5, sub-s. (2) of the Bengal Tenancy Act. *Per Richardson J.*—The tenants had failed to prove that the lands were left for purposes of cultivation, or that they had acquired occupancy right therein. That by using lands, intended for grazing, for purposes of cultivation, the tenants did not incur forfeiture. **Sheik Latifar Rahaman v. A. H. Forbes. 14 C W N 372= 5 Ind Cas 783.**

Charitable bequests.

See cases under:—

(1) Hindu Law—Will—Construction of will—Bequest for charitable purposes.
(2) Endowment.
(3) Will-Construction.
(4) Mahomedan Law—Wakf.
(5) Hindu Law—Religious Endowment.

Charitable Endowment.

Ses also cases under:—

Landlord & Tenant. **8 C W N 545.**

1.-Trust-Debts incurred on behalf of trust—Decree, form of-Trust property not to be made liable but only the income.

Trust property, as such, cannot be made liable by a decree in respect of debts contracted for the purposes of the trust; but only the yearly income thereof can be made liable for its just debts. **Seetha Lakshmi Ammal v Srinivasa Aiyangar. 16 M L J 412.**

Charitable Institution, Suit relating to.

See (1) Costs—Taxation of costs. **20 Bom 301.**
(2) Right of suit—Subscription suits. **10 C L R 197.**
(3) Trust Act S.34, **18 Mad 443.**

Charitable intention.

See Will. **36 Cal 261.**

Charitable purpose.

Charitable purpose—Meaning of—Registration of Societies Act. **3 A L J 124.**

Charitable society.

See Act XXI of 1860 S, 20. Case No.(1). **28 All 384.**

Charitable trust.

See Cases under:—

(1) Limitation Act 1877 Sch. II art. 134 (1891, Art. 134).
(2) Mahomedan Law—Endowment.
(3) Religious Community.
(4) Cases under Right of Suit-Charities and Trusts.
(5) Right of Suit—Interest to support Rights.
(6) Trust.

1.—Charitable trusts—Perpetuity—Muktad trusts—Valid.

Trusts and bequests of lands or money for the purpose of devoting the incomes thereof in perpetuity for the performance of Muktad, Baj, Yejushei, and other like ceremonies, are valid "charitable" bequests, and as such are exempt from the application of the rule of law forbidding perpetuities. **Jamshed K. Tarachand v Soonabi. 10 Bom L R 417 = 33 Bom 122 = 1 Ind Cas 834.**

2.—Charitable Trust-Religious trust-Scheme of management.

The Privy Council framed a scheme of management of a temple in a way to meet the exigencies of the case without impairing the authority of the Mahant as the duly constituted manager of the institution. **Prayaga v Tirumala. 9 Bom L R 588.**

3.—Practice-Decree, setting aside of-Notice of motion-Jurisdiction-Public charitable bequests—Distribution of *tramdis* and *tras* among members of the testator's caste and to Sarasvat Brahmins-Doctrine of *cypres*.

Charitable trust-*Contd.*

When a decree, either preliminary or final, is once passed, the Judge passing it has no power to vary or alter it on an application made to him based merely on a notice of motion. A Lohana testator by his will gave a bequest of Rs. 7,500 for distribution of *tramdees* (brass pots) to the members of his caste and Saraswat Brahmins in Bombay; and he made another bequest to present *tras* (a kind of copper pot) and sugar candy among the members of his caste and Sarasvat Brahmins in 1440 villages in Cutch. The advocate General, as the relation of the plaintiffs, sued to have it declared that it was not practicable to carry out those bequests, and to ask the Court to apply them *cypres* to some other and more useful charity. *Held*, that the bequests in question were valid public charitable bequests, and were capable of being carried out. In cases of charitable bequests, the Court has no right to set aside the wishes of the testator and substitute another charity in the place of one directed to be established by him, simply because the one might not be so useful as some other that the Court might substitute. **The Advocate General of Bombay v Fardoonji Ardeshir Cursetji Fardoonji. 13 Bom L R 332.**

4.—Plaintiff's suit brought to recover money paid under the following circumstances, dismissed: Money was made over to the Deputy Commissioner on behalf of certain indigent persons whose parents or other relatives had been killed in an accident at the plaintiff's premises. At the removal of the corpses, the Deputy Commissioner in the presence of a large crowd expressed to the plaintiff, to the defective state of whose building the accident was partly attributable, that the sufferers were in very indigent circumstances and that looking to the plaintiff's means it was proper that he should come to the relief of their families. He at once expressed his readiness so to do. Some of the principal citizens of Amritsar who were then standing round were asked what they thought would be a proper sum for him to give. They then said Rupees 500 for the relations of each person. The Deputy Commissioner, however, expressed his opinion that Rupees 250 would be a more appropriate amount and accordingly the sum of Rupees 3,000 with Rupees 250 for the police and the medical attendant, was made over to one of the subordinates of the Deputy Commissioner, who had left the place. The Deputy Commissioner immediately

Charitable Trust-*Concld.*

after the money had come to his office, commenced a system of relief out of the money. In this way he had disposed of Rupees 300, when he received a telegram requesting him to stop the disbursement, and he shortly afterwards received a letter from the plaintiff's agent requesting the return of the money. He, however, disbursed the rest of the money, whereupon plaintiff sued.

A gift of money for a charitable purpose is not revocable when the trust is created for definite objects of bounty, and acted upon. **Sirdar Pertab Singh v Lewin. P R 43 of 1867.**

5.—Applicability to charitable trusts.

The Trustees' and Mortgagees' Power's Act XXVIII of 1886 does not apply to charitable trusts. S. 34 of the Act is repealed wholly; there is no saving or exception in favour of charitable trusts or of trustees of properties dedicated to charity. **Sir Dinshaw M. Petit, Bart. v Sir Jam-setji Jijibhai, Bart. 11 Bom L R 85.**

Charitable uses.

See Endowment. **6 C W N 321.**

Charities.

See (1) Advocate General. Case No.(1) **4 M I A 190.**

(2) Cases under Right of Suit—Charities and Trusts.

(3) Supreme Court, Madras.

(4) Civil. Pro. Code.

(5) Land Acquisition Act s. 54.

Charities.

1—Consent of Advocate General—Suit relating to charity—Amendment of plaint—Substitution of another plaintiff with the consent of the Advocate General.

A suit under S. 539 of the Civil Procedure Code was in the first instance brought by one person with the consent of the Advocate General. This was objected to, and it led to an amendment of the plaint by the addition of the second plaintiff, with the certificate of the Advocate General which ran:-"I give my consent to the amendment of the plaint of this suit as proposed."

Held, that the suit as brought is defective in a material particular; for S. 539 of the Civil Procedure Code nowhere speaks of the consent of the Advocate General to an amendment of the plaint, and it would be unduly forcing the words of the Code to hold that by virtue of the second consent given by the Advocate General it can be said of this suit that it was instituted by two persons having an interest in the trust and having obtained the consent in writing of the Advocate General. **Darves v Jainudin. 8 Bom L R 751=30 Bom 603.**

Charities-*Contd.*

2—Charities, suits relating to C P C s. 539—Suit relating to charity—Suit brought by the Advocate—General at the instance of relators—Dismissal of suit—Right of appeal—Relators cannot appeal in their own right.

Where a suit filed under S. 539, C P C by the Advocate-General at the instance of relators is dismissed, and the Advocate-General does not think fit to appeal, it is not competent to the relators to file an appeal on their own account against the dismissal. **Jan Mahomed Abdul v Syed Nurudin. 9 Bom L R 996=32 Bom 155**

See also Cases under C P C S 539.

3—Bequest to a—General charitable intention—Death of executors—Charity not established—Accumulations of interest on fund—Cypres doctrine. **Will—Construction, 36 Cal 261=1 Ind Cas 944.**

Charities—No authorities for the proposition that charitable property cannot be alienated at all.

4 A—A case which is to last as long as the pendency of a mortgage, is not bad as being for an indenfinite period.

As regards public charitable property, long lease are *pro tanto* alienations of the property. But it is competent to mortgage or alienate portions of the public charitable property for the purpose of the preservation of the charitable property. There is no authority for the proposition that public charitable property cannot be alienated at all.

Leases between a mortgagor and mortgagee, to last during the pendency of a mortgage, are not bad in themselves, though, they, like all other transactions between a mortgagor and mortgagee are to be looked upon with certain amount of suspicion.

As beween a mortgagor and mortgagee the

Charities-*Concld.*

possession of the mortgagor is presumed to be permissive and not adverse.
Mahomed v Ezekiel. **7 Bom L R 772.**

Notes.—Not fol; 30 Bom 395=8 Bom L R 296,

4B—Charity—Property burdened with a charge for charity—Alienability.

Where property is not merely dedicated to a charity, but burdened with a charge in respect of a charity as where the founder's family has a beneficial interest in the surplus income it can be alienated subject to the charge. **Muthu Nadan v Shumoogatha Pillai.** **7 Ind Cas 79.**

5—Application to Charity provided by a Parsi donor:

Where under altered circumstances through lapse of time or through other causes it appears to the Court that the charity provided by the donor could not be carried out literally in terms of his directions with any benefit whatever to the objects of his benefactions, the Court ought not to hesitate to give its sanction to a scheme which will carry out the charitable intentions of the donor to be gathered from the instrument establishing the charity, as nearly as possible to the original interest of such donor. **Hormusji F Warden.** **9 Bom L R 1203.**

Charter Act.

1—Press and Registration of Books Act, S. 18—Jurisdiction of High Court—Persons aggrieved—Trial on affidavits:—

The High Court of Calcutta as successor of the Supreme Court of Calcutta, has jurisdiction to deal with an application under S. 6, Indian Copyright Act, to have a name expunged from the catalogue of books kept at Bombay under the provisions of Act XXV of 1867; and a Judge appointed by the Chief Justice under S. 14 of the Charter Act to take the work of the Original Side of the Court has jurisdiction to try the case. Where a person gets his name registered in a catalogue of books in fraud of the rights of the proprietor of a copyright, such proprietor is a person aggrieved within the meaning of S. 6 of Act XX of 1847. When a case of this nature is clear upon the merits, the court is justified in disposing of it upon affidavit evidence An application under S. 6 of Act XX of 1847 complaining of the infringement of a copyright is a summary proceeding in respect of infringement within the meaning of S 14 of the Act, and therefore the entry of the applicant's name in the book of registry at the office of the Home Department of India is necessary before such proceeding can be commenced. **Abdoola Bhoy Sarafalli v Ismail Bin Shaikh Badul.** **10 C W N 134; 33 Cal 571.**

Charter Act-*Contd.*

Charter Act sec 15.

See Practice—Civil cases—Inspection and production of documents.
10 C L J 407.

Charter Act s. 15.

See Bengal Tenancy Act ss. 15 & 16 case No. (79). **14 C W N 788=12 C L J 1= 6 Ind Cas 193.**

See also.

Letters Patent.

1A—S. 15—Interference in cases under S. 145, Cr. P C.—

The High Court's power of interference under S. 15 of the Charter Act is discretionary and ought in relation to case under S. 145, Cr P C to be exercised with every caution. In a case in which the Court has proceeded with irregularity, the High Court should not interfere, unless it can be shown that some one has been materially prejudiced by such irregularity. **Sukh Lal Sheikh v Tarachand.** **9 C W N 1046=33 Cal 68.**

2—S. 15—Sanction Order—Interference with-Section 15—Practice.—

Where sanction had been accorded by the Sub-Judge and confirmed by the District Judge although the High Court might not interfere under S. 622 Civil Procedure Code, where the Courts below did not act illegally or with material irregularity, yet where the High Court had to consider the subject matter of the sanction upon the merits in connection with another application by way of appeal under S. 195, Cr. P. C with respect to the sanction of other offences on the same materials and the High Court held that the sanction accorded was not proper, the High Court might, in exercise of the powers vested in them under S. 15 of the Charter Act, set aside

Charter Act-*Contd.*

the sanction for the offences accorded by both Courts. **Palaniappa Chetty v Annamala Chetty. 14 M L J 74=27 Mad 223.**

Notes:—Ap· 30 Mad 392 F B Ref· 17 M L 266 F B.

3–S.15–Perpetual liability—High Court–Revision—

The High Court will exercise its extraordinary jurisdiction in cases where the effect of a decree of a lower Court is to impose a perpetual liability and thus affect the parties to an extent far beyond the mere money value of the suit. **Balkrishna v Janardana. 6 Bom L R 547.**

4—Sec. 15—Letters Patent, secs. 28 and 29—Powers of High Court to stay proceedings in Criminal Courts—Same matter in appeal.—

Held, that the High Court has jurisdiction to direct criminal proceedings ordered by a Civil Court to be stayed till the disposal of the appeal from that Civil Court. (34 Cal 848 Expl. B L R 426 Expl: F B). **L. Jogiah. 4 M L T 186= 18 M L J 466=31 Mad 511.**

5—Charter Act, S. 15.—Agency Court—High Court—Appellate jurisdiction–Right of the High Court to transfer a suit from Agency to District Court.

Within the meaning of S. 15 of the Charter Act, the High Court has appellate jurisdiction over the Agency Courts, and the District Court is a Court of jurisdiction equal to that of the Agency Court. The High Court may, therefore, under the said section, transfer a suit from the file of the Agent's Court to that of the District Court.

Per Curiam - Section 4 of Act XXIV of 1839 which authorises the Government to make rules for guidance of Agents does not preclude the High Court from making rules under section 15 of the Charter Act to regulate the practice and proceedings of the Agent's Court.

The Governor in Council is not authorised by section 4 to constitute any other Appellate Court than the Sudder Court, and therefore Rule 22, which provides that an appeal shall lie to the Governor in Council in the circumstances mentioned therein is *ultra vires* and illegal. **Vikram Deo v Papayamma. 9 M L J 323.**

6—Charter Act, s. 15.—Superintendence of High Court, power of.

II C. C. 87

Charter Act-*Contd.*

Held (*per* Stuart, C. J.) that under section 15 of the 24 & 25 Vic. Ch. 104, the power of superintendence to be exercised by the High Court is not merely administrative, or ministerial, but also judicial. **Musammat Bijee Kooer v Rai Damodar Dass. 5 N W P 55.**

7—S. 15—Issue of commission for examination of witness without jurisdiction—Revision. **Somasundram Chettiar v Manicka Vasaka Desika Gnanasambhanda Pandra Sannidi. 31 Mad 360.**

8—S. 15—Order of remand—Judgment–Civil Procedure Code (Act XIV of 1882). S. 584—Second appeal—Ground.—

A Judgment of Judge of the Court sitting singly and remanding a case after dealing with the whole case and setting aside the judgment and the decree of the lower Court is a judgment within the meaning of S. 15 of the Charter Act.

A question as to the weight which the lower Appellate Court should have given to certain documents, or that the lower Appellate Court misunderstood the result of the first Court's local investigation, is no ground of second appeal. **Rai Benode Behari Bose v Rai Pasupati Nati Bose. 13 C W N 105=4 Ind Cas 329.**

See also Cases under:—
" Letters Patent ".

9—Powers of Presidency Magistrate to commit accused previously discharged by another Presidency Magistrate—Order of discharge not set aside—Criminal Procedure Code (Act V of 1898 Ss. 252, 253, 403, 435, 436, 437, 439)—Reference to Full Bench upon a point raised before prisoner called to plead–Charter Act.—

There is nothing in the Code to the effect that the dismissal of a complaint being entertained so long as the order of dismissal remains unreserved. Hence a commitment by a Presidency Magistrate on fresh evidence is legal although the accused may have been previously discharged by another Presidency Magistrate and the order of discharge was not set aside.

Held also–That the Judge presiding at the Sessions has no power to refer to a Full Bench a point of law raised before the accused was called upon to plead. **Dolegobind Dass. 5 C W N 169=28 Cal 211.**

Charter Act-*Concld.*

10.—Judgment of the affirming Judge—Decree—Charter Act Arts 15 and 36—Appeal—Points on which the appeal should be heard —

The decree of one of two judges of a Division Bench, whose judgment has prevailed under the provisions of S. 575 of the Code of Civil Procedure, is appealable under S, 15 of the Letters Patent. On appeal under the Letters Patent, the appellate court has jurisdiction to hear the appeal not merely on the points on which the Judges of the Division Bench differed, but also on other points raised in the appeal. **Kunhunni v Srivullabhan. 11 M L J 10 F B.**

11.—Charter Act s. 15—Analogous appeals in superior and inferior Courts—Duty of inferior Court to await decision of superior Court.

The High Court has powers either under s. 622 Civ. P C or if not under s 15 of the Charter Act to interfere in cases where the lower Courts have not acted correctly in accordance with law.

Where a plaintiff failed to secure the production of an important document from the records of another Court though he took all reasonable steps for that purpose and the suit was disposed of by both the Court of first instance and the Appellate Court without reference to that document, the High Court in revision set aside the judgments of both the Courts.

When appeals preferred in analogous cases are pending some in an inferior and others in a superior Appellate Court, the inferior Court of Appeal would exercise a wise discretion to await the decision of the superior Appellate Court. **Mohant Gobind Ramanuj Das v Lakhun Parida. 11 C W N 112.**

11A.—Grove, purchaser of—Sharer—Wajibularz. A purchaser of a grove not being liable for payment of Government revenue is not a co-sharer in the village and is not entitled to pre-empt. 16 All 412 Dist; 2 A L J 612 applied. **Muhammad Ali v Hukum Kunwar. 2 A L J 288=1905 A W N 264=28 All 246.**

Notes.—Ref W N (1907) 173: 4 A L J 665.

Charter of incorporation.

1—Mosque, Mahomedan-Suit to set aside scheme—Rights of congregation—Crown if necessary party—Prerogative.

Charter of incorporation-*Contd.*

In 1852——53, some Mahomedan merchants of Mauritius purchased certain properties purporting to act on behalf of the place and founded a mosque. Thereafter from time to time adjoining properties were bought and added to the mosque by Mahomedan merchants purporting to act in the same way on behalf of the whole Mahomedan community In 1877 and on subsequent dates several purchases of properties were made by Cutchee merchants purporting to act on behalf of the Cutchee Mahomedan alone, but this practice was not consistently followed in later times, and though the Cutchees, being the richest members of the congregation, contributed individually in proportion to their means, considerable contributions were also made in the aggregate by the Hallaye and Soortee Mahomedans The administration of the affairs of the mosque was left mainly, if not entirely, in the hands of Cutchee Mahomedan because they were leading merchants but not because they belonged to that particular class of Mahomedans. In 1893 Cutchees executed deeds forming themselves into a society (which they subsequently had incorporated) consisting of Cutchee Mahomedan alone and excluding the other classes for all future time from membership of the society and the management of the mosque, for which purpose they appointed a committee or management out of their own body with extensive powers of selling and letting properties other than the mosque and its accessories. All the properties they declared to have vested exclusively in the society:—*Held* —That a portion of the congregation had no right by forming a new association to transfer all the property to the new association and exclude the rest of the congregation from membership and from participation in the management of the affairs of the mosque. The charter of incorporation obtained by the defendants did not legalise their position, as the only association which could claim to be legalised was the congregation on whose behalf the mosque had been founded. That the rule laid down in the French Civil Code (which is in force in Mauritius) that a religious community does not constitute a "Civil person" and cannot without being authorised by the State hold property has not always been carried out to its logical conclusions and the court will grant relief to aggrieved members of an unauthorised religious community against their fellow members. That having regard to the existing law of Mauritius the court in setting aside the deeds and the scheme of manage-

Charter of incorporotion-*Concld.*

ment set up by the defendants could not proceed to frame a new scheme of management such as would be entirely free from legal objections. In the absence of any reason to fear that the restoration of the *statu quo ante* would lead to mal-administration this should be left to the congregation to settle amicably, and give effect to, by obtaining a charter of incorporation. That in a suit by some of the aggrieved Hallayas and Soortees to set aside the deeds set up by the defendants the Crown was not a necessary party as the law of Mauritius does not require that the Crown should be impleaded and the prerogatives of the Crown would not be affected by the decision in the suit. That in any case the objection that the Crown had not been made a party ought to have been taken to the lower Court. *Quære*—Whether a congregation formed for the purposes of prayer and religious worship requires the sanction of the Government, and that without such sanction it becomes an illegal association, in the sense of being criminal within the meaning of Arts. 219 and 213 of the Ordinance 6 of 1838 ?

Ibrahim Ismail v Abdool Carr Peermamode. 13 C W N 26=35 I A 151 (P C.)

Charter-party 1--12

(1) Ship unable to enter port or lie there without previous lightening (1)
(2) Principal & Agent (2-7)
(3) Parties to suit (8)
(4) Conditions precedent. (9)
(5) Freight (10)
(6) Right to retain cargo for amount of bill for freight dishonoured. (11)
(7) Nomination of ship's Agents by freighters. (12)

Charter party.

See (1) Bill of Lading. Case Nos. (25 27,28) [**Bourke, O. C. 171, 309**
Bourke, O. C. 100
5 Bom., 313
(2) Damages—Remoteness of Damage.
(3) Guarantee
(4) Injunction—Special Cases—Breach of Agreement.
(5) Principal and Agent—Liability of Agents.

(1) Ship unable to enter port or lie there without previous lightening.

1 " Safe port or as near thereunto as she

Charter-party-*Contd.*

(1) Ship unable to enter port or lie there without previous lightening—*Concld.*

may safely get always afloat "—Rights of parties.—

where a vessel is chartered to load a full and complete cargo, and being so loaded, to proceed therewith to a " safe port or so near thereunto as she may safely get and deliver the same always afloat, " the master is not bound to sign bills of lading for, or to, sail to a port where the vessel cannot, by reason of her draught of water, lie and discharge " always afloat " without being previously lightened, even if the cost of the requisite lightening would, by the charter-party, fall on the charterers. By the terms of a charter-party a vessel was to take in a full cargo at Bombay, and therewith proceed to a " safe port in the Mediterranean (Spanish Ports excluded), as ordered on signing bills of lading,or so near thereunto as she may safely get, and deliver the same to the said charterers or their assignees always afloat. " Marseilles was at first named as the port of discharge, but subsequently the vessel was ordered to Cette, a French port a little to the west of Marseilles; and bills of lading, made out for Cette, were tendered to the master for signature. The master refused to sign the bills of lading or sail for Cette. The vessel's draught of water when loaded was such that she could not have entered or lain afloat in Cette harbour without discharging a portion of her cargo. The cost of lightening the vessel by lighters outside the harbour would, under the charter-party, fall on the charterers, and they were willing to incur the expenses necessary for that purpose. *Held* that it was no breach of the charter-party by the master to refuse to sail to Cette, or to sign bills of lading for that port. **Graham & Co. v Mervanji Nusservanji. 5 Bom 539**

(2) Principal and Agent.

2—Charter-party signed by agents for master and owner—Parties to suit—Liability of master—Liability of agents—Master of ship, the agent of charterer, to sign bill of lading—Right of master to recover from charterers sums paid by master as damages for short delivery of cargo —Appropriation of payments —Contract Act (IX of 1872), ss. 69, 230, 235.

By a charter-party, dated 20th September

Charter party-*Contd.*

(2) Principal and Agent—*Contd.*

1880 F. M. & Co., as agents for master and owner let the steam-ship Hutton to E, for a term of not less than three and not more than four months for the sum of Rs. 15,000 per month, payable in advance. By subsequent agreement the term was extended to 30th March 1881, and the charterer was to pay at the rate of Rs. 18,000 a month for the extended time. On 27th February 1881, the ship being about to proceed on her last voyage to Calcutta and thence to Bombay, E, finding himself unable to pay more then Rs. 6,000 out of the sum of Rs. 18,000, which was then due as hire for the month ending 9th March 1881, requested the plaintiff to pay F, M& Co. on his behalf the remaining Rs. 12,000.The plaintiffs did so in consideration of an agreement, whereby E assigned to them all the freight payable to E and all benefits under the said charter-party in respect of the then intended voyage of the Hutton It was also agreed between the plaintiffs and *E* that the said ship should be consigned to the plaintiffs at Calcutta and also to them at Bombay, and that the plaintiffs should receive all the freight, passagemoney, etc.. to be recovered for the said voyage, the plaintiffs charging two per cent, commission on the gross value of the freight shipped in Calcutta and two per cent. on the amount of freight collected by them in Bombay, and interest on the said sum of Rs. 12,000 at the rate of nine per cent. per annum. Due notice of this agreement was given to *F, M & Co.* On the 11th March, E, being unable to pay the Rs. 6,000, requested the plaintiff to pay that sum to *F, M & Co.* on his behalf, which the plaintiffs did,—E agreeing that the said payment should be on the same terms as those on which the Rs. 12,000 had been paid. The ship, having proceeded to Calcutta, returned with cargo to Bombay, where she arrived on 2nd April 1881. *F, M & Co* ,as agents for master and owner, refused to allow the plaintiffs to collect the freight payable in Bombay, and collected it themselves. The plaintiffs brought his suit, in the first instance, against the owner and the master of the *Hutton* (first and second defendants), praying for an account of the moneys received by the defendants or their agents in respect of the freight, and for payment of the balance found due after deducting the sums properly payable to the defendants for hire of the ship and and for Rs.400 damages sustained by the plaintiffs by

Charter party-*Contd.*

(2) Principal and Agent—*Contd.*

reason of the wrongful act of the defendants, whereby the plaintiffs had been deprived of the two per cent. commission. The plaintiffs alleged that the balance due to them would be about Rs. 9,500. The first defendant did not appear. The second defendant (the master) contended that he was not liable;that *F, M & Co.* had been especially appointed as agents of the owner; that they were not his (the master's) agents; and that they had no authority to sign the charter-party for him. He admitted that the sum of Rs.12,000 had been paid to *F, M & Co.* by the plaintiffs as agents for the owner; but as to the Rs. 6,000, he denied that it had been paid to *F, M & Co.* on his account or on account of the owner. He further alleged that there was a large sum due by E in respect of hire of the ship and other proper claims against him under the charter-party, and that the defendants were, therefore, justified in refusing the demands of the plaintiffs as assignees of E until the whole of their claims against E were liquidated. He alleged that *F, M & Co.* had received the freight of the ship, amounting to Rs. 20,426, and he claimed a lien on this sum in respect of the sum of Rs. 19,282 due for hire and other charges on the said ship, and Rs. 605 for money paid for short delivery of goods. The plaintiffs subsequently made *F. M & Co.* defendants to the suit. In their written statement, *F, M & Co.* stated that they had signed the chater-party as agents only and not as principals, and they contended that the plaintiffs could not proceed simultaneously against the first defendant and the second defendant, but must elect to proceed separately against either, and, further, that the plaintiffs could not proceed simultaneously against themselves (*F, M & Co.*) and the second defendant, but should elect to proceed separately against either. They admitted the receipt of the Rs. 12,000 as agents for the first defendant, and not as agents of the second defendant. As to the Rs. 6,000, they alleged that it had been paid to them, not on account of the *Hutton*, but in respect of claims which they had against E in connection with the *Clan Gordon*, another ship which had been chartered by E. They admitted the receipt of the freight of the *Hutton*, amounting to Rs. 20,426, but claimed a lien on this sum in respect of hire and other proper charges due under the charter-party. *Held* that the second defendant (the master) was not liable on the charter-party. He had given no authority to

Charter party-*Contd.*

(2) Principal and Agent—*Contd.*

F, M & Co. to sign it as his agents; and his conduct in acting under the charter-party, being referable to his character of, and duty as, master, did not amount to ratification. But inasmuch as he claimed to deduct from the freight received in Bombay sums which were paid either by him or to *F, M & Co.* for him, he was so far a proper party to the suit. *Held*, also that, under s 230 of the Contract Act (IX of 1872), *F, M & Co.* were not liable as principals on the charter-party as they appeared on the face of the charter-party to have signed merely as agents. But they were liable, under s. 235 of the Contract Act, for having untruly represented themselves to be the authorized agents of the master to enter on his behalf into the contract therein contained. Their liability was limited to the amount which could have been recovered from the master if he had really been their principal. No difference was made in their liability by the fact that the owner was also liable. As to the Rs. 6,000.—*Held* on the evidence that the plaintiffs at the time of the payment had specifically appropriated this sum to the hire then due for the *Hutton*. *Held*, further, that the charter-party was one of the class known as " *locatio navis et operarum magistri* ", that under such a charter-party the master would as between owner and charterer, sign bills of lading as agent of the charterer; that as between the owner and the charterer the latter was liable to defray the damages for non-performance of the contracts contained in the bills of lading, including damages for short delivery of cargo; and that, such being the liability of E as charterer, the plaintiffs as his assignees were bound by all the equities affecting him, so that the defendants might set off as against the plaintiffs whatever the owner of the *Hutton* might have set off against E if he had been the plaintiff. The second defendant (the master) alleged that he had paid in Bombay certain sums of money to consignees as damages for short delivery of cargo,and he claimed credit for such payments as against the plaintiffs. *Held* that he had no power to bind E by making such payments on his behalf in Bombay, where both E and the plaintiffs were resident, without the consent either of E or of the plaintiffs. In order to establish these charges against E and his assignees (the plaintiffs), it was necessary for the defendants to prove either that they were in fact due, in which case the master would be justified in paying them under s. 69 of the

Charter party *Contd.*

(2) Principal and Agent—*Contd.*

Contract Act, or that their correctness had been admitted by E or his agents. The defendants having failed to produce the required proof, the claim of the second defendant was disallowed.

Hasonbhoy Visram v. Claphan. 7 Bom 51.

3.—Misdescription of tonnage of ship—Misrepresentation in contract—Contract Act (XI of 1872), ss. 10, 13, 14, 18, 19—Condition precedent.

The defendants in Bombay chartered a ship from the plaintiffs, which was described in the charter-party as of the measurement of about 2,700-2,800 tons nett register. The ship had never been in Bombay, and was wholly unknown to the defendants. Evidence was given that in the negotiations for the charter-party the plaintiffs stated to the defendants that the ship was certainly not more than 2,800 tonnage register. She, however, turned out to be of the registered tonnage of 3,045 tons, and the defendants refused to accept her in fulfilment of the charter-party. *Held* by Parsons, J; that the defendants were entitled to treat the contract as void by reason of the erroneous statement of the plaintiffs with regard to the size of the ship. (Contract Act, IX of 1872, ss. 10, 13, 14, 18, 19,). *Held* on appeal Sargent, C. J; and Farran, J, (1) that the representation in the charter-party as to the tonnage of the vessel was intended to be a substantive part of the contract between the parties; (2) that the statement in the contract was a condition precedent of which the defendants were entitled to avail themselves whether or not they would have suffered loss had they accepted the ship, (3) that the facts justified the defendants in repudiating the contract.

Oceanic Steam Navigation Company v Soonderdas Dhurumsey. 15 Bom 389.

Affirming the decision in S. C **14 Bom 241.**

4.—Optional clause—Choice of ports to load cargo—Election of port.

The plaintiff chartered the defendants' ship to proceed from Bombay to Jedda and thence carry a cargo of pilgrims to Calcutta. The charter party contained the following clause:—" Owners to have the option of requiring the charterer to ship salt at Ras Rawaya or at Aden to fill up the lower holds of the steamer, at a lump sum of Rs. 12,000 payable before delivery at the port of discharge.Rs.2000 to be deposited by the charterer on account of the above freight,out which Rs,500 to be paid here (Bombay) 48 hours before sailing. and

Charter party-*Contd.*

(2) Principal and Agent—*Contd.*

Rs.500 before departure of the steamer from Jedda". Before the ship left Bombay the plaintiff was called upon to pay and paid the Rs.1,500 advance freight. On the ship's arrival at Jedda, the plaintiff was required by the defendants' agent to name the port where he intended to load the salt, and pay the Rs. 500 named in the charter-party, The plaintiff, in reply, named Aden and paid the Rs.500, which the defedants' agent acknowledged as received "for filling up salt to go to Aden." This was on the 22nd July. The captain, however, believing that the plaintiff would not find salt at Aden for Calcutta, refused to sail to Aden to load the salt, unless the expense of going there and returning to Jedda for the pilgrims was guarenteed by the plaintiff, which the plaintiff refused to do. Subsequently, on the 30th July, the captain, on the instructions of the defendants, informed the plaintiff that the choice of the port to load salt was with the defendants, and that they named Ras Rawaya as the port where the plaintiff was required to load his salt, and refused to go to Aden. The plaintiff refused to go to Ras Rawaya. There was, to the defendants' knowledge, no salt at Ras Rawaya. There was plenty of salt at Aden, though none offering for Calcutta, owing to the prices ruling at the latter port. The captain refusing to load the pilgrims unless the balance of the Rs 12000 salt freight was paid in advance, the plaintiff paid it, and brought this suit to recover the whole of the said sum *Held* that the plaintiff was entitled to succeed (*i*) because by the true construction of the contract the choice of the port must be taken to be with the plaintiff, who had to do all that was necessary to provide the salt, the option given by the contract to the owners being as to whether they should require salt to be loaded or not; and (*ii*) because, if the election of the port was with the defendants, they, through their agent at Jedda, conclusively determined their election in favour of Aden at latest on the 22nd July when they accepted the Rs 500 "for filling up salt to go to Aden." **Abdul Rahman Allarakhia v Hasanbhoy Visram. 16 Bom; 501.**

5.—Mistake in date—Mistake mutual or unilateral—Rectification or rescission of contract.

The plaintiffs required a steamer to sail from Jedda "fifteen days after the Haj," in order to convey pilgrims returning to Bombay. They chartered a steamer from the defendants in June 1891 for that purpose. The defendants chartered their steamers by English dates. The date inserted in the charter-party was "the 10th August 1892 (fifteen days after the Haj)". "The 10th August 1892" was given or accepted by the plaintiffs in the belief that it corresponded with the fifteenth day after the Haj. The defendants had no belief on the subject, and contracted, only with respect to the English date. The 19th July 1892, and not the 10th August 1892, in fact corresponded with the fifteenth day after the Haj. On finding out the mistake in March 1892, the plaintiff brought this suit for rectification of the charter-party by the insertion of the correct date, the 19th July 1892, instead of the erroneous date, the 10th August 1892. Meanwhile the defendants had let all their steamers, and could not give the plaintiff one for the 19th July 1892. *Held* that the agreement was one for the 10th August 1892, and that, as that date was a matter materially inducing the agreement, there could be no rectification, but only cancellation, even if both parties were under a mistake. *Held*, further, that the mistake was not mutual, but on the plaintiffs' part only; and, therefore, there could be no rectification. A plaintiff seeking rectification must show that there was an actual concluded contract antecedent to the instrument sought to be rectified, and that such contract is inaccurately represented in the instrument.. **Abdul Rahman Allarkhia v Bombay and Persia Steam Nevigation Company. 16 Bom; 561.**

6—Charter-party—Contract between shipper and freight brokers, effect of—Notice of a charter party not sufficient to bind the intending shipper to its terms.

Where there is no contract or privity between a shipper of goods and the captain of a ship chartered by frieght-brokers who have given shipping orders to the shipper, the captain has no right to compel the shipper to ship his cargo, under the charter-party but is bound either to return the goods already shipped, if demanded back by the shipper, or to carry them under the terms of the shipping orders. A shipper who knows of all the clauses in the charter-party must not be taken, by sending his goods on board, to have contracted with the owners and to be bound by all the

Charter party-*Contd.*

(2) Principal and Agent—*Contd.*

terms of the chater-party if sub-charter who contracted with him fails to perform his contract. Where a chartered ship is held out publicly as a general ship and a person ships goods on board of her, he is not bound by any of the terms of the charter-party but that where he knows of a charter-party he is *prima facie* bound by its terms, though to what extent depends upon circumstances. Mere notice of a charter-party is not sufficient to bind the intending shipper to all its terms. In order to bind the shipper there must either be express or implied contract or else circumstances and contract on the part of the shipper which operate as an estoppel against him. Where clean mate's receipts are given to a shipper of goods, he has a right to demand bills of lading subject to the charter-party. "Completion of Shipment" means the complete shipment of the entire cargo according to the charter-party **Chhabildas v. Ralli, 1 Bom L R 319=23 Bom 551.**

7.—Contract of—Ship-owner's lien—Charterer and sub-charterer—Bill of lading issued to sub-charterer by captain—Captain authorized by owner of ship to sign bill of lading-Sub-charterer whether bound by charter party-"Without prejudice to the charter," meaning of—Notice by shipper of charter party, effect of.

Where the captain of a chartered ship was, by the terms of the charter-party, authorized to sign bills of lading on behalf of the ship-owners, a bill of lading issued by the captain to a sub-charterer entitled the latter to have the goods delivered to him on the terms of the bill of lading, irrespective of the charter-party, although he had notice of it. (1 Cal and Fin 1832; 9 Bing 574, 1883. L R 1 C P 689,1866; L R 15 Q B D 1884 Fol). A stipulation in the charter party that the bills of lading were to be signed by the captain "without prejudice to the charter" only meant that the rights of the shipowners and the charterers against each other under the charter-party were to be preserved. Third parties to whom the bills of lading were issued would not thereby be made liable to the conditions stipulated in the charter-party. L R 1894, 1 Q B 612 Ref. Notice by a shipper of the charter party has not the effect of incorporating into the bill of lading any terms which are inconsistent with it and which the captain was not bound to embody in the bill of lading. If the

Charter party-*Contd.*

(2) Principal and Agent—*Concld.*

charter-party shows that the captain exceeded his authority in signing the bill of lading, and the shipper knew this, he cannot enforce the terms of the bill of lading uncontrolled by the charter-party. If the shipper knew that there was a charter-party, and had the opportunity of reading it, and did not trouble himself about it, he might be treated as knowing the contents. **Turner v Haji Goolam Muhammad Arjam. 1 A L J 553 P C=31 I A 222=28 Bom 573=6 Bom L R 743=9 C W N 1.**

(3) Parties to suit.

8.—If a master of a ship signs a charter party in his own name as a contracting party, and at the same time discloses the name of his principal, he can sue upon the charter party, but if a master signs a charter party for the owner as a contracting party, he cannot sue upon it. The owner of a ship residing in England can be sued in a Civil Court in Burma for a breach of the charter party, provided the cause of action arose within the jurisdiction of the Court in which the suit is instituted. (5 Bom 584; 7 Bom 51; 5 Cal 71; 5 Bom 589; 5 Cal 79 Ref). **F W Chadwick v Nawsee Dewraj L B R 1872—1892, 658.**

(4) Conditions precedent.

9—"Now on her passage"—Breach of warranty—Principal and agent—Undisclosed principal.

The plaintiffs entered into a contract of charter-party with the defendants, whereby it was agreed between them and the defendants, acting for the owners, "that the steamer *Atholl*, now on her passage to Calcutta, being tight, staunch, and strong, etc. shall receive on board from the charterers a complete cargo of merchandise, to consist of 700 tons dead weight, and being so laden shall therewith proceed to London with liberty to call for any legal purpose at any intermediate port or ports; freight to be paid on the above cargo on right delivery of the same at and after the rate of £ 4-2-6 per ton; charterers to have the option of cancelling the charter-party, if the steamer has not arrived in Calcutta on 16th April 1871." The defendants signed the charter-party, as "agents of steamer *Atholl*." The steamer was not, at the time the charter-party was entered into, on her way to Calcutta, being then in the port of London, and she did not start

Charter party-*Contd.*

(4) Conditions precedent—*Concld.*

for same days after the date of the charter-party. She touched at Madras and Colombo on her way, and did not arrive in Calcutta until 11th April. Rates of freight having declined since the middle of March, at which time it was alleged, the steamer ought to have arrived, the plaintiffs sued the defendants for damages. *Held*, the defendants were liable. The statement in the charter-party that the steamer was on her passege to Calcutta was a condition precenent. **Schiller v. Finlay.** **8 B L R 544.**

(5) Freight.

10—Bill of lading—Liability of master where quantity signed for is more than cargo shipped.

The plaintiff chartered a ship, of which he was master, to one *C H C*, of Calcutta, under a charter-party, by which it was agreed that the ship (which was then at Melbourne) should proceed to certain ports and there load a cargo for Calcutta, "the cargo to be delivered to the charterer at Calcutta, on being paid freight at and after the rate of the lump sum of £ 1,150 for the full reach of the ship, the said freight to be paid on the unloading and right delivery of the cargo as customary, less any advances that may have been made." On the arrival of the ship at Calcutta, *C H C* requested the plaintiffs to deliver the cargo to the defendants as his agents which the plaintiff agreed to do on having payment of the freight guaranteed by the defendants. The defendants were *bona fide* holders of the bills of lading which had been signed by the plaintiffs in respect of the cargo. They sent to the agents of the plaintiff in Calcutta the following letter: "As it will be necessary for us for the protection of our interests to get delivery of the cargo, and as we do not care about further trouble in the matter, we agree to guarantee payment of the balance of freight due on the charter party, less any claims for short delivery," etc. On unloading there was found to be a deficiency in quantity between the goods mentioned in the bills of lading and those actually shipped and delivered. *Held* that, notwithstanding this, the plaintiff was entitled to the whole of the freight specified in the charter-party, and was justified in keeping the cargo until the freight was paid.

Dods v. Stewart **8 B L R 340; 17 W R 49.**

Charter party-*Contd.*

(6) Right to retain cargo for amount of bill for freight dishonoured.

11—*M* chartered a ship to load a cargo at Cardiff and proceed therewith to Madras, the freight to be paid in London on unloading and right delivery of the cargo; one third by M's acceptance at three months from the sailing of the ship (the same to be returned if the cargo were not duly delivered), and the remainder by like bill at three months from the date of delivery in London of the certificate of right delivery of the cargo. The charter-party provided for payment of a commission on the contract, ship lost or not lost, that the £ 150 should be advanced in cash at the port of discharge on account of the freight against the captain's draft on *M*. The cargo was loaded accordingly, a bill of lading was given for the same, and the ship sailed from Cardiff on the 8th October 1863, *M* having consigned the cargo to *A & Co* who carried on business at Madras. On the same day the owners drew a bill on *M* at three months for £ 261-1*s*. 10*d*, being one third of the freight. On the 10th October 1863. the general agents in London of *A & Co.* advanced to *M*, on *A & Co.*'s account and out of their funds, £ 700, received as security for such advance the bill of lading blank, and endorsed and forwarded the bill to *A & Co.* On the 29th October 1863, *M* accepted the bill for £ 261 1*s*. 10*d*., and in the following December he suspended payment, and the bill was protested. On the 14th January 1864, the ship arrived at Madras, and thereupon *A & Co*, as holders of the bill of lading, applied for the delivery of the cargo. and offered to advance the £ 150 in cash pursuant to the charter-party, but the captain claimed to retain the cargo for the value of the dishonoured bill and the balance of freight due. *Held* that the terms of the contract were at variance with the right of lien so claimed, and that it was not suspended by the bill, nor revived by the freighters' insolvency.

Arbuthnot v Daigre **2 Mad, H C R 88.**
See also **Bjorck v Madras Railway Company** **2 Mad., H C R 102 note.**

(7) Nomination of ship's agents by freighters.

12—Right of agents to sue on charter-party—Ships "going seeking," Meaning of,

Charter party-*Concld.*

(7) Nomination of ship's Agents by freighters—*Concld.*

A charter-party made between the defendants (the owners of the *Seaforth*) and H *& Co.* (the freighters) provided that the owners should employ at the ports of discharge the consignee nominated by the freighters to transact the ship business there inwards and outwards on the customary terms. not exceeding 2½ per cent. on amount of freight payable inwards, and 5 per cent. outwards. H *& Co.* nominated the plaintiffs to transact the ship's business in Bombay (a port of discharge) with the knowledge and consent of the master of the *Seaforth*, and the plaintiffs accepted and acted under such nomination. The defendants refused to pay the plaintiffs commission on the outward freight of the *Seaforth* on the ground that, under the circumstances under which such freight was procured, the plaintiffs were not under the charter-party entitled to receive commission on it. *Held* that the plaintiffs were sufficiently within the consideration of the charter-party to maintain a suit for the breach of such clauses of it as were inserted for their benefit. Meaning of the mercantile expression of ship "going seeking" discussed **Blackwall & Co, v. Jones & Co. 7 Bom A O C R 144**

Notes:—Ref: 6 Bom L R 421.

Chastity.

See (1) Hindu Law—Maintenance.
5 C W N 549.
(2) Mahomedan Law—Inheritance.
(3) Hindu Law (inheristance)

Chattel

Chattel mortgage of—Priority.
13 C W N 813 P C

Chaukidar.

See cases under:—
Limitation Act, 1877 Art 7 (1859 s 1 cl 2).

Chaukidari Village—

See cases under:—
(1) Bengal Regulation XX of 1817 s. 21.
Case No 1 **18 W R 298**
(2) Village Chowkidars Act,

Chaukidari Act.

1.—Possession, suit for-Zemindar and putnidar—Resumption by Government and subsequent settlement with zemindar-Frame of suit.

Certain lands included in a *putni pottah*, having been chaukidari chakran lands, were resumed by Government and subsequently settled with the zemindar. The putnidar sued for possession of these lands.

Held, the suit was one for possession and not for specific performance of a contract and was maintainable, even if all the parties to the contract were not made parties to the suit.

Kumar Bunwari Mukunda Deb v. Bidhu Sundar Thakur. 7 C L J 439=35 Cal 346=12 C W N 459.

2.—Resumption, title—Chowkidar, power to appoint.

Certain chowkidari chakran lands were resumed by the Government and transferred to the holder of the zemindari within which they were situated. Long anterior to this, the whole of the zemindari excluding certain lands in the khas possession of the zemindar had been granted in putni. The putnidar claimed to be entitled to the resumed land. The zemindar and the lessee from him resisted the claim on the ground that as under the putni lease right was reserved to the zemindar to appoint chowkidars upon a vacancy arising in the office, the zemindar was entitled to the lands upon resumption.

Held, that the fact that the zemindar was entitled to make an appointment to the office of chowkidar, did not create in him an interest in the lands held by the chowkidars, which, upon resumption and transfer to the zemindar, would pass to the putnidar from whose lease they had not been excepted. **Grish Chandra Roy v Hem Chandra Roy. 5 C L J 28.**

3.—Resumption and transfer to zemindar—Putnidar's right to claim settlement for zemindar—Suit, virtually for specific performance—Conditions which zemindar may impose-Equitable defence-Liability of Putnidar to pay amount of assessment by Collector and part of the profits.

A suit by a *putnidar* against his *zemindar* for recovery of resumed *chowkidari chakran* bought on the ground that under the terms of the *putni* the *putnidar* became entitled to the *chowkidari chakran* lands as soon as they were

Chaukidari Act-*Contd.*

transferred by the Government to the *zemindar*, is virtually a suit for specific performance of contract.

The *zemindar* would be equitably entitled to refuse settlement asked by the *putnidar* unless the *putnidar* agreed to the conditions as to payment of the assessment made by the Collector and a proportionate share in the profits such as the zemindar would in the circumstances be entitled to impose on him.

Semble:—It is not correct to hold that the *putnidar* is not bound to pay to *zemindar* more than the assessment made by the Collector (5 C L J 33=11 C W N 201 (1906); 4 C W N 814 (1900), Ref.) **Rajendra Nath Mukherjee v Hira Lal Mukherjee.** **14 C W N 995= 7 Ind Cas 554.**

4.—Chowkidari chakran lands, resumption of, settlement with zemindar, sale for non-payment of Government revenue.

When chowkidari chakran lands, after resumption and transfer to the zemindars, have been sold for non payment of the Government assessment, the zemindar as also the putnidar are entitled to share in the surplus sale proceeds, provided the chakran lands are included within the putni grant. The determination of this question does not depend upon the decision of the question of the right of the putnidar to hold the chakran land upon payment of additional rent.

Hiradas Goswami v Nistraini Gupta. **5 C L J 30.**

Notes.—Ref: 5 C L J 33; 34 Cal 109.

5.—Patni, construction–Zemindar—Patnidar—Lands held by Chowkidar, revert to whom on resumption.

In the absence of a contract to the contrary, the Zemindar who appoints and dismisses Chowkidari land is in enjoyment of their services since the creatain of the patni lease is entitled to the lands held by the Chowkidars after the resumption of such lands by the Government. (5 C L J 28 dist). **Nityanund Hazra v Maharajadhiraj Bejoy Chand Motab.** **7 C L J 593.**

Chaukidari Act-*Contd.*

6.–S. 50–Resumption and transfer–Act VI (B C) of 1870, Ss. 48, 51, 61 and 64–Limitation Act, (XV of 1877) Sch. II Art. 14–Presumption of fact—Evidence Act (I of 1872) s. 114—Burden of Proof—Jurisdiction of Civil Court.

Per Mitra and Woodroffe JJ:—When the plaintiff sues for the recovery of possession of land on the allegation that the land is Chaukidari Chakran land and lies within his zemindari and the Collector has transferred the same to him, he is bound in the first instance to prove so much of his case as has been denied or has not been admitted by the defendant. It being found that the land was not Chaukidari Chakran land and did not lie within the zemindari of the plaintiff, any transfer made by the Collector in his favour under s. 50 of the Act, is not authorised by the Statute and does not confer any title on him. An order passed without jurisdiction need not be set aside and Art. 14 of the Limitation Act, Sch. II does not apply to such a case. An order of the Collector under s. 50 is of the nature of a vesting order and is not an order contemplated by the Limitation Act Sch. II, Art 14 and does not require to be set aside, specially at the instance of one who was not a party to it. Such a party has no cause of action until his possession has been interfered with. Article 14 cannot be invoked against a defendant defending his possession unless the law makes the order final by reason of its not being contested within the specified time. The mere fact that the Collector has made the transfer does not raise any presumption that the land was Chaukidari Chakran land and that the Collector acted within the Statute. Section 114 of the Evidence Act has no application to such a case. Per Pargiter, J, Contra.—Under s. 114 of the Evidence Act there is a presumption that the resumption was made legally, and by s. 61 of the Chaukidari Act the resumption is final. The objection that the order of the Collector was illegal as the Collector had come to a wrong decision regarding the estate in which the land lay, is not valid as it is a question merely of an error in the decision of the Collector and not a question of jurisdiction. The defendant had his remedy by a suit to set aside the order of the Collector. Under Art 14 and S. 28 of the Limitation Act, the defendant's title has ceased to extend and he cannot set it up in defence. The Civil Court has no jurisdiction to go into the question of the resumption and the transfer. The burden of proof lay on the defendant to show tha

Chaukidari Act-*Contd.*

the transfer which was admittedly made by the Collector under the Act and which must be presumed to have been made rightly, was illegal.

Raja Narendra Lal Khan v Jogi Hari. 2 C L J 107=32 Cal 1107.

Notes.—Fol: 33 Cal 693. Rel: 10 C L J 189; 36 Cal 726. Appl: 2 C L J 306.

See also "Bengal Acts."

7.—Village Chaukidars Act (VI of 1870 B. C.) Secs.48, 54, 55—Resumption——Parent estate—Detachment.

The effect of the resumption by Government of chaukidari chakran lands is to detach them from the parent estate. When such lands are thereafter settled with the zemindars he hold them on a different right altogether. A sale, therefore, of the parent estate for arrears of land revenue, does not pass any title to such lands.

Kashim Sheikh v Prasanna Kumar Mukherjee. 5 C L J 299=10 C W N 598=33 Cal 596.

Notes.—Dist: 11 C W N 201, 34 Cal 109; 5 C L J 33.

8.—S.51—Chakran land, resumption of—Lessee from Chaukidar, rights of.

When Chaukidari land is resumed and transferred by the Collector to the Zemindar the interest of the Chaukidar in the land and along with it, all rights created by him in favour of others, cease. S. 51 of the Chaukidar Act does not save rights created by the Chaukidar but refers to contracts made by the Zemindar in respect of the village in which the Chaukidari land or any portion of it is situate. **Krishnakinkar Dutta v Mahanto Bhagaban Das. 12 C W N 161.**

9—S. 55—Act XI of 1859, Ss. 5, 6—Chaukidari assessment—Arrears for 3 years—Sale—Validity.

S. 55 of Act VI of 1870 (B. C) does not prohibit the Collector selling the land for the arrears of Chaukidari assessment of more than one year. If he so sells, his proceedings are irregular, but the sale is not necessarily or *ipso facto* void.

If a Collector issues a notice under S. 6 instead

Cdaukidari Act-*Concld.*

of under S. 5 of the Act XI of 1889, it is a mere irregularity which does not render the sale a nullity. (31 Cal 255; 31 I A 52; 32 Cal 111 ref to.)

Maharaja Sir Jotindra Mohun Tagore Bahadur v Jogendra Nath Roy. 6 C L J 99=11 C W N 1107.

10—Resumption—Transfer to zamindar—Right acquired in land—Settlement by a person not having any right—Bengal Tenancy Act VIII of 1885 s. 181, if applicable.

Where Chaukidari Chakran lands which had been resumed were settled upon tenants by a person who had no right to deal with the lands and the tenants with whom settlement had been made set up title as against the real owner on the ground that they had acquired *bona fide* a right from one whom they *bona fide* believed to have a right to let them into possession and were consequently occupancy or non-occupancy raiyats. *Held*, that the tenants did not acquire any right and 20 Cal 708 did not apply. Harrington and Bodilly JJ.—Chaukidari Chakran lands when resumed and transferred to the zemindar become his zerait lands. Mookerjee J—Upon such transfer the lands are at the zemidar's disposal to be dealt with by him as mal or zerait at his option. Applicability of s 181 of the Bengal Tenancy Act to such lands considered. **Shaikh Jonab Ali v Raikbuddin Mallik. 9 C W N 571=1 C L J 303.**

Notes—Fol: 5 C L J 33=11 C W N 201=34 Cal 109. Ref: 6 C L J 572.

Chaukidari Chakran Lands.

See Chowkidari Act.

Chaukidari Chakran lands—What are. Act VI of 1870 (Village Chaukidar,) **14 C L J 151.**

1—Partition, partial—Co-owners, not members of joint family-Suit, if maintainable-Chowkidari Chakran land.

One of the co owners of an estate sued the other co-owners for partition of Chowkidari Chakran lands of one village only of the estate.

Held, that the reasons against the partial partition of a joint family property did not apply to such a case and the suit was maintainable. 28 All 39 followed. (7 Cal 577 commented on; 1 C L J

Chaukidari Chakran Lands-*Contd.*

40 relied on). **Syed Habibur Rasul Abdul Faiz v Ashita Mohan Ghosh. 12 C W N 640.**

2—Right of occupancy—Ejectment—Tenant-at-will—Act X of 1859, S. 6.

Held that a tenant can acquire a right of occupancy by S.6 of Act X of 1859.(B L R sup 202; 3 W R Act X 29; 17 W R 231; 21 Cal 129; 6 Lef Comp 15, referred to). **Ram Kumar Bhattacharjee v Ram Newaj Rajguru. 31 Cal 1021=8 C W N 860.**

3—Zemindar and Putnidar—Chowkidari Chakran Land, resumption of—Acceptance of rent from tenant by zemindar—Right to Khas possession—Putnidar—Landlord and tenant—Landlord letting under a doubtful title.

Certain Chowkidari Chakran lands were resumed by Government and made over to the zemindar defendants who allowed the tenant-defendants to remain on the lands and accepted rent from them. The plaintiff who was the putnidar was by virtue of the putni lease entitled to all resumed lands without any adjustment of rent.—*Held* that plaintiff was entitled to obtain possession by ejecting the tenant-defendants. But if the zemindar had acted *bona fide* under a doubtful title, the case may be different. (4 C W N 814; 20 Cal 798 dist.). **Upendra Narain Bhattacharya v Pratap Chander Pardhan. 8 C W N 320=31 Cal 703.**

4—Ss. 51, 52—Chaukidari Chakran—Resumption and settlement with Zemindar—Right of putnidar to possession—Liability to pay revenue assessed—Resumed land, if forms a separate estate—Regulation VIII of 1879, S. 41.

Where a putni lease conveyed to the putnidar all the lands of which the zemindar at the time of the execution of the lease was possessed in the Mouzah of which the putni was granted and the Mouzah included Chaukidari Chakran land:-*Held* that on resumption by the Government and settlement with the Zemindar under Act VI (B C) of 1870, the putnidar became entitled to possession of the Chaukidari Chakran land, subject only to payment to the Zemindar of the extra assessment of revenue imposed on account of the resumed land. (10 C W N 598; 33 Cal 596 dist.). *Mookerjee* J.—If in assessing the putni rent the

Chaukidari Chakran Lands-*Concld.*

profits of all the lands including the Chakran land were fully taken into account the putnidar would not be liable to pay additional rent for the Chakran lands when they come into his possession. 4 C W N 814 considered. Whether land resumed land settled under Act VI (B C) of 1870 becomes separated and is held under a distinct title from the parent estate considered. (10 C W N 598, 33 Cal 596 doubted by *Mookerjee J.*). **Kazi Newaz Khoda v Ram Jadu Dey. 11 C W N 201, 34 Cal 109.**

5—Chowkidari Chakran Land (Act VI of 1870 B C), sec. 48—Chakran 'dasturi', meaning of-Reg VIII of 1793, S. 41.

Under Sec 48 of the Chowkidari Chakaran Act the resumed lands are to be transferred not to the zemindar of the village in which they are situated geographically but to the zemindar of the estate to which the lands appertain and of which they form a part and parcel. **Pratap Narain Mukerjee v The Secretary of State for India in Council. 3 C L J 530=10 C W N 637=33 Cal 390.**

6—Ss. 50, 55—Resumption and transfer to Zemindar—Chowkidari land, if part of estate—Purchaser of estate at revenue sale—Title to Chowkidari land—Regulation VIII of 1793, S. 41.

When Chowkidari Chakran land is resumed and transferred to the Zemindar under S. 50 of Act VI of 1870 (B C) such land becomes detached from the parent estate and the Zemindar holds it under a different title from his other malguzari lands. A purchaser of the parent estate at a revenue sale acquires no title in the resumed Chowkidari land. S. 41 of Reg VIII of 1793 has been impliedly repeated in districts or parts of districts to which Bengal Act VI of 1870 has been made applicable **Kashim Sheikh v Prosunno Kumar Mukerjee. 10 C W N 598; 33 Cal 596.**

7—Suit by putnidar against zemindar for possession of lands granted on putni.

A suit by a putnidar for possession of land granted by a zemindar on putni in 1854, and subsequently resumed by Government and made over to the zemindar only in 1899 is governed by Art. 113 of the Limitation Act. **Ranjit Singh v Radha Charan Chandra. 34 Cal 564.**

Chaukidari Register, entry in.

See (1) Evidence Act s. 32 (2)
(2) Partition. **12 C W N 640.**

1—Admissibility in evidence—if made in discharge of official duty—Made "in the ordinary course of business,"

Reg. XX of 1817 does not impose on the Daroga any duty of keeping a register of *chaukidari chakran* lands.

From the precise and uniform character of the entries as to such lands appearing in a register kept under the Regulations, *held*, that there could be no doubt that they were made under proper direction in the ordinary course of business though outside the statutory duty of the person who made them.

That S. 35 of the Evidence Act did not cover such entries, but S. (32) (2) of the Act applied, and they are admissible in evidence.

The pharse "in the course of business" does not apply to any particular transaction of an exceptional kind such as the execution of a deed of mortgage, but to business of professional employment in which the declarant was ordinarily or habitually engaged.

The "business" referred to may be of a temporary character (25 All 90, Ref: 23 Bom 63 Ref.)

Sheonandan Singh v Jeonandan Dusadh.
13 C W N 71=1 Ind Cas 376

Chaukidari tax.

See Cess. Case Nos. (15 & 16).
22 Cal 680.

Chauhans.

See Custom. **8 O C 94.**

Chelas.

—Right of, to succeed. **See** Religious Endowment. **7 C W N 145.**

See also:—

(1) Hindu Law—Inheritance.
(2) Custom.
(3) Hindu Law (Custom).

1—Sanyasi, property left by—Succession—

Chelas-*Contd.*

Dasnami sanyasis—Chela's right to succeed—Biraja Home ceremony, if essential to valid appointment of Chela—How and at what age performed—Period of probation-Mulmantras-"Yati" Mohunt if—Nomination of Chela as successor or election by neighbouring Mohunts, if indispensable—Subordinate muth, if must be governed by rules of parent muth—Lapse of Mohunth's property on death to monastery, custom of.

Held, on the evidence that according to the custom of the *dasnami* sanyasis, every aspirant for entrance into the order has to pass through a period of probation which may extend to months or even years and during which period it is open to the chela to revert to his natural family. It is not till the perfomance at the final ceremony of the Biraja Home, that the aspirant is irrevocably attached to the sect and completely severed from his family. It is, therefore, essential to entitle a chela to claim by inheritable the estate of his guru that the Biraja Home should have been duly performed.

It is not usual to wisper the mulmantras into the ears of the novice at the time of the first initiation when it is still uncertain whether he will or will not return to the enjoyments of worldly life, though some mantras may be recited on such an occasion.

Quære.—Whether the Biraja Home ceremony can be performed when the chela is under sixteen years of age : but unquestionably the rule is that the chela must have reached years of discernment so as to be able to realise for himself the full significance of the final act of the renunciation of the world.

The chela of a Mohunt cannot claim to be the latter's heir under the rule which allows a "virtuous pupil" to succeed to a "Yati."

The ordinary rule is that among the sanyasis generally no chela has right as such to succeed to the property of his deceased guru ; he must be nominated by his guru, such nomination being generally confirmed by the Mohunts of the order or in default of such appointment he must be elected by the Mohunts and principal persons of the sect in the neighbourhood.

But this is not a universal rule, and in some cases, according to custom, the principal chela succeeds as of right, even without such appoint-

Chelas-*Concld.*

ment of former election ; but apparently an election or recognition by members of the sect is necessary.

Where one muth is the offshoot of another, there is no fixed rule which regulates the relation between the two, and it cannot be said that the subordinate muth necessarily follows the customs of the parent one.

In order to establish a custom that on the death of the Mohunt his properties lapse to the muth and devolve on the spiritual head thereof, it is necessary to show, not only that in some instances the properties had so passed to the spiritual head, but also that this had taken place in the presence of a chela who would otherwise have been competent to take by inheritance. (32 I A 113=9 C W N 477 Fol; 8 M I A 170 at p 187 Fol; 1 I A 241 at p 264 Fol; 4 1 A 24 Fol; 32 I A 113 =9 C W N 477, 20 I A 112; 20 I A 127; 35 I A 48 =35 Cal 420; 12 C W N 593 Fol; 7 C W N 145; 10 Mad 375; 13 Mad 524 Ref; 1 S D A for N W P p 512; 1 All 539; 10 W R 172, 29 All 109 Ref: 20 W R 217; 10 Mad 375; 8 C L J 499 Rel).

Gossain Ramdhan Puri v Gossain Dalmir Puri. 14 C W N 191=2 Ind Cas 385.

Cheque.

See (1) Stamp Act 1879, sch 1, art 11.
(2) Negotiable Instruments—Cheques.

—Payment of.—

See Banker and Customs. Case No (8).
18 I A 111.

—taken in payment, dishonour of.—

See Bill of exchange. Case No (5)
7 B L R 431.

—taken in payment of rent.

See Tender. **4 Cal 572.**

1—Cheque—Payment by Banker of forged cheque—Customer's liability.

A banker cannot make his customer liable for his own payment of a forged cheque except in case of negligence imputable to the customer. (4 Bom 253 dist. 1896 A C 514 ref.).

Bhagwan Das v Creet. 31 Cal 249.

2—Post dated cheque—Stamp.

A post dated banker's cheque is available in the hands of its holder and is admissible in evidence

Cheque-*Concld.*

with only a one anna stamp. **Motilal v Jagmohundas. 6 Bom L R 699.**

3—S. 69, Negotiable Instruments Act; 1887, s. 84—(2)—Present of cheque within reasonable time—One of fact.

The question whether a cheque has been presented within a reasonable time is one of fact and is not a question which the Small Cause Court can refer for the opinion of the High Court.

The East India and Anglo-Indian Deposit and Loan Society Limited v Dr. T. M. Nair; and C. Sankaran Nair, Advocate-General of Madras. 4 M L T 89.

4—Indian Stamp Act (I of 1879), Sections 3 (6), 5 and Schedule I, Article 19—"Cheque"—Cheque drawn in India on bank in England and bearing impressed stamp of the value of one penny—Admissibility of such cheque in evidence —Cheque exceeding Rs. 20 in value.

Plaintiff sued defendant for Rs 1,056, alleged to be due by defendant on account of principal and interest due on two cheques, one for £35 dated 21st October 1889, and the other for £25, dated 16th November 1889, drawn at Nowshera on Messrs. Cox & Co of London, on cheque forms bearing impressed stamps of the value of one penny which it was alleged were dishonoured by the drawees on presentation. Plaintiff alleged that the cheques were endorsed with defendant's signature and sought to make defendant liable on the gronnd that he was an acceptor or drawee in case of need.

Held, that inasmuch as the cheques were for amounts exceeding Rs. 20 in the value and were executed in British India after the 1st April 1879, they were by Section 5 of the Indian Stamp Act, 1879, chargeable with a duty of one anna, and as they were not duly stamped, they were not admissible in evidence. **Damodar Das v Major Doran. 69 P R of 1894.**

Cherra Poonjee Raj.

See Foreign State. **11 Calc 17.**

Chief.

—Deposition of Chief—Appeal.
1 A L J 691, P C=32 Cal 1=31 I A 239= 8 C W N 841=6 Bom L R 763.

Chief Constable.

1—Chief constable, liability of Government for tortious acts of. **6 Bom L R 65= 28 Bom 314.**

See also cases under.—

(1) Torts.
(2) Damages suit for.
(3) Principal agent.

Chief Court.

See Punjab Chief Court.

Chief Court (Punjab)-Powers of.

See Cases under:—

(1) Punjab Chief Court-Powers of.
(2) High Court Jurisdiction of.

Chief Court-Punjab-Practice.

1—Further appeal—Practice of Chief Court to interfere with concurrent finding of facts.

Held, following (26 Cal I P C) that a finding of facts in which two Courts had concurred would not be disturbed in further appeal by the Chief Court unless cogent reasons are shown. **Kharud Mian v Badshah. 50 P R 1904.**

See also Punjab Chief Court.

Chief Judge of Small Cause Court, Bombay.

—Decision of, as to compensation for land.

See Appeal—Bombay Acts—Bombay Municipal Act. **Case No (322) 18 Bom 184**

Chief Lambardar.

See Ala Lambardar.

Chiefship.

1.—Chiefship, succession to. **5 Bom L R 486**

Child.

See (1) Custody of Children.
(2) Marriage Act, s. 68.

—Evidence of

See Oaths Act s. 13.

Child-*Concld.*

—paternity of

See Evidence Act s. 112.

6 C W N 146.

1.—Maintenance of—Power to cancel an order for maintenance. **A W N 1904, 149.**

See also

(1) Hindu law-Maintenance
(2) Minors

Children.

See Hindu Low—Will—Construction of wills —Gifts to a Class

—Access to

See Divorce Act s 41.

—Custody of

See (1) Custody of Children.
(2) Divorce Act, s. 41
(3) Hindu Law—Guardian
(4) Mahomedan Law—Divorce
(5) Mahomedan Law—Guardian.
(6) Majority Act 1875.
(7) Minor—Custody of Minors.

—Proof of age, and order of birth of

See Evidence Act s. 32.

Children by different wives,

See Hindu Law—Inheritance

Children, custody of minor.

See Divorce Act, 1869, Sec 42.

Child-witness

1.—Child-witness, affirmation of **5 Bom L R 551.**

Child—witness—Procedure:—

See Evidence Act, S. 118.

Chinese Buddhist.

Residing in Burma—Law applicable. **8 Ind Cas 452.**

Chinese Law--Inheritance.

1.—Chinaman marrying a foreign woman of different religion and claiming to administer her estate after her death.

Chinese Law-Inheritance-*Contd.*

When a Chinese marries a woman in a foreign country and that woman is capable of possessing and does possess property, there may be a customary law governing the succession to such property. If she is a Buddhist and she dies leaving no children, her husband would be an heir and presumably entitled to administer Where plaintiff, a Chinaman, and follower of Confucius, who had two Chinese wives whom he had married in succession, on coming to Rangoon, went through a ceremony of marriage with one Ma Bi, a Burmese (Zerbadi)woman, and a Buddhist or a Mahomedan who lived with him and was recognised by the Community as a wife and on Ma Bi's death, plaintiff applied for letters of administration to her estate and defendants failed to establish any rights as caveators, *held*, after consideration of the legality of the marriage, and of the rights which it gave to plaintiff in Ma Bi's estate after her death, that, in the circumstances, the plaintiff's claim was just and reasonable, and orderd accordingly. (2 L B R 95 Ref.) **Pal Beng Teng v Ko Maung 2 L B R 261**

2.—Buddhist law not applicable to Confucians and Taoists—Indian Succession Act, s. 331.

Buddhist law as administered in Burma is not usually applicable to Chinese residents. Confucians and Taoists are not Buddhists, and are therefore not exempted by s. 331 from the provisions of the Indian Succession Act 1865. (10 B H C 241, 5 B H C O C 172, 185, 12 M I A 81, 4 B H C O C 1, 24 Ref.). **Hong Ku v Ma Thin L B R 1872=1892 135.**

3.—Inheritance among Chins—Joint family property—Customs—Acquiescence—Division of property.

Plaintiff respondent claimed certain property as having been wrongfully taken away from her by her husband Shwe Gan's brother, Nga Shan. On looking at the evidence, it was conclusively proved that the property so taken was Nga Shan's own. Originally all the property was the joint family property of the two brothers and their nephew Nga Shwe. After the death Shwe Gan, his widow the plaintiff-respondent, went on living in common with Nga Shan, and after a year or so, when she desired to quit the household, a division was made between her and her brother-in-law by Chin elders, both parties touching the pipe or tube for sucking *Kaung* from *Kaung* pot in token of acquiescence, as usual in such matters among the Chin people; and Nga Shan removed from the house taking his portion of the goods with him. The first appellate Court refused to be satisfied with this positive evidence of assent merely because the division was of recent date, and the plaintiff had brought the suit. *Held* that the plaintiff-respondent had accepted the division of property and could not now challenge or go back upon what had been done. **Maung Hmon v. Ma Pyu U B R 1892—1896, Vol II, 238.**

Chit.

See:—Kuri Chit, **(1911) M W N 249.**

Chit fund

See Companies Act s. 4. **14 M L J 136= 29 Mad 477.**

1—Chief Fund—Payment of part of prize to a subscriber—Agreement between stater and subscriber for payment of balance on subcriber's furnishing security-Failure of starter to pay balance of prize money—Whether relieves subscriber from obligation to pay future instalments—Default in payment of instalments—Action for payment of all future instalments—Stipulation for payment of all future instalments in default of any one instalment—Waiver—Limitation.

A *kuri* was started by plaintiff's predecessor in 1893. It was to consist of 14 tickets of Rs. 500 each and it was to continue for 13 years. Defendant, one of the subscribers, won a prize at the sixth drawing. A portion of the prize-money was paid to him by the plaintiff and the balance was reserved with the latter for payment of future subscriptions. It was found that defendant offered the security and that plaintiff defaulted to pay the balance reserved with him. It was also a condition that, in default's payment of any one instalment, all future instalments would become due at once. Plaintiff credited the unpaid prize-money towards subsequent instalments, and sued defendant for the last two instalments. Defendant pleaded that he was not liable to pay the future instalments, as plaintiff did not give him the balance of his prize-money, and that, as he made default in payment of the instalment due for 1900, all the

Chit Fund-*Concld.*

instalments became then due and the suit was barred by limitation.

Held, (1) that, apart from the special agreement, a default in payment of the prize-money did not relieve the defendant from liability to pay future subscriptions;

(2) that, as it was found that plaintiff had waived the benefit of the stipulation for payment of all overdue instalments, in default of any one instalment, the suit was not barred by limitation. (3 Mad 61; 12 Mad 192, 18 Mad 257 at p. 261; 13 C W N 1010 at p. 1010; 4 Ind Cas 17 Ref.)

Pazhancheri Panangat Biahayil v Pazhancheri Mananthan. 8 Ind Cas 510.

2—Companies Act (Act VI of 1882), S. 1 Chit Fund consisting of more than 20 persons-Unregistered Company—Illegal association-Suit to recover back subscriptions—Maintainability.

A chit fund consisting of more than 20 persons having joint rights and obligations *inter se* among the members whether it amounts to a partnership in law or not, is an association having for its object the acquisition of gain within the meaning of section 4 of the Indian Companies Act and if unregistered, a suit to recover the subscription back is not maintainable. (19 Mad. 31 Fol. 20 Mad. 68; 22 Mad 212, 1 M. H. C. R. 448 Dist.).

Madasami Asari v Pechi Asari, 1 M L T 106.

Chittahs.

See 3 C. 322.

Prepared for distributing public revenue on a partition of an estate are public documents.

15 C W N 515. 29 Cal 187, P C=29 I A 24 =6 C W N 386.

Chittagong hill Tracts Act XXII of 1860.

See High Court. Jurisdiction of.

27 Cal 654.

Chhimba.

1—Occupancy tenant, gift by, to his daughter's sons—Suit by reversioners to contest alienation—Punjab Tenancy Act, ss. 59, 60, &c.—Presumption as to tenant's competency to alienate—Proof. **60 P W R 1907=38 P R 1909.**

II C. C. 89

Chose in Action.

See (1) Assignment of Chose in Action.
(2) Insolvent Debtors Act S. 23.

Chota Nagpore.

See Sale for Arrears of Rent—Under-tenures, Sale of. **10 C L R 76.**

Chota Nagpore Encumbered Estates Acts (VI of 1876 and V of 1884,)

See (1) Specific Performance—Special Cases.
(2) Statutes, Construction of.

1—Grant by a disqualified proprietor—Ratification.

An owner of an estate granted a *khorposh* lease in respect of a portion of his estate when such estate was under the management of an officer under the Act.

Held, that although he was incompetent to grant such a lease at the time of grant, yet, subsequently, when he ratified it after the disability ceased, it became a valid grant.

Roy R C v Thakur Ram Jiwan Singh. 10 C W N 149=33 Cal 363.

2—Meaning of 'holder' and 'heir', capacity to mortgage.

The words 'holder' and 'his heir' in the Chota Nagpor Encumbered Estate Act mean the holder of the property at the time of the determination of the debts and liabilities under s. 8 of the act and his heir. The word 'heir' is applicable to the person who is the holder's heir at the time of the determination of the debts and liabilities and to no other heir, nor to the heir's heir. **Koka Mohton v Manki Jagar Nath Sahi. 27 Cal 462: 4 C W N 158.**

3—Sec 3-'Such debts and liabilities'-Appeal-Competency to Contract-Perpetuities, law against.

The expression 'such debts and liabilities' in section 3 Act VI of 1876 means debts and liabilities other than those in favour of Government and includes every other debts or liabilities.

An appeal in a suit to enforce an agreement outstanding, when the estate is taken over by Government, is, therefore, barred,

Chota Nagpore Encumbered Estates Acts (VI of 1876 & V of 1884)-*Contd.*

When a suit is compromised by the proprietor of an estate taken charge of by the Government under Act VI of 1876, such proprietor is not *sui juris* and not competent to enter into an agreement to grant a lease of any portion of his estate, at a time when the estate might be released by Government, and such an agreement cannot therefore be enforced, even if it had been embodied in the decree drawn up by the Court in terms of the compromise. Such agreement, moreover, is bad as infringing the law against perpetuities, as the estate might not have been released within the period limited by that law. (2 Cal 445, 7 Cal 82 Fol.). **Jagadis Chandra Deo Dhabal v Satrughan Deo Dhabal. 4 C L J 238= 33 Cal 1063.**

Notes—Fol: 9 C L J 523; 7 C L J 578.

4—S. (3) (c)—Contract by person subsequently declared to be owner of encumbered estate—Subsequent withdrawal of encumbrance—Revival of validity—Barring of pending suits-'Debts and liabilities,' meaning of:—

A contract entered into by a person who is subsequently declared to be the heir of a deceased person whose estate had been at the time of the contract taken charge of under the Encumbered Estates Act, is void as such person had no competency to contract.

Even though at the time of the execution of the contract he had not been declared to be the heir, yet as soon as he was found to be the heir, he became heir from the time of the devolution of the estate which was admitted prior to the execution of the contract, and such contract became void for want of capacity to contract. On the release of the estate from the operation of the Act the validity of the contract could not be revived as it was absolutely void.

While the suit was pending the etate was taken charge of for the second time, and the suit therefore barred. It does not matter if the particular liability has not been mentioned in the application under the Act, as 'debts and liabilities' in S. 3 mean 'all debts and liabilities of the holder of the estate taken charge of' other than debts or liabilities incurred by Government. (20 Cal 600; 33 Cal 1065 Fol.) **Rajah Satrughan Deo Dhabal v Rajah Jagdis Chandra Deo Dhabal. 7 C L J 578.**

Chota Nagpore Encumbered Estates Acts (VI of 1876 & V of 1884)-*Contd.*

5.—Ss. 3, 7 and Act V of 1884, Deo Estate Act IX of 1886, Sec 1, Chap 4,—debts and liabilities.

The effect of Chotta Nagpure Encumbered Estate Act made applicable to Deo estate in Gaya district is to give relief to the holders of the land for all debts and liabilities existing immediately before the vesting order, other than debts or liabilities due to the Government. Therefore Sec 3 bars all suits after the vesting order. S.7 operates to create a bar in respect of estate dealt with in s. 1, Ch 4 of the Deo Estate Act. The result of Ss, 3 and 7 is that suits to enforce such debts or liabilities other than those due to Government, are if pending at the time of the vesting order are barred. If instituted after it, inspect of such debts and liabilities, null and void in their inception. **Kameswar Prasad v Bhikhan Narain Singh. Bhikhan Narain Singh v Kameswar Prasad. 20 Cal 609.**

Notes:—Dist: 2 Bom L R 918. Ref: 29 Bom 193; 36 Cal 675=9 C L J 523; 6 Bom L R 735. Fol: 33 Cal 1065=4 C L J 238; 7 C L J 578.

6—As amended by Act (III B. C. of 1909), Ss. 3, 12—"Civil Court," meaning of—Whether includes Revenue Courts—Stay of proceedings while estate declared encumbered—Rent decree—Limitation.

S. 3 of the Chota Nagpur Encumbered Estates Act enacts that, as soon as an estate is taken charge of under the Act, all proceedings pending in Civil Courts in respect of the debts of the disqualified owner shall be barred; and S. 12 of the Act, the debts barred under S, 3 are revived when the estate is released.

Held, that the words "Civil Courts" are comprehensive enough to include the Revenue Court deciding rent suits and executing rent decrees.

A decree-holder obtained decree against the judgment-debtor from the Revenue Court for arrears of rent on April 19, 1905. The estate of the judgment-debtor was in charge of the Encumbered Estates Department from May 23, 1906 to April 21, 1908 on which last date it was released. The decree-holder applied for execution of his decree on February 13, 1909;

Chota Nagpore Encumbered Estates Acts (VI of 1876 & V of 1884)-*Conta.*

Held, that the applicaton was quite within time. (9 Cal 295; 12 C L R 361; 9 I A 174 Ref.)

Maharaj Protap Udai Narain Shahu Deo v. Thakur Madan Mohan Nath Shahu
7 Ind Cas 787.

7—Secs. 7, 10. 17—Manager's power to grant perpetual lease—Prudent management—Execution of mokarari lease—Liabitity—Notice—Deputy Commissioner's order, final—Manager without notice satisfying a debt or liability, if valid—Proprietor, if to be party in granting perpetual lease—Perpetuities, rule against—Personal covenant-Laying out of money by the lessee, a part performance-Specific performance, suit for-Benefit or burden of a covenant running with land test—Time, running of, against covenantee or assigns—Demand and refusal—Enquiry by Deputy Commissioner—Examination of witness—Completed conveyance, suit to set aside—Benefit of lease—Equity.—

Per curiam: Though S. 17 of the Chota Nagpur Encumbered Estates Act (VI of 1876 as amended by Act V of 1884) is apparently wide in its terms and though it probably confers on the manager a somewhat large measure of discretion for the management of the estate, it does not enable him to do any act which is demonstrably injurious to the interest of the estate. The execution of a lease in perpetuity without a bonus, and not for the purposes of reclamation of any waste land or other purposes of a similar kind cannot be justified as an act done in the course of prudent management of the estate.

Assuming that the right of the lessee under the covenant to call upon the lessor to execute a *mokarari* lease imports on the part of the proprietor a liability within the meaning of that term in section 7 of the Chota Nagpur Encumbered Estates Act, the notice of that claim is unnecessary, because the manager, when he assumed management of the estate which was at the time under *ijara* must be deemed to have had under the law constructive notice of the lessee's right to claim under the covenant in the *ijara* lease the *morkarari* lease of any land within the leasehold for certain purposes.

Per Doss J.:—The order of the Deputy Commissioner granting *mokarari* lease and which was upheld by the Commissioner is, under section 10 of the Chota Nagpur Encumbered Estates Act' final and the matter cannot be re-opened by a suit.

The debt or liability which is barred under section 7 of the Chota Nagpur Encumbered Estates Act is not extinguished, but that so long as the estate continues under the operation of the Act, the remedy only is barred, the right subsisting. If the manager without any notice as required by section 7, satisfied a debt or liability. the proprietor cannot after the restoration of the estate to him, bring a suit to recover back the money so paid. or annul any deed executed by the manager in fulfilment of that liability merely on the ground of absence of notice.

Per curiam:—Under the Act VI of 1876 the manager had power to devise any part of the property for a period, not exceeding twenty years, without the consent of the proprietor. but under the amending Act V of 1884 he is now entitled to sell or demise in perpetuity without the consent of the proprietor.

Per Doss J.—A lease in perpetutity granted by a manager which is otherwise valid is not the less binding on the proprietor because he was no party to it or that it was granted without his consent

The rule against perpetuities applies only to future interests in land, which may, by any possibility, be capable of vesting beyond the legal limit of perpetuity.

The laying out of considerable sums of money by the lessees in the erection of permanent structures on the land for those very purposes that are mentioned in the covenant and hence referrible to the covenant and to the covenant alone, and all this done to the knowledge of the lessor who resided close by, must be regarded as part performance, and indeed a substantial part performance of the covenant for a perpetual lease such as would entitle the covenantee to claim specific performance of the covenant on the ground that it would be inequitable and fraudulent for the covenantor to refuse to perfrom the covenant.

Chota Nagpore Encumbered Estates Acts (VI of 1876 & V of 1884)-*Contd.*

Per Richardson J:

There is a difference between a suit for specific performance and a suit to set aside a completed conveyance

Where there is no common mistake of fact and not common mistake of law of the kind equivalent to a mistake of fact which goes to the root of the executed contract, the Court will not be justified in saying that it is inequitable that the defendants should not be allowed to retain the benefit of the lease.

Per Doss J:

A mere personal convenant is not open to objection on the ground of remoteness or as tending to create a perpetuity.

One very important test whether the benefit or burden of a covenant in any perticular case runs with the land or not is whether such covenant or contract in its inception bends the land. If it does, it is then capable of passing with the land to subsequent assignees, if it does not, it is incapable of passing by mere assignment of the land. Another test laid down by the House of Lords in the case of *Dyson v. Forester* is whether the covenant affects the nature, quality and value of the land. The *ijara* lease with a covenant for a *mokarai* is more valuable than it would be without such convent.

Time cannot run against the conventees or their assigns unless there is demand on their part and refusal on the part of the convenantor or his assigns.

It is not necessary for the Deputy Commissioner in conducting his enquiry before granting the *mokarari* to examine witnesses on oath or record their depositions. It would be enough if he makes a full and complete investigation in the matter. **H Mathewson v Sri Sri Ram Kanai Singha Deb. 9 C L J 523.**

1-A—S. 10—Jurisdiction—Lease of land lying outside Chota Nagpur—Question of law taken for the first time in second appeal.

Where a certain estate in the District of Manbhum was taken charge of under the Chota Nagpur Encumbered Estates Act, and thereupon the manager proceeded to cancel under that Act a lease of land lying in the district of Bankura, *held* that the Act had no application, inasmuch as the Act applies only to land in Chota Nagpur. The High Court allowed this question to be raised for the first time in second appeal.

Ajodhya Nath Chowdhury v Keshub Chandra Mukherjee, 11 C W N 1127.

Chota Nagpore Encumbered Estates Act.

—Ss 7, 12, 18.

See Lease. 36 Cal 675.

Chota Nagpore Landlord and Tenant Procedure (Act 1 of 1879).

Notes—Rep., Ben. Act VI of 1908.

Chota Nagpore Landlord and Tenant Act (1 of 1879).

See Landlord and Tenant—Ejectment-Notice to quit.

Chota Nagpore Landlord & Tenant-Act

1—S. 6—Non-occupancy raiyat, position of after notice to quit—Trespasser-Occupancy right.

After the service of a valid notice to quit a non-occupancy raiyat holding land under the Chota Nagpur Landlord and Tenant Procedure Act of 1879 became a trespasser, and the fact when the suit for ejectment consequent upon the notice was instituted, the raiyat had been already holding the land for twelve years did not entitle the raiyat to claim occupancy rights. (1 W R 119; 8 W R 501; 9 W R 513; 4 W R 24; 15 W R 133 con)

Nathunni Kam v Raja Paresh Nath Singh. 14 C W N 297=3 Ind Cas 436.

1-A—S. 30—Application of "agent," meaning of—Forest Mehal—Accounts, suit for—Agent under Act VIII of 1869, S. 30, meaning of-Act VIII applies (to suits between landlords and tenants).—

The term 'agent' in S. 30 means a man who is employed as such by a landlord as a landlord, that is, a person employed to assist a landlord in his dealings with the tenants. A person employed to sell timber in a Forest Mehal and credit

Chota Nagpore Landlord and Tenant Act-*Contd.*

the proceeds to his employer is not an 'agent' within the Act and to a suit against him, Act VIII of 1869 does not apply. **Nabin Chandra Barua v Chandra Madhub Barua. (1909) 10 C L J 106.**

2.—Sec 34 Registration omission to apply —Forfeiture—Alienation—Resumable tenure.

When a tenure has been created by a deed which makes it resumable upon the failure of the heirs of the grantee, the interest created is not inalienable and the tenure is resumable only upon the contingency specified and not on the ground of forfeiture by reason of alienation.

Omission to register the name of the successor or heir of the original grantee under section 34 of Act I of 1879 B C does not work a forfeiture of the tenure.

Under Sec 34 of Act 1 of 1879 B C two conditions must be satisfied before an application for registration can be made, *viz.* the applicant must be in possession and must be a transferee by succession or inheritance. Where, therefore, the successor of the original grantee had transferred his interest before Act 1 of 1879 B C came into force and gave him possession of the property, an application under Sec. 34 could not be made either by the transferor or the transferee.

When, under such circumstances, an order was made putting the zamindar, in possession of the tenure, such order is not binding upon the transferee who is not a party thereto. Section 3 of the Civil Pro, Code does not bar a suit in the Civil Court by the transferee for declaration that his title has not been affected by such order under S. 34 of the Act 1 of 1879 B C and for recovery of possession. (1 B L R 170=22 W R 17). **Maharaj Kumar Jagatmohan Nath Shah Deo v Brinda Saha. 1 C L J 557 =2 C L J 202.**

3.—Beng. Act I of 1879 sec. 37—Appeal in ejectment suits.

There is no prohibition in section 37 of Act I of 1879 against an appeal in ejectment suits in the Chota Nagpore. **Ramjan Khan v Raman Chamar. 11 C L R 480.**

Piraj Nath Saha Deo v Mura Munda. 24 Cal 249=1 C W N 181.

Contra **Kheda Mahto v Buddun Mahto. 27 Cal 508.**

Chota Nagpore Landlord and Tenant Act-*Contd.*

Notes —Over : 27 Cal 508 F B.

4.—Suit to recover tenure—Chota Nagpore Landlord and Tenant Procedure Act, Section 37—Denial of tenant's title by landlord—Limitation Act (XV of 1877) Section 14, Sch 11, Arts 138, 142, Exclusion of time—Non-mention of claim to extension in the plaint, not fatal.

A suit to recover a permanent tenure by the auction-purchaser from tenant in which the landlord defendant denies the title of the plaintiff on the ground that on the death of the previous tenant the land reverted to him does not come under section 37 of the Chota Nagpore Landlord and Tenant Procedure Act and is triable by the Civil Court. To such a suit Art. 142 and not Art 138 of Schedule 11 of the Limitation Act is applicable.

In computing the period of limitation, the time during which a suit remained pending in a Court not having jurisdiction to entertain it is excluded, under section 14 of the Limitation Act. The non-mention of a claim to that extension of the period in the plaint, presented to the proper Court after return is not fatal (8 C W N 168=31 Cal 195 Diss). **Raghunath Bhagat v Syed Samad Shah. 7 C L J 560= 12 C W N 617.**

—S. 39.

See Appeal—Bengal Act——Chota Nagpore Landlord and Tenant Procedure Act. Case No. 1(314) **24 Cal 249; 27 Cal 508=1 C W N 181.**

5.—Ss. 44A, 62, 77—Successive rent suits within six months—Maintainability—First suit dismissed for default—"Limitation of suits, provisions for" what are-Bengal Tenancy Act (VIII of 1885) S 177:—

Where a suit for rent for the years 1959 to 1961 Sambat was, after issues had been framed struck off owing to the plaintiff's absence and the plaintiff within six months of the institution of the first suit instituted a fresh suit for rent for the years 1960,1961 & 1962 Sambat:—*Held*, per *Casperz J* (*Core J dissentiente*) that S 44 A of the Chota Nagpur Landlord and Tenant Procedure Act was no bar to the institution of the later suit. S. 44 A of the Act does not control the provisions of S. 62 or the first clause of S. 77. *Per Curiam*

Chota Nagpore Landlord and Tenant Act-*Contd.*

—S. 44A, which provides against the institution of a second rent suit within 6 months of the institution of another, is not a "provision for the limitation of suits" within S. 62 of the Act.—
Karma Uraon v. Baraik Debi Dayal Singh, 13 C W N 287=9 C L J 9=36 Cal 115.

—S. 88.

See Execution of decree—Decree to be executed after appeal or review. **22 Cal 467.**

6—Ss. 123, 125—Decree for consolidated rent of several tenures, whether binds tenures-Decree whether obtained against sole recorded tenant—Proof — Onus — Right of auction-purchaser of share in tenure.—

A decree for the consolidated rent of several tenures held by the same tenants does not bind the tenures or any of them.

Where a tenure was sought to be sold in execution of a decree for rent obtained against one of the tenants, after the shares of the other tenants had passed by auction sale to a stranger, on the allegation that the tenant, against whom it had been obtained, was the sole recorded tenant of the landlord, *held* that. whether this was so or not was a matter specially within the knowledge of the landlord, and the *onus* was on him to prove it. **Baikunta Nath Roy v. Thakur Debendro, 11 C W N 676.**

Notes:—Fol: 13 C W N 650, Ref: 36 Cal 765.

7—S. 124-Sale of Jaghir tenure in execution of a decree for rent — Registered ilakadar's right, title and interest.

A suit was brought for the arrears of rent due in respect of a jaghir tenure, a joint family property. The arrears had accrued during the lifetime of the four united brothers. The decree was obtained against the eldest brother who was held responsible in the zamindar's book *Held*, that the decree related to arrears of the whole tenure and not merely to the judgment-debtor's individual interest, and the sale of his right, title and interest would include the right, title and interest of any person claiming jointly with him, and whose interest was inseparably united with his. **Modhusudun Nath Tewari v. Hiru Ram Pandey, 25 Cal 396=2 C W N 94.**

Chota Nagpore Landlord and Tenant Act-*Contd.*

8—S. 124—Jahagir and under-tenure—Decree for arrears of rent.—

Decree for arrears of rent cannot be made against a person other than the real tenant, or his security. Therefore there can be no decree for rent against persons having subordinate interest in a jaghir tenure created by the jaghirdar **Pertab Udai Nath Sahi Dev v. Pardhan Mokand Singh, 25 Cal 399=2 C W N 96.**

9—Appeal, Chota Nagpur Landlord and Tenant Procedure Act (I of 1879 B C), Secs. 135,136, 137, 144—Execution proceedings—Order-Appeal —Revision—Jurisdiction— Order without jurisdiction void.—

Under Act I of 1879 B C as it stood before its amendment by Act V of 1903 B C,an order made by a Deputy Collector relating to the execution of a decree for rent was open neither to revision nor to appeal. When, therefore, such an order was set aside by the Divisional Commissioner, the latter must be taken to have acted without jurisdiction.

The consent of the parties to a litigation cannot confer on a Court jurisdiction which it does not possess. The agreement of parties cannot authorise a superior Court to revise a judgment of an inferior Court in any other mode of proceeding than that which the law prescribes.

An order made without jurisdiction is absolutely null and void. Such an order may be shown to be a nullity in any proceeding where reliance is placed upon it, although no formal and direct proceeding has been taken to have vacated or reversed. (21 Howard 85; 15 O H 414 Ref:)
Golab Sao v. Chowdhury Madho Lal, 2 C L J 384=9 C W N 384.

—Ss. 137 and 144.

See Appeal—Bengal Acts — Chota Nagpore Landlord and Tenant Procedure Act. Case No. (316). **1 C W N 341.**

10—S. 144—Execution—Appeal from orders —Second appeal—Act V of 1903 (B C), S. 41.—

Under Act I (B C) of 1879, as amended by Act (B C) of 1903, no second appeal lies from an order passed in execution.
Raja Issur Lal Singh v. Patroo Sahu Singh, 10 C W N 284=33 Cal 878.

Cho'a Nagpore Landlord and Tenant Act-*Concld.*

11—S. 144—Order passed in execution—No second appeal:—

No appeal lies from orders passed in execution under the Act. **Iswar Lal Singh v. Jagoo Saku, 33 Cal 178.**

—S. 146.

See Bengal Act VI of 1862, s. 20. Case No. (1). **20 Cal 425.**

Chota Nagpore Raj.

See Hindu Law—Alienation—Restraint on Alienation.

Chota Nagpore Tenancy Act.

See Bengal Acts—Act VI of 1908.

1—Sections 44 A, 62, 77—Striking off—Fresh suit within six months, if barred.—

The plaintiff, in March 1906, sued for the 1959 to 1961 Sambat, and alleged that some rent for 1962 had been deposited by the defendants. Issues were framed, and the 18th May 1906 was fixed for hearing. On that day, the Deputy Collector recorded the order: " Plaintiff absent; struck off, section 62 C. N. T. A." The plaintiff's application for restoration was rejected on the same day. In June 1906, without waiting for the expiration of the period of six months mentioned in section 44A of the Chota Nagpur Landlord and Tenant Act, the plaintiff instituted fresh suits for the recovery of arrears of rent for 1960, 1961 and 1962.

Held, (Per Caspersz J.)—That as no issue was tried and determined on the 18th May 1906 the orders striking off the suits were passed under the first clause of section 77 read with section 62. Consequently, the only remedy open to the plaintiff was to proceed by way of fresh suits, and if those suits were maintainable he could properly include in his claim all arrears of rent then accrued due.

Section 62 of the Chota Nagpur Landlord and Tenant Act is not controlled by section 44A.

Section 44A restricts the Court's jurisdiction rather than the plaintiff's right of suit; the latter exists though it is in abeyance for six months. The section must be construed strictly, that is, in favour of the plaintiff

The plain meaning of section 44A is that when a landlord has instituted a suit for the recovery of any rent, he shall not institute another suit for the recovery of any rent subsequently accrued due until after six months from the date of the institution of the first suit.

The words "any rent" in section 44A must be liberally interpreted to refer to any rent covered by the previous suit and any rent covered by the second suit, and *ex nature rei*, the subject matter of the respective suits must be different.

The words " struck off " mean that the suit has and never had, any existence; they imply that the suit is withdrawn as in section 373 of the Code of Civil Procedure.

Per Coxe J.—The Legislature in framing s. 62 intended only to refer to the latest date on which a suit is instituted.

The suits were barred by section 44A.

The effect of striking off a suit under s. 62 was not to restore the parties to their original positions, as if such a suit had never been instituted. The second suit was a new suit and not a continuation of the first suit.

Section 44A is to be construed against the landlord. **Karma Uraon v Baraik Debi Doyal Singh, 9 C L J 9=13 C W N 287 =36 Cal 115=1 Ind Cas 447.**

2—Chota Nagpur Tenancy Act. Ss. 46, 211—Act V of 1903, s. 10 (c)—Manbhum district—Transfer of holding before December, 1909, validity of.—

There is nothing in S. 46 of Act VI of 1908 (Chota Nagpur Tenancy Act) which would invalidate the transfer of a holding by a tenant in the District of Manbhum in August 1909, that is, before the Act was extended to the District. **Yesta Cliffon Sebastian v. Kuloda Prosad Deogharin, 7 Ind Cas 763.**

3—Chota Nagpur Tenancy Act (VI B C of 1908), S. 46—Sale of raiyati holding — Statute invalidating such sale subsequently applied to district, if has retrospective operation:—

There is nothing in S. 46 of the Chota Nagpur Tenancy Act which was extended to Manbhum by Government Notification dated 22nd December 1909 to invalidate a sale of a raiyati

Chota Nagpore Tenancy Act-*Concld.*

holding in Manbhum which took place on the 19th August, 1909, (*i e*) prior to the extension of the Act to the District —

Mrs Verta Clifton Sebastian v Kueoda Proshad Devgharear, (1910) 15 C W N 43

Chota Nagpore Tenancy Act, s. 123

See Chota Nagpore Tenancy Act s 164 Case No (3) **13 C W N 111**

4—Ss 164—Entries, correctness of—Presumption—Suit to correct, if lies—'Particulars', includes what—Bengal Tenancy Act (VIII of 1885), Sec 103 B —

The provisions of section 164 of the Chota Nagpur Tenancy Act as amended by Act V of 1905, make the entries in a record of rights in cases of *Mundari Khunt Kattidari* lands conclusive evidence that is no suit lies to correct an entry of this description

The word 'Particulars has a very wide application and covers an entry such as declaring that the tenants have to pay certain rents named in the record to persons other than a purchaser under section 123 of the Act

There is no limitation as to the nature of the suit to which the provisions of section 103 B of the Bengal Tenancy Act applies

Tokhi Sahu v. Tori Munda, 9 C L J 83= 13 C W N 111

Chota Nagpore Tenancy Act, s 211

See Chota Nagpore Tenancy Act, s 46, Case No. (2) **7 Ind Cas 763**

Chota Nagpore Tenures Act (II of 1869).

Notes —S 22 Rep., Act VII of 1870

Chota Nagpore Tenures Act (Bengal Act II of 1869).

See Evidence—Civil Cases — Miscellaneous Documents—Registers **19 Cal 91, 22 Cal 112**

1—Bengal Act II (B C) of 1869-Special Commissioner under Act II (B C) of 1869—Jurisdiction—Boundaries.

Chota Nagpore Tenures Act (Bengal Act II of 1869)-*Concld.*

A Special Commissioner appointed under Act II (B C) of 1869 has no jurisdiction to determine a question of disputed boundaries between two villages and oust the Civil Courts of their ordinary jurisdiction in determining the rights of parties under conflicting titles as proprietors of such villages **Sham Chunder Adhicari v Sobin Bhoopal Singh 8 Cal 397= 10 C L R 419.**

Chowkidar.

See Chaukidar

"Chowdhris", suit for declaration as.

See Declaratory decree suit for **29 All 683**

Chowkidari Register, entry in.

See Chaukidari Register entry in

Chowkidari Tax.

See Cess Cases Nos (15 & 16) **22 Cal 680**

Christians in Salsette.

See Salsette Law applicable in **19 Bom 630**

—Native

See (1) Converts
(2) Trust **8 C W N 918**

Chukdar.

1—Right of pre emption as between "chukdars and village proprietors —

In the Mooltan district where the *chukdari* tenure prevails the co sharers in a well have the right of pre emption as to the shares in that well, in preference to the general proprietor of the village, who has no share in the well, but merely receives a *huq zemindari* payable by the *chukdars* **Mukdum Shah Ali Mahomed v Oomur Ali P R 44 of 1870**

2—Chukdaree Tenure in Mooltan —

Suit by a *chukdar* to restrain the *zemindar* from constructing a new well within the holding of the former

Found, that while the *zemindar* is owner of the soil the *chukdar* is owner of the well, and enjoys the right of arranging for the cultivation,

Chukdar-*Concld.*

Held, consequently, that to the *chukdar* alone belongs the right of repairing the old well or replacing it by a new one —

Nawab Mahomed Surfaraz Khan v Dewa Mull, P R 34 of 1868.

Chundarvand.

See Custom, Inheritance
142 P L R 1906

Chundavand and Pagvand

See Pagvand and Chundavand.

Church.

1—Roman Catholic Church—Powers of dhar makartas or headmen—Closing church—Appointment of priest —

A committee of directors or headmen or dhar makartas appointed by the bishop in a Roman Catholic Church to assist the priest in the secular affairs of the Church give the members thereof no right to close the church or oust the Vicar, and still less to appoint a schismatic priest not under the discipline and obedience to the Church of Rome. **Marian Pillai v Bishop of Mylapore, 17 Mad 447.**

Chur Lands.

See Cases under —

(1) Onus of Proof—Limitation and Adverse Possession
(2) Landlord and Tenant
(3) Limitation
(4) Onus of proof—Limitation & adverse possession. **33 Cal 33.**
(5) Accretion

1—Possession of chur lands-Title-Evidence—

The cultivation of chur lands like that of waste or jungle lands, carries no *prima facie* character of usurpation or wrong and the claimant against a purchaser, *bona fide* and without notice, in possession, must strictly prove his title
Ekowri Sing v Hiralal Seal 2 B L R P C 4 11 W R P C 2=12 Moore's I A 136

2—Suit for chur lands—Survey — Possession —Title —

In a suit regarding a chur claimed by defendant as having formed on the bank of the river adjacent to his village, and by plaintiff on the

Chur Lands-*Contd.*

ground that the bed of the river belonged to his village, the Court upheld the state of matters existing at the time when a survey had been made on the ground that the survey had been made at the time when neither of the present parties held any right in the land but when both villages belonged to the same proprietor, and that it was some evidence of possession at that time, not only of the julkur but of the right of property in the river, and possession under these circumstances was some evidence of title.
Mohinee Mohun Dass v Assanoollah, 17 W R 73.

3— Evidence as to position of—Local investigation—Maps —

In a dispute as to the position of chur lands, where the change in the course of a river threw doubt upon their position, the judgment of the Court of first instance, given after local investigation, was upheld against the decision of the High Court founded on inspection of the maps and on the arguments adduced before it.
Sarat Sundari Debi v Prosonno Coomar Tagore, 6 B L R 677 15 W R, P C 20 =13 Moore's I A 607.

4—Suit for possession on declaration of title——Indentification of chur as reformation, if necessary—Appearance of chur as an Island chur—Main land unity with subsequent—Possession adverse—Accretion to parent estate—Settlement of tenants—Limitation Act (XV of 1877), Sec, II, Arts, 120, 142, 144-Government, possession of—Court of Wards, position of —Release of Government, effect of— Gradual reformation, burden of proof

A plaintiff, in order to succeed has to prove and establish with certainty the identification of the chur claimed by him as a re-formation of lands of the villages to which the chur is alleged to be re-formation

Where the plaintiff makes no allegation of ever having been in possession or having been dispossessed, but claims possession of immoveable property the suit is governed by Article 144 of Schedule II of the Limitation Act (XV of 1877) which fixes the period of 12 years as commencing from the time when the possession of the defendant becomes adverse to the plaintiff, and not by Article 120 of that schedule.

Chur Lands-*Concld.*

The Government and the Court of Wards are in no sense identical and the Court of Wards cannot be regarded as merely a department of Government. The Court of Wards is a statutory body; the Board of Revenue, in this province, being the Court of Wards. It does not make the possession of Government the possession of the plaintiffs by the Court of Wards.

The burden of proving that the reformation of a chur was gradual and that portions of chur appeared above water within 12 years of the suit and if so, which portions are of this description lies on the plaintiff. **Guru Das Kundu Chowdhury v Kumar Basanta Kumar Roy 11 C L J 373.**

5—Alluvion—Limitation—Possession—Dispossession—Limitation Act (XV of 1877), sch II, Arts 142, 144.

In a suit for declaration of title to and recovery of possession of *chur* lands which had been diluviated more than twelve years before the suit, the plaintiffs proved their title and possession up to the time of diluviation, and alleged that the disputed lands had re-formed within twelve years of the suit. The defendants alleged and it was found that the lands in question came into existence some 30 years ago and have been gradually forming since then. How much was formed yearly and whether the chur was fully formed in five years could not be determined: *Held*, that the case should not be treated as though it were one of adverse possession falling within art. 144, Limitation Act, whereas the appropriate article was art. 152. (7 Cal 225, 8 C L R 126, Fol.)

Bilash Chandra Mukhopadhya v Amjud Ali Patwari. 9 Ind Cas 554.

Churs or islands in Navigable rivers.

See Accretion (New formation of Alluvial Land).

Circuit Committee.

—Proceedings of—is good evidence in questions relating to rights of Government with respect to Zamindari property—See Service Tenure.

3 C L J 1 P C=10 C W N 161=3 A L J 55 =8 Bom L R 1=16 M L J 1=14 M L T 3(PC) =29 Mad 52=33 I A 48.

Circuit Committee — Records—Evidence how far. **16 M L J 1=29 Mad 52 (P C.)**

Circular order by Judicial Commissioner of Punjab.

See Indian Councils Act.

12 B L R 167; 18 W R 389.

Circular order 41 of 1866.

See Local Investigation.

4 Cal 718.

—25 of 1870.

See Local Investigation.

4 Cal 718.

—10th July 1874.

See Bengal Rent Act, 1869, s. 58. Case No. (282), **3 Cal 547: 1 C L R 149.**

Circulars of High Court.

1—High Court, Civil Circular, 80—Essentials of an application for execution.

The proper view to take of Rule 80 is not that it prescribes the essentials which an application for execution must contain, and which are necessary to constitute the application itself an application in accordance with law, but that it requires something further besides the application itself, an accompaniment extraneous to the application, as a condition precedent to further action by the Court executing the decree.

Ramchandra v Laxman. 8 Bom L R 892= 31 Bom 162.

2—Circulars of High Court, effect of.

A circular order of High Court cannot affect the law as laid down by a Full Bench.

Golokemoney Dabia v Mohesh Chunder Mosa. 3 Cal 547=1 C L R 149.

Circumstantial Evidence.

See Evidence.

Citation.

See cases under:—

(1) Letters of Administration.
12 Bom 164; 4 Cal 87.

(2) Practice—Civil Cases Probate.
30 Cal 528.

City of Bombay Improvement Act.

1—Acquisition of land with buildings thereon —Amount of compensation—Principles upon which the amount to be fixed—Civil Procedure Code (Act XIV of 1882), S 561—Cross-objections.

Section 48 (II) of the City of Bombay Improvement Act, does not provide for leave to appeal being granted to any individual, but for a certificate that the case is a fit one for appeal that is the whole case and not any particular part of it. The consequence of the grant of this certificate is that there shall be an appeal to the High Court from the award, or any part of the award and this must mean that there shall be a right of appeal, or to use the language of the Civil Procedure Code, that an appeal will lie to the High Court. And the respondent is entitled to object to the award in the manner provided by S. 561 of the Civil Procedure Code.

In calculating the amount of compensation to be awarded upon acquisition of lands, with buildings thereon, by the City of Bombay Improvement Trust, the rental should be the basis of calculation, so that after arriving at the net rental, that what has to be ascertained is the rate of return, investors in this class of property expect; for that serves to determine the number of years purchase it is proper to allow, after giving due weight to any special conditions that may affect the property advantageously or otherwise.

As to the contention that the property was at the date of the declaration capable of fetching a higher rental which was apparent from the fact that the rents of their property had been steadily rising for 16 years previous to 1899:

Held, that, though for the purpose of this inquiry it was legitimate to have regard to the passed history of the rental, it could not be taken for granted that enhancement would continue possible for ever, and still less that there was such a certainty of this as to make it a basis for fixing a higher purchase price.

As to the contention, that in arriving at the valuation the Tribunal of Appeal following the Collector, had deducted 4 per cent in respect of water-tax, whereas the water supply to the premises was measured by meter and the average payment for water was Rs. 16 per annum.

Held, that the Tribunal was right in deducting 4 per cent, for water-tax from the rental.

City of Bombay Improvement Act -*Concld.*

The Collector allowed 20 years purchase as the value of the property. On appeal, the Tribunal took an average of the instances adduced before them and allowed the claimants 21-50 years purchase.

Held, that the striking of an average as done by the Tribunal might be a crude method of calculation; but it could not, on evidence, be said that the claimants had been awarded too little.

Rughunathdas Gopaldas v Secretary of State. 7 Bom R L 569=29 Bom 514.

Notes:—Ref: 10 Bom L R 931; 701.

City of Bombay Municipal.

See (1) Bom. City Municipal Act.
(2) Jurisdiction of Civil Court.
9 Bom L R 417.

City Municipalities Act.

See (1) Bomblay Acts—City Municipality Act & Municipal Act 1888.
(2) Bengal Acts—Municipal Act.
(3) Madras Acts—Municipal Act.

Civil and Revenue Court.

See (1) Civil Court.
(2) Jurisdiction of Civil & Revenue Courts.

1—Suit for partition of dera and site—Civil and Revenue Courts—Jurisdiction.

In a suit for partition of a *dera* standing on agricultural land situate in a *mahal*, in which the plaintiff had a share, *held*, that, though the suit was in name one for partition of a building, it was really a suit for partition also of the land, on which the building stood, and that it was barred by S. 233 (k), Land Revenue Act. **Narain Das v Bhup Narain. 6 A L J 408=31 All 330= 2 Ind Cas 628.**

Civil Circular.

1—A pleader who is unable to attend the Court owing to his temporary appointment as a Subordinate Judge of another Court, is not bound to appoint another pleader to conduct his cases in the Court in which he was practising.

Narayan v Dattatraya. 1 Bom L R 92.

Civil Circular-*Concld.*

2—Where the subject mattar in a miscellaneous proceeding admits of a precise valuation costs should be calculated on that amount as in a suit. **Karsandas v Mathuradas. 1896 P J 303.**

3—Proceedings in execution against strangers in so far as they are concerned are miscellaneous proceedings under Civil Circular Order 62 and as the subject matter does not admit of a precise valuation the fees specified in that order should be awarded to them as costs. **Karsan v Motibai 1896 P J 313.**

Civil Circular order 174.

See Bombay Regulation VIII of 1827 s. 11 Case No (8) **1896 P J 489.**

Civil Court.

See (1) Jurisdiction of Civil Court.
(2) Madras Forest Act, S. 4.

1.—" Any other written grant " " Treaty. " In the Revenue Jurisdiction Act, 1876, s. 4, cl (*i*), the phrase, "any other writteen grant" means any written grant other than that which falls within clauses (*h*) and (*i*) of the same section. The clauses (*h*), (*i*), (*j*), and (*k*) of the section are independent of one another; the source of title referred to in each stands apart from the rest and each clause is connected only with that portion of the proviso which precedes cl. (*h*).

The term " treaty " in s. 4 (*a*) of the Act is to be strictly construed and is to be confined to an agreement between two or more independent Sovereign Powers or States.

The effect of the Amending Act (XVI of 1877) is to restore the jurisdiction of the Civil Courts to the extent mentioned in that Act in the district mentioned in the schedule thereto, and so far to remove the bar created by s.4 of the principal Act X of 1876. **Kalabhai v. Secretary of State For India 6 Bom L R 648**

2.— Appointment— Jurisdiction— Presumption.

The power to appoint a guardian *ad litem* is inherent in every Court of civil jurisdiction. Where therefore a Shia Muhammadan lady had been appointed by a Civil Court guardian *ad litem* of her infant children, it was held that the appointment must be presumed to be valid and

Civil Court-*Contd.*

that a sale in execution of the decree obtained in such a suit was binding on the minors. **Muzaffar Ali Khan v Parbati. 1907 A W N 221: 4 A L J 521; 29 All 640.**

3.—Transfer of civil cases-Civil Procedure Code Secs. 23, 25—Reference by District Judge-Bengal Civil Courts Act (XII of 1887) Secs, 9, 39—Court of Subordinate Judge, if subordinate to the Court of the District Judge—Delay.
The Court of the Subordinate Judge is Subordinate to the District Court for the purposes of section 23 of the Civil Procedure Code (Act XIV of 1882), no matter what the forum of appeal may be in the particular case for the transfer of which the application is made.

The jurisdiction of a superior Court to transfer a suit from one subordinate Court to another ought to be exercised with extreme caution. The choice of forum given to plaintiff by the Legislature ought not to be lightly interfered with,and the Court will not transfer a suit properly laid, except upon proof of special circumstances. A well-recognised ground exists when the convenience of necessary witnesses and the ends of justice will be promoted by the transfer: but the ground alleged must be clearly established.

Under section 25 of Code of Civil Procedure (1882) the Court has, no doubt, ample power to make the order even after the issues have been framed: but satisfactory reasons ought to be given in explanation of the delay. (22 ch. Dist. 397 Ref.). **Umatul Mehdi v Kulsoom. 10 C L J 208.**

4.—Annual survey assessment which is remitted.

Proviso 3 to cl 5 of S. 7 of the Court Fees Act has reference only to the annual survey assessment which is remitted, that is to say to the rate of remissions at the date of suit; it has no reference to remissions previously made,but no longer existing. **Balvant v Secretary of State. 7 Bom L R 497=29 Bom 480.**

Notes:—Ref 32 Bom 432=10 Bom L R 531; 11 Bom L R 1372.

5.—Suit for rent due and for money due in respect of fishery attached to the holding—Jurisdiction of Civil Courts.

Civil Court-*Concld.*

A Suit for rent due in respect of an agricultural holding and for a sum of money due by the defendent in respect of a fishery attached to the holding is not bad for misjoinder of causes of action (*vide* S 45 C P C.) and a suit for the rent due in respect of a fishery is cognizable by a civil court in its ordinary orginal jurisdiction. **Shib Prosad Chaudhuri v Vakai Pali. 33 Cal 601.**

6.—Suit by usufructuary mortgagee of an occupancy holding for possession of the property mortgaged to him.

A suit brought by the usufructuary mortgagee of an occupancy holding for possession of the property mortgaged to him was rightly brought in a civil and not in a Revenue court. (15 All 219; 26 All 78 Ref to). **Binaeshri Rai v Sadho Charan Rai. 26 All 591=1904 A W N 132.**

7.—Jurisdiction—Ejectment—Limitation.

On the death of an occupancy tenant, his two daughters had their names recorded as tenants of their father's holding, but they never obtained possession, the zamindar having put in his own tenant. One of the daughters gave a lease of half of the holding, and the lessee sued the zamindar's tenant in a Civil Court to recover possession. *Held* the plaintiff's proper remedy was by suit under section 79, and as he had been out of possession for about three years, the suit was barred by limitation. **Ram Lal v Chunni Lal. 24 W N 281=2 A L J 69=27 All 272.**

8—Civil Court—S. 144 C P C.

S. 15 and 17 of the Civil Procedure Code, control s. 144 of the Bengal Tenancy Act: a suit for rent should be instituted, subject to pecuniary limitations in the Court of the lowest grade competent to try it. **Fazlur Rahim Abu Ahmed v. Dwarka Nath Chowdhury, 30 Cal 453.**

Civil Court-Jurisdiction.

1.—Jurisdiction of Civil Courts—Suit of a civil nature—Suit by Temple Committee against Temple servants for declaration as to their right to have the services performed by others.

The plaintiffs held the office of members of the Committee of Management of a certain temple under a *sannad* from Government and received annually a certain sum of money for defraying the expenses of certain kinds of religious worship in the temple. The obligation attached to the office was to get the worship performed by the hereditary officers or servants attached to the temple. Plaintiffs alleged that they failed to perform the worship owing to differences among themselves with the result that the duties owing to the idol were neglected and the funds in the hands of the plaintiffs remained unexpended. The plaintiffs therefore, asked for a declaration of their right to disburse the funds by getting the worship performed by a suitable person or persons in the event of the hereditary officers or servants of the temple concerned failing to perform it; and for an injunction to restrain those servants from obstructing the plaintiffs in the exercise of the right so declared. It was objected that the Civil Court had no jurisdiction to try the suit in which the prayer was for a bare declaration of the plaintiff's right either to perform by themselves or to get performed certain religious ceremonies in a temple and there was no contest as to any right to property or to any office. *Held*, overruling the objection, that the plaintiffs were trustees of a public charitable trust holding moneys in their hands for disposal in a certain manner for certain defined purposes. An action would lie against them by the Advocate-General acting on behalf of the public to compel them to a due execution of their particular acts of duty. The obligation cast on them by the trust gave them a corresponding right to disburse the funds after getting the religious worship for which those funds were intended properly performed. Such a a right was not less of a civil nature though the funds were to be appropriated to religious ceremonies. The Court was not called upon to enter into the adjudication of any rites and cermeonies but only to decide the right of the trustees to fulfil the trust unhindered. ((1880) 5 Bom 82 ref). **Trimbak Gopal Paricharak v Krishna Rao Pandurunga: Krishna Rao Pandurung v Visvanath Gopal Badre 33 Bom 387; 11 Bom L R 389.**

2.—Salary earned but not spent within Municipality-'Circumstances' and property-Assessment:-

The word 'circumstances' does not in any way restrict the natural meaning of the word 'property' as used in the section. The intention seems to be, on the other hand, to widen the scope

Civil Court-Jurisdiction-*Concld.*

of the section so as to make taxable what might perhaps be not properly comprised under the term 'property' and at the same time ought not to escape assessment, *e g* voluntary payments to a priest. Consequently, a tax levied on the whole income and not merely the expenditure incurred within the Municipality is proper.

Chairman of Giridih Municipality v Suresh Chandra Mozumdar.

12 C W N 709; 7 C L J 631; 35 Cal 859.

Civil Court order of

See Small Cause Court, mofussil.

Civil Courts Acts.

See (1) Bombay Civil Courts Act.
(2) Bengal Civil Courts Act.
(3) Punjab Civil Courts Act.
(4) Oudh Civil Courts Acts 1871 & 1879.

Civil Courts Act (XIV of 1869)

1—S. 13—Subordinate Judges having same local jurisdiction—No assignment of business by District Judge—Effect—Concurrent jurisdiction.

Where no order has been made by a District Judge under S. 13 of the Civil Courts Act assigning to each of two or more Subordinate Judges having the same local jurisdiction the particular business to be done by each, the subordinate Judges must be taken to have concurrent jurisdiction.

An application for execution was made and registered in the office of the Deputy Commissioner of Singhbhum and then forwarded by post to the Subordinate Judge of Singhbhum sitting at Purulia.

Held,—That the Subordinate Judge had jurisdiction to entertain the application. **Chaturbhuj Marwari v. A W Walker.**

13 C W N 265.

2—S. 13—Execution, application for, where to be made—Transfer of jurisdiction—"Court which passed the decree".

The expression "the Court which passed the decree" in S. 232, C. P. C., includes the Court which by reason of a transfer of jurisdiction has jurisdiction in respect of the subject-matter of the suit. S. 649, C. P. C., should, if possible, be so construed as to make it convenient to the parties to execute their decrees; the decree-holders as well as the judgment-debtors. **Udit Narain Chowdury v. Mathura Pershad Mahati.**

12 C W N 859; 35 Cal 974.

Civil Courts Act (XIV of 1869)-*Contd.*

3—Civil Courts Act, Ss. 15, 18 and 19—Act VII of 1887 (Suits Valuation Act). Ss 9 and 21—Valuation of suit—Suit for restitution of conjugal rights—Jurisdiction.

A suit for restitution of conjugal rights is not a suit which is of necessity excluded from the jurisdiction of a Munsif. The value of such a suit is, as a sule, the value which the plaintiff chooses to put upon it, provided that the suit be not unwarrantably undervalued or overvalued from improper motives. (31 Cal 849 diss. from; 13 Cal.232; 18 Cal. 378; 5 Moo. P.C. 81; and 4 Moo. P. C, 374 dist; 15 All. 378, 10 All. 524; 13 All. 320; 16 All 286 and 8 Bom 31 ref to.). **Zair Husain Khan v. Khurshed Jan.** **1906 A W N 99. 3 A L J 266, 28 All 545: F B.**

4—S. 17—Grant of certificate—Order to find security—Practice.

Where a Judge acting under S. 9 of the succession Certificate Act, requires security to be furnished by a person to whom a certificate of succession is granted, the amount of the security should be specified in the order and a time should be prescrided within which the security must be furnished. *Semble:* that S. 8 of the Act cannot be applied to the case of a fixed deposit in a bank, such not being a 'security' within the meaniog of S. 3 (2). **Gulraji Kunwar v. Jagdeo Prasad.**

1906 A W N 94; 28 All 477.

5—S. 19—Jurisdiction of Munsif in account suit—Valued within pecuniary limit—Larger sum found due—Practice—Procedure.

In a suit for accounts and recovery of papers brought before a Munsif who had pecuniary jurisdiction to try suits up to Rs. 1,000 in value the claim for recovery of papers was valued at Rs. 50 and that for accounts at Rs. 150 with a prayer that additional Court fees would be paid for any amount to be found due in excess; after the preliminary decree the amount due was ascertained to be Rs. 8,424.—*Held*: That the plaintiff cannot obtain a decree for a sum of Rs. 1,000 in excess of the limit of the Munsif's pecuniary jurisdiction: that the plaintiff ought to be called

Civil Courts Act (XIV of 1869)-*Concld.*

upon to relinquish the excess and thus place the case formally within the pecuniary jurisdiction of the Court of his deliberate choice or the Court may, in such a case, remit the excess or presume the excess to have been remitted. **Golap Singh v. Indra Coomar Hazra.**

13 C W N 493; 9 C L J 367.

6—S. 21. Cl. (a)—Appellate Forum—"Value of the original suit"—Mesne profits, past and future—Test—Value as stated in plaint or as found by Court—Interest.

Per Full Bench.—In a suit filed in the Subordinate Judge's Court for possession of land and mesne profits which was originally valued at a sum below Rs. 5,000 but in which the whole amount actually found due, inclusive of mesne profits payable by the defendant to the plaintiff is over Rs. 5000 an appeal lies to the High Court. Per *Mookerjee* J.—Only if the amount is accepted by the plaintiff and additional Court fee be paid under S. 11 of the Court Fees Act.

Per *Mookerjee* J:—The forum of appeal depends not upon the value as adjudged, but upon the value as accepted by the plaintiff after adjudication, *i.e.* where the Court allows him a larger amount than what is tentatively claimed, he adopts the increased amount as the value of his claim, and in the other instance, that is, where the Court allows him a less amount, he still adheres to his claim in respect of the large amount stated in the plaint and seeks to enforce the same. **Ijjatulla Bhuiyan v. Chandra Mohan Banerjee.** **11 C W N 1133.**

6 C L J 255; 34 Cal 954.

7—Civil Court Act—S. 22—Jurisdiction of Judge to transfer case remanded by High Court.

The District Judge has power to transfer an appeal for hearing by a Subordinate Judge even after such appeal had been previously heared by him and has been remanded by the High Court for a fresh hearing. (15 W R 547; 23 Mad 314 dist. 21 All. 230 diss. from.). **Prankrishna Shaini v. Kunja Behari Das.** **(1908) 9 C L J 572.**

Civil Pro. Code (1859) Amendment Act XII of (1879).

See C. P. C. (1882).

Civil Pro. Codes—Whether exhaustive.

See C. P. C. 1908.

Civil Pro. Code (1882) S. 20.

1.—Ss. 20. 111—Set off—Same transaction—Sale of Mortgage decree free of incumbrance—Existence of prior attachment-Claim for purchase money-Raising of attachment by vendee.

Defendant executed an amanati receipt in favour of the two plaintiffs, the contents of which were as follows: "That you keep in deposit with me Rs.7,774-5-10 in order to pay off debts due to your Calcutta creditors on account of your joint business as well as to meet the expenses of your joint law suit. I shall return the said deposit money to you when you both will jointly demand payment from me of the said money in deposit." (The rest of it provides for the payment of interest at a certain rate from the date of demand.)

The amount mentioned in the receipt represented the unpaid balance of the purchase money of mortgage-decree sold by the plaintiffs to the defendant, on the same day, free of incumbrance. The decree, however, had been already attached by some creditors of the plaintiffs. In a suit brought by the plaintiffs on the basis of the amanati receipt to recover the amount of deposit with interest, the Defendant claimed to set off a sum of Rs.6,289-12-5 paid by him to release the decree from attachment, the payment having been made at a time when a second mortgagee of the property recovered by the decree applied for execution of a decree obtained on his mortgage by sale of the property. In support of his claim the defendant adduced evidence to prove (1) that the deposit was made as a security for the release of the decree from attachment, and (2) further that there was an oral agreement between the parties that on plaintiffs failing to pay off the attaching creditors, the Defendant would be at liberty to make the payment out of the deposit.

Held, that the defendant was entitled to the set off claimed.

(1) because, having the right to compel the plaintiffs to pay off the claim of the attaching creditors, Defendant had been forced to pay it off himself in order to save his own interests under the purchased decree from the second mortgage.

(15 W R 545).

(2) because, the payment was made on the plaintiff's behalf and they had the benefit of it.

Civil Pro. Code (1882) S. 20-*Contd.*

(3) and because, the claim for re-payment of the deposit and the payment made to release the decree were so connected together as to form parts of the same transaction.

Khetsidas Agrawala v Shib Narayan Murda. **9 C W N 178.**

2.—C P C S. 20 (1882)—Of High Court to restrain suit in Presidency Small Cause Court-Admission of set off by plaintiff-Suit by defendant in Small Cause Court-C P C Ss.20 and 111.

A filed this suit against B to recover Rs.3421-15-3 alleged to be due on account stated on account of business dealings. He admitted a debt of Rs.621-14-3 due by him to B on a different account. B on the same day as A's suit was filed, instituted a suit in the Presidency Small Cause Court to recover the said Rs.621-14-3.

Held, that this Court has jurisdiction to restrain the Presidency Small Cause Court from proceeding with B's suit. **R S Hart v Grosser. 9 C W N 748.**

Notes.—Ref: 34 Cal 97.

3—Section 20—Staying proceedings, grounds for—Civil Procedure Code (Act XIV of 1882). Section 20—Analogous suit instituted elsewhere-Plaintiff not party thereto.

Plaintiff having obtained permission to sue in *forma pauperis* in the Court of the District Judge, Ferozepore, for certain property which he claimed as heir of one B. L., instituted his suit in the Court. Application was thereupon made to the Court under Section 20 of the Civil Procedure Code to stay proceedings on the ground that one of the defendants in plaintiff's suit was at the time suing certain of his co-defendants in the Umballa Court for part of the property comprised in plaintiff's claim. It was admitted that plaintiff had not been made (and he was not necessarily) a party to the latter suit. The District Judge granted the application on the grounds that "all the property claimed at Umballa was included in the present suit; that plaintiff though not a party to the Umballa case would probably be made one now, that the Umballa case had been pending some time and much evidence had been taken, and that the points for decision in both cases were the same."

Held, that, as the jurisdiction given by Section 20 of the Civil Procedure Code is of an

Civil Pro. Code (1882) S. 20-*Concld.*

exceptional character to be exercised cautiously and only upon very clear cause shown the sole test under that section being whether "the Court is satisfied that justice is more likely to be done by the suit being instituted in some other Court" and there being no mention of convenience or expediency, the mere fact that the points for decision in both cases might be analogous was not sufficient reason for holding that justice was more likely to be done by compelling the plaintiff to sue in the other Court, especially in view of the facts that plaintiff had not been made a party to the suit at Umballa and that the value of the property claimed by plaintiff at Ferozepore was considerably larger than of that in suit at Umballa. (4 C L R 282, distinguished; 13 Bom 178, cited). **Kheta v Ganga Ram P R 8 of 1894.**

C. P. C. s. 27.

See (1) Civil Procedure Code, 1882, s.257A.
(2) Civil Procedure Code, 1882, s.258.

C. P. C. s. 20.

See (1) Jurisdiction of Civil Court—Revenue Courts—Orders of Revenue Courts.
(2) Rules made under Acts.

C. P. C. (1882) S.257A.

See Compromise—Compromise of suits under Civil Pro. Code.

4—5.—Agreement by which decrees are modified—Guarantee by which a surety who pays judgment debt is to be indemnified.

S. 257 of the Code of Civil Procedure is applicable only as between parties to the decree. **Yella v Munisami. 6 Mad 101.**

Notes.—Ap: 11 All 228. Fol: 13 Bom 671. Ref; 19 Mad 230; 6 Bom L R 344; 28 Bom 383.

6—S. 257A—Arrangement to pay decree by instalments.

The decree-holder and judgment-debtor of a decree filed a petition (sulehnama) in the Court executing the decree, praying that the Court would sanction an arrangement providing for the payment of the decree by instalments, and enhancing the rate of interest made payable by the decree. The Court sanctioned the arrange-

Civil Pro.Code (1882) S.257A-*Contd.*

ment. *Held* that the "sulehnama" was within s. 257A of the Civil Procedure Code, and the decree might be executed in accordance with the provisions. **Sita Ram v Dasrath Das. 5 All 492.**

Notes.—Fol: 11 All 228. Dist: 19 All 186. Ref: 12 All 571.

7.—S. 257 A—Bond for satisfaction of judgment-debt without sanction of Court.

G, the father of the plaintiff, obtained two decrees: one against the defendant *A* and his father, and the other against *A*'s father alone, and in satisfaction of these decrees obtained a bond without the sanction of the Court, and brought a suit to recover the sum due under the said bond. *Held* that the bond was void under the second clause of s 257A of the Civil Procedure Code (Act XIV of 1882). **Ganesh Shivram v Abdul Beg. 8 Bom 538**

Notes:—Diss: 11 Cal 671. Not Fol: 16 Cal 504. Fol: 15 Bom 419; 18 All 479. Dist 25 Bom 253.

8.—Amount found due—Increased by agreement.

A decree for sale under section 88 of Act IV of 1882 can only be executed for the amount decreed or found in account to be due, and the order for sale cannot, except with regard to any additional costs which may be provided for by s. 94, extend in any way the liability of the judgment-debtor or his property under the decree. (5 All 492 distinguished). **Kashi Prasad v Sheo Sahai. 19 All 186, 17 W N 12.**

Notes.—Ref: 19 All 205. Dist: 10 C L J 91.

9.—S. 257A-Agreement or adjusting satisfying decree-Mortgage-bond in satisfaction of decree—Sanction of mortgage by Court—Sufficiency of sanction.

Where mortgage-bonds were passed for debts due on decrees, and the execution of the bonds (which had been sanctioned by the Court) and the amounts for which they were passed were certified to the Court, and the Court recorded the adjustment without objection, and the decrees by reason of such adjustment became incapable of execution,—*Held* that sufficient had been done by the Court to satisfy the requirements of s. 257A of the Civil Procedure Code (Act XIV of 1882), although no formal sanction had been recorded. **Krishna Ramaya Naik v. Vasudev Venkatesh Pai. Vasudev Venkatesh Pai v Mhasti. 21 Bom 808.**

Notes.—Con: 25 Bom 252. Ref: 4 Bom L R 587; 9 C W N 923; 9 Bom L R 274. Dist: 4 Bom L R 587.

10.—S. 257A-Judgment-debt—Sanction of Court—Contract void—Principal—Surety.

An agreement entered into to pay interest not awarded by a decree in addition to the sum decreed without the sanction of the Court which passed the decree is void under s. 257A of the Code of Civil Procedure, Act XIV of 1882, so far as it operates in satisfaction of the judgment-debt. When the void part of an agreement can be properly separated from the rest, the latter does not become invalid; but where the parties themselves treat debts—void as well as valid—as a lump sum, the Court will regard the contract as an integral one and wholly void, upon which neither the principal nor the sureties can be sued. **Davlatsing v Pandu 9 Bom 176.**

Notes.—Diss. 11 Cal 671. Not Fol: 16 Cal 504. Fol: 5 Bom L R 672; 15 Bom 419; 18 All 479. Dist: 25 Bom 259. Ref: 28 Bom 62.

11.—S. 257 A—Adjustment of decree out of Court—Instalment bond—Consideration.

S. 257A of C P Code gives no effect to agreements between judgment-debtor and decree-holder for extending time for execution of the decree, without consideration and without the sanction of the Court. It does not prevent the parties from entering into a new contract for the payment of the decretal amount by instalment or otherwise. **Jhabar Mahomed v Modan Sonahar. 11 Cal 671.**

Notes:—Not Fol: 11 Bom 6 F B; 15 Bom 419; 16 Bom 618. Fol: 16 Cal 504. Dist: 20 Cal 32. Ex: 12 Mad 61. Ref: 17 Mad 382; 2 M L J 221; 21 Bom 808; 22 Bom 693 F B; 25 All 317 F B; 7 C L J 543=35 Cal 870=12 C W N 674; 6 A L J 726

12.—Execution of Decree—Civ Pro Code 1882, ss. 257A. 210.

Civil Pro.Code (1882) S 257A *Contd.*

The parties to a decree for money, dated the 14th July, 1871, entered into a compromise whereby in lieu of a portion of the decretal money the decree-holder was placed in possession of certain property, and the remainder of the decretal money was to be paid by fixed annual instalments and, in case of default in the payment of any instalments, it was agreed that the entire amount should become immediately realizable by execution of the decree. On the 11th December 1882, the decree-holder alleging default in payment of the instalments, applied for execution of the compromise.

Held that such an agreement could not be treated as an instalment-decree, and, as such, capable of execution. **Ramlakhan Rai v Bakhtaur Rai. 6 All 623.**

Notes:—Ref: 11 All 228.

13—C P C S. 257A—Adjustment of decree out of Court—Instalment-bond—Consideration—Execution of decree—Right of suit.

Where the benefit of a decree is given up and in consideration of it a bond is executed, it cannot be said that the bond should not be the foundation of a fresh suit. The bond is not void as an agreement falling under s. 257A of the Civil Procedure Code. Such an agreement is void only as far as it affects the right to execute the decree, (12 Mad. 61, 11 Calc, 671, and 16 Calc, 504, followed) **Juji Kamti v. Annai Bhatta 17 Mad 382.**

Notes.—Ref: 21 Bom 808, 22 Bom 693 F B, 25 All 317 F B; 7 C L J 513=35 Cal 870=12 C W N 674. Not Fol 26 Mad 19; 12 M L J 113.

14—S.257A-Settlement of decree without sanction by giving promissory note payable on demand —Note renewed from time to time—Suit on note.

On the 4th December 1889, the plaintiffs obtained a decree against the defendants for Rs. 941. The decree was made payable in eight days *i. e.* on or before the 12th Dec. 1889. On the 9th Dec. 1889. *i. e.*, before the decree was capable of execution, it was settled by the defendants' paying Rs. 600 in cash and passing a promissory note for Rs. 341 payable on demand and carrying interest at 3 per cent per mensem. The decree was satisfied and handed over to defendants, and plaintiffs also endorsed the summons to that effect. That compromise was not sanctioned by the Court. On the 9th November 1892, and again on the 4th November 1895, the plaintiffs made up their account with defendants and obtained new promissory notes from them for the amount found due in renewal of the note passed in 1889. The present suit was brought on the note passed on the 4th November 1895, which was for Rs. 815 and carried interest at 3 per cent. per mensem. *Held* that the note sued on fell within the purview of s. 257A of the Civil Procedure Code, and was void and unenforceable under the provisions of that section. The consideration for the note given in 1889 was the agreement of the plaintiffs to accept it in satisfaction of the decretal balance due to them. If that agreement was void the note given for the void consideration was void also. The note was not in fact the agreement, but was given in performance of the agreement. **Heera Nema v. Pestonji Dossabhoy. 22 Bom 693**

Notes.—Dist: 25 Bom 252. Diss: 25 All 317 F B. Fol: 27 Bom 96. Ref: 28 Bom 62: 9 Bom L R 950; 295; 31 Bom 552.

15—C P C S. 257A-An agreement entered into by a judgment-debtor with a decree-holder to pay the amount of a havala given in settlement of a decree without the Court's sanction held to be void under paras 1 and 2 of s.257A, Civil Procedure Code. **Vishnu Vishwenath v. Hur Patel. P J (1888) 60=12 Bom 499.**

Notes.—Not Fol: 16 Cal 504. Fol: 18 All 479. Dist: 25 Bom 252, Ref: 21 Bom 808; 23 Bom 502, 28 Bom 62.

16—C P C S. 257 A—A decree for redemption, under Act XVII of 1879 was made and, subsequently, modified, on the 23rd September 1882, by the special Judge. The decree directed payment of the amount, with costs, within seven months On 3rd October 1885, the parties entered into an agreement, extending the period of payment to five years and applied to the subordinate Judge to sanction it on the 18th February 1888, when execution of the decree was time barred. *Held*, that the agreement required the sanction of the Court under s. 257 A, Civil Procedure Code and could not then be sanctioned. **Naru v, China Bhosle P J (1888) 188=13 Bom 54.**

17—C P C S. 257 A—Agreement for time for satisfaction of judgment-debt, without sanction of the court—Illegal contract—Contract Act s.23—Consideration.

An instalment decree was made but the defendant failed to pay the instalments and the plain-

Civil Pro.Code (1882) S.257A-*Contd.*

tiff accepted a bond executed jointly by the defendant and his father making both of them liable for the amount at the rate of 10½ percent. A suit was brought on the bond. The defendants pleaded that the bond was void under s. 257-A C P C and s.23 of the Contract Act and consequently the suit could not lie. *Held*, that s. 257 A C P Code was not applicable. The section is intended to prohibit the enforcement of an agreement of the kind mentioned therein made without the sanction of the court, but the section was not intended to take away the right of the parties of entering into a fresh contract, either for the payment of the judgment-debt or for the payment of a sum larger than that of the decree, if it is for a proper consideration. It cannot be said that because satisfaction of a decree was not certified to the court there was no consideration. *Held* also that the bond was not void under s.23 Contract Act and the consideration is a lawful consideration **Hukum Chand Oswal v Taharunnessa Bibi. 16 Cal 504.**

Notes:—Diss: 18 All 435; 26 Mad 19. Not Fol. 12 M L J 113. Fol: 17 Mad 382; 23 Bom 394, Ref: 16 Bom 618; 21 Bom 808; 22 Bom 693 F B; 25 All 317 F B; 7 C L J 543=35 Cal 870=12 C W N 674; 6 A L J 726.

18—C P C S.257A-Agreement not to execute decree—Execution—Breach of contract-Suit to recover damages.

The provisions of s. 244 of the Civil procedure Code are no bar to a suit to recover damages for breach of a contract not to execute a decree.

Hanmant Santaya Prabhu v Subbabhat. 23 Bom, 394.

19—S. 257 A of the Civil Procedure Code relates only to judgment debts which are still enforceable. **Shripatrav v. Govind Narayan P J (1889) 361=14 Bom 390**

Notes.—Ref: 26 All 36.

20—Civil Procedure Code s 257A—Amendment Act (VII of 1888) s.27-Adjustment of a decree, suit upon—Agreement to extend time for enforcing decree by execution.—

On the 16th July 1886, S. obtained a decree against K for Rs 315 with costs. On the next day K paid S Rs 200 in part satisfaction of the decree, and induced K to accept a bond by which he (S) gave up the costs, and by which K was to pay the balance of the decree with interest at the end of eight months. S sued upon the bond. K contended that the bond was void under s. 257 A of Civil Procedure Code, and that the suit would not lie *Held* that the suit would lie. Since amendment made in s. 258 by Act VII of 1888 such payments or adjustments may be recognized by a Civil Court, except when executing the decree and, therefore, a suit based upon such a payment or adjustment should be admitted. The concluding clause of s. 258 has no direct bearing on s. 257 A, as it relates to a different subject-matter. *Quere*—Whether s. 257 A relates exclusively to agreements to extend the time for enforcing decrees by execution, as ruled by the Calcutta High Court, or is applicable to all agreements according to the view taken by the Bombay High Court ' (11 Calc 671; 1881 P J 315; 8 Bom. 538; 8 Bom. 300 and 9 Bom 176 referred).

Swamirao Narayan Deshpande v Kashinath Krishna Mutalik Desai. 15 Bom 419.

Notes.—Ref: 26 All 36.

21—C P C S. 257 A—Agreement to give time for the satisfaction of a judgment-debt—Agreement not enforceable without sanction by the Court.

S. 257A of the Civil Procedure Code, when it provides that "every agreement to give time for the satisfaction of a judgment-debt shall be void" unless made for consideration and with the sanction of the Court, etc., does not make such agreements illegal, in the sense prohibited by law. It only prevents such agreements being enforced in a Court of Law. Where such an agreement to give time, never sanctioned by the Court as required by s. 257A, formed part of the consideration for a bond, and had actually been enjoyed by the obligee of the bond,—*Held* that such consideration, not being in its nature illegal, and not having as a fact failed, there was no reason why the obligor should not enforce the terms of the bond. **Bank of Bengal v Vyabhoy Ganji. 16 Bom 618.**

Notes.—Dist: 25 Bom 252. Fol: 6 C W N 27. Ref: 31 Bom 552; 21 Bom 808; 6 Bom L R 344; 28 Bom 383; 9 Bom L R 950; 7 C L J 543=35 Cal 870=12 C W N 674; 9 Bom L R 1380 Appl: 33 Bom 708.

22.—Alteration of decree.—Per *Edge*, C. J.—An agreement sanctioned under s. 257A, cannot

Civil Pro.Code (1882) S.257A-*Contd.*

be treated, without anything more, as a decree of the Court and cannot operate as an order under s. 210, though an order under s 210 would operate as a sanction under s 257 A. **Gandharap Singh v. Sheodarshan Singh. 12 All 571: 10 W N 197.**

23.—Agreement with the sanction of the court-Enforcement of the agreement in execution.

Parties to a decree agreed with the sanction of the court under s. 257A, C P Code that money due under the decree should be realised as in execution of the decree rather than by a separate suit.

The agreement may be enforced in execution. The court which would try a regular suit brought upon the agreement is the same court which would execute the decree to enforce its own terms. **Sadasiva Pillai v. Ramalinga Pillai 5 B L R 383=24 W R 193 relied on, Thakoor Dyal Singh v Sarju Pershad Misser 20 Cal 22.**

24.—The provisions of s. 257 A of the Civil Procedure Code do not include within their scope an agreement between a Judgment-creditor and a person other than the Judgment-debtor where by such person in consideration of the postponement of execution of the decree against the judgment-debtor undertakes to pay to the judgment-creditor a certain sum of money. **Kesu Shivram Marwadi v.Genu Babaji Powar. P J (1898) 374=23 Bom 502.**

Notes.—Ref: 6 Bom L R 344; 28 Bom 383; 7 C L J 543=35 Cal 870=12 C W N 674.

25.—S. 257 A, Civil Procedure Code, applies only as between the parties to a suit or decree, and does not affect a bond executed by a son of the judgment-debtor to a son of the judgment-creditor. **Ramji v. Mahomed. P J (1889)90 =13 Bom 671.**

Notes.—Ref: 19 Mad 230. 23 Bom 502; 6 Bom L R 344; 28 Bom 383.

26—Two plaintiffs got a decree in their favour for partition of family property. One of the plaintiffs died before the execution of the decree and a question arose between the surviving plaintiff & one of the defendants as to the devolution of the deceased plaintiff's interest & it was decided in favour of the surviving plaintiff. The contending parties however entered into an agreement, which set out that some portion of the land going to the share of the deceased plaintiff should be given to the defendant. This agreement was not however certified to the court. The surviving plaintiff got his decree executed & subsequently refused to abide by the agreement. The defendant thereupon filed a suit praying in the alternative for possession of the land awarded to him for damages

Held, (1) that plaintiff's claim for the land was not maintainable, (2) that the claim for damages for breach of the agreement was maintainable, **Krishnasamy Ayyangar v Ranga Ayyangar. 20 Mad 309.**

Notes.—Dist: 16 M L J 54.

27.—S. 257A—Agreement for satisfaction of judgment-debt.—

A money-decree was passed against a zamindar by the High Court in 1883, and it was transferred to the District Court for execution. The decree-holder attached and prepared to bring to sale certain villages of the judgment-debtor. These villages were included in a mortgage subsequently executed by the judgment-debtor in favour of third parties. Both before and after the mortgage the decree-holder received from the zamindar certain sums in consideration of his agreeing to postponements of the sale; also it was agreed between them at a date subsequent to the mortgage that interest should be computed at a higher rate than that provided by the decree. Subsequently the decree-holder sought to bring the land to sale, and in computing the amount then due gave credit for none of the sums so received and calculated interest at the enhanced rate. The mortgagee objected that the computation was erroneous in both these respects, and the District Judge upheld his objection. The judgment-debtor took no part in the contest. *Held* that the District Court, not being the Court which passed the decree, had no power to sanction the agreements under s. 257A, and that the decision was right. **Paramananda Das v Mahabeer Dossji 20 Mad 378.**

Notes.—Fol: 24 Mad 689. Ref: 17 M L J 321.

28.—Agreement to give time to the judgment-debtor—Agreement not sanctioned by the Court.

Civil Pro.Code (1882) S.257A-*Contd.*

A judgment-debtor asked for time to pay the decretal amount. The decree-holders agreed to give time on condition that the judgment-debtor gave them a hundi for Rs 1,500, that sum representing a portion of the decree-holder's claim which had been dismissed as barred by limitation. The judgment-debtor gave the hundi but the sanction of the Court was not obtained to the transaction. In a suit by the decree-holders to recover the money secured by the hundi given under the circumstances mentioned above, it was *held* that the transaction was one contemplated by s. 257A of the Code of Civil Procedure, and that, as it had not been made with the sanction of the Court, it could not be enforced and the suit should be dismissed. (16 Cal, 504, dissented from.). **Dan Bahadur Singh v Anandi Prasad. 18 All 435.**

Notes.—Fol: 18 All 479. Dist: 2 A L J 683=(1905) W N 57; 25 All 317 F B. Ref: 22 Bom 693 F B.

29.—Agreement as to payment of decretal money—Void agreement.—

An agreement between the decree-holder and the judgment-debtor for the satisfaction of a decree by which any sum in excess of the decretal amount is payable, and which has not been sanctioned by the Court which passed the decree, cannot be made the basis of a subsequent suit (18 All 435, 8 Bom., 538, 9 Bom 176, 17 Bom 499, 15 Bom 419, referred to.) **Dalu Malwahi v. Palakdhari Singh 18 All 479.**

Notes—Dist: 25 All 317 F B.

30.—S. 257A—Agreement for the satisfaction of the decree without the court's sanction.

Agreement for the satisfaction of a decree without the sanction of the court under s. 257A is void but if it is sanctioned, it may be carried out in execution. **Durga Prasad Banerjee v. Lalit Mohun Singh Roy. 25 Cal 86.**

31—32.—257-A—Repeal—Effect on S 13 (c), Act XVII of 1879. **13 Bom L R 508.**

33.—S. 257A——Application of—Essentials for:—

It is essential that there should be a subsisting decree capable of being executed in order to make S. 257-A, apply to a case; and where the decree itself has been adjusted as such, S. 257 A is not applicable (F B), Per C J and *Blair* J *Semble*.—An agreement, made in contravention of S. 257 A. is void only in execution of the decree and not for all purposes. (22 Bom 693, 27 B 96 dissented from 18 All 435; 18 All 479 distinguished.) **Lalji Singh v Gaya Singh. 1903 A W N 45=25 All 317.**

Notes.—Fol: 32 Cal 917=9 C W N 1004; 2 A L J 683=(1905) W N 57; I A L J 390: Ref: 7 C L J 543=35 Cal 870=12 C W N 674; 6 A L J 726.

34—C.P.C. (1882) S.257A-Limitation Act Ss.19, 20—Estoppel—Execution—Mortgage—Decree for payment by instalments—Default—Order absolute—Subsequent receipt of instalments-No sanction under S. 257A, C P. C.—Limitation.

A mortgagee decree-holder who puts an end to the payments by instalments provided for in the decree on the first default and obtains an order absolute cannot afterwards call in aid any future payments that might have been made, as payments in the instalment terms provided for in the decree. He may rely upon such future payments if he can under Ss. 19 and 20 of the Limitation Act or as payments in virtue of a subsequent agreement if the requisite sanction had been obtained by him under S. 257-A, C. P. C., and not otherwise. **Bhagwan Das v Janki, 1905 A W N 268=28 All 249=2 A L J 828.**

35—C. P. C. (1882) S. 257-A—Mortgage bond superseding decree—Increased rate of interest.

A bond given to the decree-holder in a full settlement of the due amount under a simple money decree, so that the decree ceases to be capable of execution or enforcement thereafter does not infringe the provisions of S 257-A. C. P. C., even though it provides for the payment of a rate of interest higher than that allowed by the decree and thus amounts to an agreement to pay a sum in excess of that due or to accrue due under the decree. (25 All 317 F B followed.) **Bindraban v Angad. 1 A L J 390.**

36—(Act XIV of 1882, s. 257 A.)—Sanction of Court—Mortgage executed without permission to discharge the decree—Agreement upheld.

Civil Pro.Code (1882) S.257A-*Contd.*

Where parties without the sanction of the Court enter into an agreement, the effect of which is not merely to suspend but to discharge the decree, the agreement so made does not offend against the provisions of section 257 A of the Code of Civil Procedure. (25 All 317. Fol; 18 All 435, Dist). **Maharaja of Vizianagram v Niranjan Mukerjee. 2 A L J 683= A W N (1905) 57.**

37—S. 257-A—Decree—Satisfaction—Agreement—Agreement to give time.

The agreement, contemplated by the first para of S. 257-A, of the Code of Civil Procedure is one which merely suspends and does not destroy the rights of execution consequent on the decree: such an agreement *ex re termini* implies that there has been no actual satisfaction but merely a stipulation for a future satisfaction. **Tukaram v Anantbhat. 2 Bom L R 1012; 25 Bom 252.**

Notes.—Ap: 26 Mad 19; 25 All 317 F B. Dist: 27 Bom 96. Fol: 12 M L J 113. Ref: 28 Bom 62 ; 31 Bom 552 ; 9 Bom L R 950 ; 7 C L J 543=35 Cal 870=12 C W N 674.

38—C. P. C. S. 257 A—Decree—Satisfaction—Mortgage—Sanction of the Court.

Where a decree is satisfied by taking out a mortgage deed, which makes provision for furture interest over the amount, such mortgage to be valid must be made with the sanction of the Court, under S. 257-A (2) of the Code of Civil Procedure. **Dhanram v Ganpat. 4 Bom L R 872= 27 Bom 96.**

Notes.—Diss : 25 All 317 F B. Ref : 28 Bom 62.

39—C. P. C. (1882) S.257 A-Decree-Satisfaction.

In full satisfaction of a decree which was for Rs. 529-10-0 and which awarded no interest, defendant executed a mortgage agreeing to pay Rs. 500 within three months from the date of the bond. The bond also contained a provision that if the sum of Rs. 500 were not so paid, interest at Rs. 1-8-0 per cent. per month should run on it until payment.

Held, (1) that as the sum to be paid was less than the decretal amount the agreement so far did not fall within para 2 of S. 257 A of the C P Code, 1882; (2) that the agreement to pay interest was void under para 2 of S. 257 A. of the Code ; but his provision did not vitiate the whole of the agreement. **Bhagechand v Radhakisan. 5 Bom L R 672=28 Bom 62.**

Notes.—Ref : 28 Bom 310 ; 383 ; 6 Bom L R 62 ; 344.

40—C. P. C. (1882) S. 257A—Decree-Satisfaction—Sanction of the Court.

Where an agreement in satisfaction of a decree makes provision for interest, which carries the sum beyond the amount of the decretal debt, the provision for interest is void but the agreement is not thereby rendered void. **Raichand v Naran Bhikha. 6 Bom L R 62; 28 Bom 310.**

41—C. P. C S. 257A—Decree—Satisfaction—Sanction of the Court.

Where in satisfaction of a decree, relating to an ancestral debt, obtained against a Hindu father, the father and his son, living in a joint family, execute an agreement for a sum in excess of the decretal amount, and no sanction of the Court is obtained to the arrangement, the agreement is void, under S. 257 A of the Civil Procedure Code, as against the father and also as against the son.

The true test of the application of S. 257-A of the Civil Procedure Code is—Is the debt in question a judgment debt as to the person executing the agreement in the sense that it is binding upon him as if he were bound by the decree ? **Govind v Sakharam. 6 Bom L R 344= 28 Bom 383.**

42—C. P. C S. 257-A—Decree—Agreement for the satisfaction of the judgment debt in excess—Sanction of the Court—Agreement is void if made without sanction—The decretal debt included with other debts in a mortgage-deed—Deed void only to the extent of the decretal debt—Contract Act (IX of 1872), S. 23.

The plaintiff owed the defendant a judgment-debt of Rs. 442-8-0 not bearing interest, which with other debts was incorporated in a mortgage, the total mortgage-debt being Rs. 2,500 the whole of which bore interest. Sanction of the Court, prescribed by S. 257-A, of the C. P. C., was not obtained to this arrangement.

Civil Pro.Code (1882) S.257A-*Contd.*

Held, by *Russell* Ag. C. J. that the bond contained several and distinct promises made for one and the same lawful consideration, and if the law will not enforce the promise as to the decretal amount and interest thereon, still it can and will enforce the promises for payment of the other sums therein mentioned.

Held, by *Heaton*, J. that the whole mortgage was not void : but the decretal amount should be omitted from the principal of the mortgage-debt. The agreement in question was not "unlawful" within the meaning of S. 23 of the Contract Act, 1872. **Bhagabai v Narayan, 9 Bom L R 950 =31 Bom 552.**

43—C P C (1882) S. 257-A—A sum in excess.

An agreement entered into by a judgment-debtor to pay interest at a rate higher than that provided in the decree in consideration of the decree holder giving time to the judgment-debtor and not sanctioned by the court, is void under the provisions of S. 257 A. C. P. C. and cannot be enforced by suit. (6 C W N 27 dist. 26 Mad 19 and 25 All 317 ref. to.) **Gopal Sahu v Brij Kishore Pershad. 9 C W N 1004= 32 Cal 917.**

44.—C P C (1882) section 257A—Agreement to pay decretal amount by instalments—Suit to enforce agreement, if maintainable.

An agreement between a decree-holder and a judgment-debtor without the sanction of the Court whereby the former agreed to take the decretal amount by instalments, after allowing certain remission and where the latter executed a bond hypothecating certain property and which contained a stipulation that the decree-holder would be competent to realise the amount in execution of decree on default of payment of two consecutive instalments, can be enforced by a suit. The provision as to giving time to execute the decree is not illegal, though it may be incapable of enforcement for want of sanction. (11 Cal 671 ; 5 L B R 223 ; 19 Cal 504= 12 Mad 61 ; 7 All 124; 6 C W N 27; 17 Mad 382 ; 16 Bom 618 ; 23 Bom 502 ; 25 Bom 252 ; 26 Mad 19 ; 25 All 317 ref. to.). **Belchambers v Sarat Chandra Ghose. 12 C W N 674= 7 C L J 543=35 Cal 870.**

Civil Pro.Code (1882) S.257A-*Contd.*

45—Civil Procedure Code Sec. 257A —Agreement in satisfaction of judgment-debt, suit to enforce—Previous sanction of Court. Sec. 257 A, Civ Pro Code, is a bar only to execution proceedings in respect of agreements therein mentioned and does not prohibit their enforcement by separate suit. **Hurkissen Dass Serowgee v Nibaran Chander Banerjee. 6 C W N 27.**

Notes.—Ref: 25 All 317 F B; 7 C L J 543= 35 Cal 870=12 C W N 674; 25 Mad 244 F B; Dist. 32 Cal 917=9 C W N 1004.

46—Section 257 A—Money decree—Mortgage bond.

The defendant executed a deed of mortgage by conditional sale in the plaintiff's favour, the consideration being, partly a judgement-debt and partly cash lent. *Held* that the deed not having received the sanction of the Court which passed the decree was void under section 257 A, Civil Procedure Code. But as the satisfaction of a judgment-debt is not an illegal consideration, the plaintiff could recover the amount paid in cash. But he could not foreclose for this portion of the debt, for the agreement of mortgage was one and indivisible; and to allow the plaintiff to foreclose for a part of the debt would be to let him get for a part of the consideration what it was agreed he would get for the whole. He should, therefore, get only a money decree for the amount due excluding the judgment-debt.

Pema v Durgoo. 2 C P L R 243.
See 8 Bom 538; 15 Bom 419; 11 Cal 671; 16 Cal 504; 16 Bom 618.

47—Section 257 A.—Onus of proof of sanction—Contract Act section 23.

Under Section 257 A of the Civil Procedure Code when the sanction of the Court which passed the decree to the execution of a bond was in question such sanction cannot be presumed until it was proved. According to all ordinary rules of evidence the onus lay on the party who asserted that the Court had given its sanction, to prove the assertion to be true. A note in the register of suits to the effect that the decree had been fully satisfied does not raise a presumption that the Court accorded its sanction to a particular agreement. There is nothing wrong in the Court raising the question whether the bond or agreement in satisfaction of a decree had received

Civil Pro.Code (1882) S.257A *Contd.*

the sanction of the Court,which passed the decree. (16 Cal 504; 12 Mad 61 referred to.)

Nandkishore v Ganpat. 4 C P L R 148.

48—Section 257 A.—Suit on unsanctioned agreement.

A suit is maintainable when based upon a private agreement made out of court in satisfaction of a decree without the sanction of the court. Section 257A was intended simply to prohibit the enforcement of an agreement of the kind mentioned therein in execution of the decree. (6 Mad 101; 13 Bom 672; 15 Bom 419; 16 Cal 504 referred to. 1 C P L R 70 explained.)

Mt Chunna Bai v Kamar Ali. 6 C P L R 133.

49—C P C (1882) S 257-A—Verification of an agreement under S. 257-A. necessary before sanction of Court:-*Held* that,as the decree-holders had not obtained the presence of the judgment-debtor in order to verify the agreement in Court, there was no such complete agreement between the parties as should have been sanctioned by the Court passing the decree after a period of more than eighteen months. **Raja Nuneshar Baksh Singh v Raghuber Dayal 7 Ind Cas 337.**

50—C. P. C. S. 257A—Agreement to pay by instalments—Decree holder to execute decree on default—Judgment-debt, extinguishment of—Agreemeut without sanction void for all purposes. Where the defeneant agreed to pay the decree-debt by instalments and on default the decree-holder was to execute the decree. *Held*, that it is an agreement to give time and therefore being void for all purposes, cannot be enforced even by a regular suit. (16 Cal 504 dissented from). If the judgment-debt is extinguished as such by the agreement, it will be valid even without sanction and under S. 257-A cannot apply in such a case. (25 Bom. 252 fol). The agreement is void even though one of the parties to it was a legal representative of one of the judgment-debtors and not a party to the suit (17 Mad 382,commented upon.)

Venkata Subramania Aiyar v Koran Kannan Ahmad. 26 Mad 19.

Notes.—Ref: 25 All 317 F B; 7 C L J 543=35 Cal 870=12 C W N 674. Fol: 32 Cal 917 =9 C W N 1004.

51—C P C S. 257-A—Agreement by person other than judgment-debtor or his representative

Civil Pro Code (1882) S.257A-*Contd.*

—Death of debtor—Representative not on record. Where the judgment-debtor was dead and no legal representative was brought on the record. an agreement made by a person other than the judgment-debtor or his representatives to pay more than the judgment-debt is not invalid. (28 Bom 383 (387): 23 Bom 502, Fol.)

Lod Govinda Doss Krishna Doss v Potti Naicken. 8 M L T 326.

52—S. 257-A—Efiect of prohibition in—Failure to obtain sanction under—Effect.

9 M L T 487.

53—(1882—Ss. 257-A., 258)—Sanction of Court—Absence of sanction. effect of—Alteration of decree—Entry of satisfaction. An agreement between the decree-holder and the judgment-debtor securing some additional benefit to the former does not become a part of the decree by sanction of Court, but can only be enforced in a separate suit. Without sanction of Court, such agreement is void and cannot be enforced either in execution or in a separate suit To hold that the section does not make it void for a separate suit is to defeat the very policy of the section which is intended to protect judgment-debtors from being coerced by threat of execution proceedings to submit to unconscionable extortion by the decree-holders and is also opposed to the clear terms of the section. A sanctioned agreement to give time for the payment of the judgment-debt operates as a stay of execution under S. 244. An agreement which adjusts the decree is enforceable in a separate suit, even though sanction has not been obtained if it does not secure the payment of any sum more than the amount payable under the decree. If the sanctioned agreement makes any sums payable towards the decree in any particular manner and payments are so made, such payment should be certified to the Court under S. 258; otherwise such payments will not be recognised in subsequent execution proceedings. The judgment-debtor can only sue for breach of contract if such payments were not given credit for. An application for sanction under S. 257-A is not a step in aid of execution and cannot furnish a fresh starting point of limitation for execution. **Venkatagiri Aiyar v Sadagopachariar 14 M L J 359.**

54—Ss. 257-A, 210—Agreement to delay execution—Sanctioned by Court—Effect—Not to be resiled from—Necessity for fresh suit

(1912) 1 M W N 9.

Civil Pro. Code (1882)-*Contd.* S. 257A-*Contd.*

55—Civil Procedure Code, S. 257A s. 258—Execution of decree— Estoppel.—

The parties by petition under s 259, Civil Procedure Code, informed the Court executing the decree, that part of the decretal money had been realized, and that they had agreed that the balance of the decree should be paid in two instalments, with interest at 8 annas per mensem; that in default of payment of the instalments on the due dates, interest at 1 anna per rupee per mensem should be charged from the date of the agreement. *Held*, that in so far as the agreement provided for the payment of interest in excess of the sum due under the decree, it undoubtedly required the sanction of the Court under s. 257 A, Civil Procedure Code. *Held*, that the sanction of the Court, under s. 257 A, should be given in terms and under circumstances to show that it had considered the propriety of the proposed compromise, and that it should state in such sanction that it regarded the consideration for which it had been made a reasonable consideration. *Held*, that no question of estoppel arises when the previous warrants of attachment either proved ineffectual or were not executed. (A W N 1891 12 followed.) **Jagan Nath v Sheo Rattan. 10 C 71.**

56—S. 257 A—Agreement between decree-holder and judgment-debtor and a third person not party to decree for satisfaction of decree—Sanction of Court.—

In a previous suit the plaintiff obtained a decree for a sum of money against *K* Subsequently the defendants K. and R. who was no relation of K, executed a bond in favour of the plaintiff, accepted liability for the debt and agreed to pay it by instalments. In default the plaintiff was empowered to recover the debt from either debtor. On this bond the plaintiff sued the defendant for the recovery of his money. *Held*, that the bond was void and unenforceable against the parties to the decree. The terms of s. 257 A, Civil Procedure Code, appear to include within their scope an agreement between the judgment-creditor and a person other than the judgment debtor, whereby such person in consideration of the postponement of the execution of such decree against the judgment-debtor undertakes to pay a certain sum of money. *Held*, therefore, that the bond was unenforceable against the defendant. **Bankey Lal v. Khammi Begam. 30 C 165**

Dissented from in 40 C 284.

57—S. 257A-Adjustment out of Court—Bond in satisfaction of decree.—

A judgment-creditor after suing out execution took an instalment bond from the judgment-debtor in satisfaction of the decree, without the sanction of the Court which passed the decree.

Held, that the bond was not void. By merely taking a bond the decree-holder does not agree to give time for the satisfaction of the judgment debt. He does not agree to anything at all. He merely acquires, or ostensibly acquires, a right against the obligor. **Narayan v Baba. 1883 P J 340.**

58-S.257A-The sanction, required for agreements under S. 257A, should be applied for at least at the time when the agreements are made or within a reasonable time thereafter A year and five months held to be not such a time. **Yeshavantrao v Keval 1887 P J 323.**

59—S 257A-Sanction-Satisfaction of decree.

(Per Jardine, J.) Sanction though given two years later being neither appealed against nor set aside was binding.

(Per Parsons. J.) Agreement for satisfaction of decree was really sanctioned at the time. Then both the parties applied to the Court that an endorsement in terms of the agreement be made on the decree. The Court granted the application. *Held*, that this was sufficient sanction under S. 257A. **Sakharam v. Bala, 1889 P J 251.**

60—C P C S. 257A-Parties.

If the parties to the decree are not the same as to the bond passed in satisfaction of such decree, S. 257A does not apply. **Harakchand v. Totaram, 1889 P J 270.**

61—C.P.C, s. 257A:—*Held*, the defendant whether he was or was not a co-parcener with his father at Hindu Law, not being a party to the suit against his father, the bond executed by him (*i e*, the defendant) on which the present suit is brought is not void under S. 257A. **Harakchand v. Totaram, 1889 P J 377.**

Civil Pro. Code (1882)-*Contd.*
S. 257A-*Contd.*

62—C.P.C., S. 257A—This section does not apply to a person who at the date of an adjustment is not on the board as a party to the suit. **Adveppa v. Ahmed,** **1891 P J 40.**

63—C.P.C. S. 257A—Where mortgage-bonds (as sanctioned by the Court) were executed to satisfy the decrees, and the amounts for which they were passed exceeded the amount of the decree, were certified to the Court, and the Court recorded the adjustment without objection, and as the decrees by such certified and recorded adjustment became incapable of execution, *held*, that sufficient had been done to satisfy the requirement of section 257A.

Krishna v. Vasudev, **1896 P J 167.**

64—C.P.C., S.257A—Agreement to give time to judgment-debtor—Sanction of "Court which passed the decree".—

Held, that the words "Court which passed the decree" in Section 257A of the Civil Procedure Code mean the Court which passed the first decree, and not the Appellate Court, though they cannot be construed so as to include the Court which is executing the decree, unless that Court and the Court which passed the decree are identical. **Chajju v. Gulab,** **P R 61 of 1886.**

65—C.P.C., S. 257A—Execution of decree—Court compelling decree-holder to grant time to judgment-debtor.—

It is not competent to a Court executing a decree to compel the decree-holder to grant the judgment-debtor time to pay the judgment-debt. Even if the decree-holder himself agrees to give time, without consideration, and the judgment-debtor relies upon the agreement as preventing immediate execution, the Judge, under Section 257A, Civil Procedure Code, would be bound to hold the agreement void. **Teja Singh v. Bhai Ghamanda Singh,** **P R 127 of 1886.**

66—C.P.C., Sections 257A and 649— Agreement for satisfaction of judgment-debt—Decree passed by Judicial Assistant Commissioner—Jurisdiction of District Judge to sanction such agreement after Judicial Assistant Commissioner's Court has ceased to exist.—

Where, after a decree had been obtained from a Judicial Assistant Commissioner, the parties thereto in execution-proceedings entered into an agreement for the satisfaction of the decree, providing for the payment of the decree by instalments and that interest should be chargeable in case of failure to pay such instalments, *held*, that the Court of the Judicial Assistant having ceased to exist, the sanction required by Section 257A, of the Civil Procedure Code to give validity to the agreement, could in accordance with Section 649 of the same Code, be granted by the Court of the District Judge, which had succeeded that of the Judical Assistant Commissioner.— **Siddhu v. Ramji Das,** **25 P R of 1887.**

67—C.P.C., S. 257A—Execution of decree—Payment by instalments — Agreement to give time for satisfaction of judgment-debt — Civil Procedure Code, 1882, Sections 210, 257A-Limitation Act (XV of 1887), 2nd Schedule, Articles 175, 178, 179.—

Appellant obtained decree against the respondents on the 3rd February 1888, and applied for execution thereof on the 25th October 1888. A warrant was directed to issue, but on the 27th November 1888, both parties put in a petition reciting that an arrangement had been made between them, by which the debt was to be paid by instalments, and praying that the sanction of the Court might be given thereto. The proceedings were thereupon ordered to be filed, a separate order of even date being recorded in the proceedings that the property should remain under attachment but not be brought to sale. On the 8th April 1892, the appellant filed an application in which, after reciting the former arrangement, it was prayed that the respondents might be summoned with a view to recovery of the sum still remaining due, and on the 5th July 1892 the appellant again applied for execution by attachment of the judgment-debtor's property.

Held, that the order of the 27th November 1888 was not one falling under Section 210 of the Civil Procedure Code, inasmuch as the application leading to that order did not purport to be under that section, nor was it presented within the period of 6 months prescribed by Article 175 of the 2nd Schedule of the Limitation Act for the presentation of applications under that section.

Held, further, that the said order was one sanctioning "an agreement to give time for the satisfaction of the judgment-debt" within the

Civil Pro. Code (1882)-*Contd.*
S. 257A-*Contd.*

meaning of Section 257A of the Civil Procedure Code, and that,as the mere sanction by the Court of an agreement under that section does not "alter" the decree, the decree to be executed was the decree, dated the 3rd February 1888.

Held, also, that inasmuch as the applications of the 8th April 1892 and of the 5th July 1892 were applications for "execution or to take some steps in aid of execution", they were applications to which Article 179, and not Article 178, of the 2nd Schedule of the Limitation Act was applicable, and that consequently the decree of the 3rd February 1888 was time-barred. (12 All 571, and 61 P R 1886, followed; 5 All 596, not followed). **Nanak Chand v Anant Ram, 26 P R of 1894.**

68—C.P.C., S. 257A—Mortgage—Construction of mortgage-deed—Satisfaction of judgment-debt—Uncertified adjustment of decree — Civil Procedure Code, 1882, Sections 257A, 258.—

Plaintiff sued upon two mortgage-deeds, executed on the 19th January 1890 and the 5th March 1890, respectively.

In the case of the second mortgage.of the consideration money of Rs. 1,800, Rs. 1,000 were on account of principal and Rs. 144 on account of interest on two decrees passed in favour of plaintiff against defendant, and the Divisional Judge, finding that interest was not allowed on one of the said decrees, which was for Rs 738, and that no sanction of the issuing Court had been given, held that the agreement in the mortgage-deed to pay interest was invalid under Section 257A of the Civil Procedure Code.

Held, that the section applicable to the case was Section 258, and not Section 257A, of the Code, inasmuch as the judgment-debt had been adjusted in whole to the satisfaction of the decree-holder, and that though such adjustment had not been certified to the Court whose duty it was to execute the decree, it could be recognized as an adjustment by a Civil Court except in execution. Rulings regarding the scope of Section 257A, Civil Procedure Code,referred to.— **Kalu Ram v Khuda Bakhsh, 54 P R of 1894.**

69—C.P.C., S. 257A—Bond executed in satisfaction of decree—Subsequent suit on bond.—

Held, that where the benefit of a decree is given up by the decree-holder and in consideration thereof a bond is given by the judgment-debtor, such bond may be the foundation of a subsequent suit, notwithstanding that the satisfaction of the decree was uncertified by the Court under Section 257A, of the Civil Procedure Code. (16 Cal 504; 15 Bom 419; 17 Mad 382, followed). **Sukhu Ram v. Umed, 16 P R of 1900.**

Civil Pro Code (1882)-*Contd.*
S. 257A-*Concld.*

70— C P.C. (1882). S. 257A—Agreement for satisfaction of a judgment-debt without sanction of Court—Agreement to pay more than the decretal amount—Agreement void.—

Held, that under the second clause of Section 257A of the Code of Civil Procedure, every agreement between the decree-holder and the judgment-debtor for the satisfaction of a judgment-debt which provides for the payment of any sum in excess of the decretal amount is void for all purposes and unenforceable as a contract unless made with the sanction of the Court which passed the decree.(12 Bom 499; 22 Bom 693, F B; 25 Bom 252; 18 All 435; 18 All 479; 28 Bom 62, cited and followed. 16 P R 1900; 11 Cal 671; 16 Cal 504; 17 Mad 382; 26 Mad 19, dissented from). **Pala Mal v. Hari Ram, 88 P R 1904.**

71—C.P.C. (1882), S. 257-A—Execution of decree—Agreement varying or satisfying decree.

Held, by the Full Bench, Robertson, J. dissentiente (overruling 88 P R 1904), that agreements under S. 257A of the Code are not void for all purposes, but merely for the purpose of execution. **Atma Singh v. Banke Rai, 61 P L R 1907 (F B)=71 P W R 1907= 29 P R, 1908.**

72—C. P. C. (1882) Ss. 336, 349 —Surety for production of judgment-debtor—Death of judgment-debtor before time.—

A judgment-debtor was released on finding a surety for his production within a certain time. He died before the date. *Held*, the obligation could not be enforced as a decree against the surety and that the surety was discharged by judgment-debtor's death. **Krishnan Nayar v. Ittinan Nayar, 24 Mad 637.**

—Ss. 344-360 (Ch. XX).

See (1) Deputy Commissioner of Akyab. **4 Cal 94.**

Civil Pro. Code (1882)-*Contd.*
S. 344-*Contd.*

(3) Insolvency — Insolvent-debtors under Civil Procedure Code.

These sections are repealed by the Provincial Insolvency Act of 1907.

73—C.P.C. (1882)—S. 344—Insolvent judgment-debtors—Person entitled to apply for the insolvency under the section.

It is only a person against whom proceedings under S. 344 are actually pending who is entitled to make an application for insolvency under the section, and not any person who had been arrested or against whose property an order of attachment had once been made.

Jumai v. Muhammad Kazim Ali, 1903 A W N 11=25 All 204.

74—C P C (1882) Ss. 344, 351—Application for declaration of insolvency-Grounds upon which such application may be rejected.

A court before which an application to be declared an insolvent is filed under S, 344 of the Code of Civil Procedure is empowered to reject the application if in its view the assets of the applicant in fact exceed his liabilities, although none of the grounds mentioned in clauses (*a*), (*b*) (*c*), or (*d*) of S. 351 of the Code may be shown. (4 All 337; 14 Cal 691; 19 All 125 ref to).

Jwala Prasad v Manik Chand. 1901 A W N 79.

75—C P C—(1882) S. 344—Appeal—Order rejecting an application to be declared an insolvent—District Court—High Court.

An appeal from an order passed by the first class Subordinate Judge rejecting an application to be declared an insolvent, under S. 344 of Civil Procedure Code, where the subject is Rs 5,000 in value, lies to the District Court, under S. 589 of the Code. **Manekshah v Dadabhai. 5 Bom L R 591.**

76—C P C (1882) S 344—Joint application for insolvency, not maintainable—Several judgment-debtors, separate application if necessary-Joint decree—Joint property, attachment of—Insolvency.

S. 344., C P C., does not contemplate joint application by several judgment-debtors to be adjudged insolvent.

If in execution of a joint decree against several persons, their joint property is attached, and all or some of them desire to be declared insolvents, each must make a separate application under S. 344, C P C, and the case of each should be tried separately from that of the others. **Saroda Prosad Ukil v Ram Sukh Chandra. 2 C L J 318.**

Civil Pro. Code (1882)-*Contd.*
S. 344-*Concld.*

77—C P C Ss. 344, 351, 354.

Where subsequently to an order for sale of mortgage property, the defendant was declared an insolvent under the Code of Civil Procedure, *held* that the sale was valid, that the Code did not provide that any consequences in derogation of the ordinary rights of judgment-creditors shall follow from application by the judgment-debtor under S. 344, that it was only when a receiver was appointed under S. 351 that the property of the insolvent vested in him under S. 354 and the rights of the creditors were interfered with, that it was not provided that such an order should have any retrospective effect. **Ishwar v Harjivan, 1896 P J 173.**

78—C P C—(1882) S. 344—Application under S. 344, not cognizable by Insolvent's Estates Court constituted under Act IV of 1872—Course of appeal—Power of revision.

Held, that an Insolvent's Estates Court constituted under the provisions of Act IV of 1872 has no jurisdiction to entertain and dispose of an application under S. 344, C P Code, 1882.

Held, also, that the chief Court, acting under S. 70 (a) of Act XVIII of 1884 to determine whether the Lower Appellate Court had jurisdiction to hear the appeal, *suo motu* quash the proceedings even of the first Court, when it comes to know it had no jurisdiction to hear the case.

Budha Singh v Sadda Singh. 161 P W R 1908.

Note.—This section is repealed by the Provincial Insolvency Act 1907.

79—C P C (1882) Ss. 345 & 352—Insolvency—Chapter XX. Civil Procedure Code, 1882—Decree-holder whose name has been entered as a creditor by a judgment-debtor executing his decree.

Held, by the Full Bench (Roe, J dissenting) that a decree-holder, whose name has been entered as a creditor by a judgment-debtor on an application to be declared an insolvent under Section 345, Civil Procedure Code, 1882, but who has not

Civil Pro. Code (1882)-*Contd.*
S. 345-*Concld.*

come forward to prove his claim under Section 352, and whose name therefore does not appear in the schedule prepared under that section, is not debarred by the mere fact of his having held aloof from the proceedings under Chapter XX of the Code from executing his decree under the other provisions of the Code.

Per Roe, J, contra.—The right to ignore proceedings under Chapter XX, and to bring a separate suit, or to execute a decree separately stand on the same footing. This right, which *prima facie* exists, is taken away by the provisions of Chapter XX, which enable a judgment-debtor to bring his creditors before the Court, and by the further provision that, when their claims *shall* be determined in a certain manner.

(150 P R 1882, and 16 Cal 592, referred to).

Khuda Mal v Shib Dial. 96 P R 1891.

80—C P C Ss. 345, 351 and 352—Insolvent—Omission to frame schedule—Creditor's right to sue—*Res judicata*.

A list of debts filed under S 345, prior to a declaration under S. 352, is not a schedule as required by S. 352. It is necessary that the Court should by order determine the persons who have proved themselves to be the insolvent's creditors and their respective debts and then frame a schedule of such persons and debts. In the absence of any such determination by Court, the declaration under S 351, that the applicant was an insolvent, cannot be deemed to be a decree in favour of the creditor for the amount due to him. And a suit by the creditor is therefore maintainable and is not barred as *res judicata* (7 Mad 318 Fol; 76 P R 1899 Dist.) **Harya v. Mul Chand. 64 P R 1907=89 P L R 1908.**

81—s. 345 (b), C P C—"Property".

Held that the mere fact that the applicant has a chance of obtaining from his father, by an action at law, whatever share at some future time he may succeed in proving to be partible in his favor from the family estate now exclusively held by the father, does not disentitle him to be declared an insolvent, such chance not being property. **Sukit Narain Lal v Raghoonath Sahoo. 6 W N 45.**

82—C P C—(1882) Ss. 347, 578—Insolvency—Creditor's application—Notice, posting up of.

The provision of S. 347 with regard to posting

Civil Pro. Code (1882)-*Contd.*
S. 347-*Concld.*

up the notice of insolvency in Court is, especially in the case of an application by the decree-holder, merely of a directory character and does not go to the jurisdiction of the Court to deal with the matter.

Ramkomal Saha v Bank of Bengal of Akyab 5 C W N 91.

Note.—This sec is repealed by the Pro Insolvency Act 1907.

Notes—Rel: 8 C W N 468.

—S. 349.

See Attachment—Attachment of Person.

11 Cal 451; 12 Cal 652; 8 Mad 503; 12 Bom 46.

84—C P C—(1882) S. 349—Assignment of security bond, suit on.

An assignee of a security bond executed under s, 349 C P C., to the District Court can maintain a suit on the bond and that is the proper course to adopt. (19 Mad 694 followed). **Gopinath Chowdhry v Benode Lal Roy Chowdhry. 31 Cal 162.**

Note—This sec is repealed by the Provincial Insolvency Act of 1907.

84—C P C S. 349 (1882)—Administration bond—Security order on executor to furnish, if, can be made after grant of probate.

It is only when a Judge grants probate that he may direct that the person to whom the grant is made should give security under S. 78 of the Probate and Administration Act. Such an order made for the first time on an application for the revocation of the probate (which application itself was refused) was set aside. **Giribala Dasi v Bijoy Krishna Haldar. 8 C W N 668=31 Cal 688.**

—S. 350 (1859, s. 281).

See Insolvency—Insolvent-debtors under Civil Procedure Code.

85—C P C—(1882) S. 350—Insolvency—C P C (Act XIV of 1882), Ss. 345, 346 and 350—Insolvent, examination of.

The examination of an insolvent under S. 350 C P C., is only necessary where the judgment-debtor is declared an insolvent upon his own

Civil Pro Code (1882)-*Contd.*
S. 350-*Concld.*

application, not where he is adjudicated an insolvent at the instance of the judgment-creditor.

Gouri Kant Burman v Damodar Das Burman. 5 C W N 90.

86—C P C—(1882) Ss. 350, 357—Insolvency—Creditor's application—Applicability of section.

The provisions of Ss. 350 and 357, C P C, relate to an application by the judgment-debtor for relief under Ch. XX and not to an application by the judgment-creditor. **Ram Komal Saha v Bank of Bengal of Akyab. 5 C W N 91.**

Notes—Rel· 8 C W N 468.

87—C P C.—(1882)—Ss. 350, 351, 359—At the hearing under S. 350-Jurisdiction of Court to send insolvent to Magistrate—Fresh inquiry.

Where after an inquiry held under S. 350, C. P C., an order is passed under S. 351 declaring a person an insolvent, a Court has no jurisdiction to make a new inquiry under S. 359 and send the insolvent to a Magistrate upon such inquiry. An order under S. 359, C P C., must be based on the findings arrived at in the inquiry under S. 350, C P C. although the order need not necessarily be made at the hearing under S 350. **Narasayya v Subbaya. 15 M L J 12.**

Note—This sec, is repealed by the Pro Insolvency Act 1907.

—s. 351 (1859, s. 281)

See (1) Appeal—Orders. **2 Mad 219, 4 Cal 888, 6 Cal 168: 7 C L R 282, 5 Cal 719: 6 C L R 135, 11 Mad 136, 15 Mad 89.**

(2) Insolvency—Insolvent Debtors under Civil Procedure Code.

88—C. P C (1882) S. 351. (d)—Insolvency—"Any other act of bad faith".

A person while actng as agent embezzled certain moneys belonging to his principal, who obtained a decree against him for recovery of the same. The judgment-debtor was arrested in execution of the decree and then applied to be declared an insolvent. *Held* he should not be declared so as the act of embezzlement was "an act of bad faith" within the meaning of cl. (d) of S.351, C P C. (17 All 218 F B fol). **Gayadin v Hira Lal. (1904) A W N 93=26 All 517=1 A L J 259.**

Civil Pro. Code (1882)-*Contd.*
S. 351-*Contd.*

89.—C P C. S 351 (1882)—Vesting of property in—Duties of receiver—Private sale-Pre-emptor's right:—An order appointing a Receiver vests in the receiver all the insolvent's property with the exception specified in the first proviso to S. 266 of the Code of Civil Procedure, and it is the duty of the Receiver to convert under the directions of the Court that property into money. When the Receiver sells the property, he cannot do so in derogation of the rights of third parties.(13 All 228 ref to:). Hence when a receiver sells property by a private sale, the person who, in the case of an ordinary sale, would be entitled to pre-empt, does not lose his right of pre-emption. **Kanhai Lal v. Kalka Prasad. 1905 A W N 149=2 A L J 390=27 All 670.**

90,—C P C. Ss. 351, 255—Insolvent—Discharge, conditional order of-Breach of the conditions—Revival of the order of arrest.

A judgment-debtor was arrested in execution of a decree passed against him, and the Court in discharging him as an insolvent under S. 351, Civil Procedure Code, made his discharge conditional upon his paying Rs. 75 every month for two years. He made a default in paying the instalments On an application to order his arrest for the default, the lower Courts held that he having been arrested before and having placed his estate at the disposal of the Court could not be arrested again.

Held, that as the order of discharge was conditional, the order of arrest would revive and could be put in force on a breach of the imposed condition. **Bai Jaiji v. Merwanji. 1 Bom L R 463.**

91.—C P C Ss. 351, 352—Rule of damdupat, when applicable—*Damdupat* if applicable in insolvency proceedings—Practice.

The rule of *damdupat* (a) exists only so long as the contractual relation of debtor and creditor exists, but not when the contractual relation has come to an end by reason of a decree.

Proof of a claim in insolvency amounts to a decree and the rule of *damdupat* would not apply to a claim so proved. Moreover, the uniform practice of this Court has been not to apply the rule of *damdupat* in insolvency proceedings. (26 Mad. 622 Ref). **Hari Lall Mallick. 10 C W N 884=33 Cal 1269.**

Civil Pro. Code (1882)-*Contd.* S. 351-*Contd.*

92—C P C Ss. 351, 588, 622—Insolvency—Applicant to be adjudged insolvent—Debts under Public Demands Recovery Act (1 of 1895 B C.) —Jurisdiction of Civil Court—Civil Procedure Code (Act XIV of 1882), Chs XIX and XX Ss. 351,588,622-Appeal. **Kedar Bans v Moharani. 2 Ind Cas 856.**

93—C P C Ss. 351. 355, 357.—Declaration of—Insolvency—Declaration——No discharge-Judgment debtor's liability to arrest. A judgment debtor who has been declared an insolvent on his application, but not discharged under sec. 355 C P C is not liable to arrest at the instance of a scheduled creditor. A judgment-debtor who has obtained his discharge under sec. 351 or sec 355 cannot again be arrested or imprisoned on account of any of the schedule debts. (*Vide* sec. 357 C P C.) (14 All 358 Ref to). **Seetaramayya v Ramchandrudu. 15 M L J 1=28 Mad 152 F B**

94.—C P C S. 351.——Declaration of insolvency and appointment of receiver—Application by debtor—Bad faith-Unfair preference among creditors—Transactions amounting to A obtained a decree against B for Rs. 7000 and odd, and attached a decree in favour of B. against C. for Rs. 125000. At that date C had a decree against B for Rs 78000. Subsequently B & C entered into a compromise by which C paid into Court Rs 30000 to the credit of B which was thereupon attached by A in place of the original decree.

Held, that the compromise on the part of B did not amount to an act of bad faith regarding the matter of his application within the meaning of S, 351 of the C P C.

Where the object of the transaction was to put an end to ruinous litigation and not to benefit any particular creditor it could not be said to be an unfair preference, though it may be that the transaction was in fact beneficial to one of the creditors.

Where certain dispositions of property had been effected by the insolvent debtor to some of his creditors, not with the dominant view of preferring them but in order that the debtor might continue to receive financial support from these creditors and they were made under pressure by these creditors.

Civil Pro Code (1882)-*Contd.* S. 351-*Concld.*

Held, that these circumstances negative a preference being the dominant view with which the dispositions were made (L R 23 ch 695; 10 Morrell 15; L R (1901) 1 K B 710 Referred to.)

Angappa Chetty v Nanjappa Row. 2 M L T 57=18 M L J 189.

95.—C P C (1882) Ss. 351 and 588 (17), 589-Rejection of application for declaration of insolvency Appeal.

An order made by a District Judge under S. 351 of the Code, rejecting an application for a declaration of insolvency, is by virtue of Punjab Government Notification No 940, dated 24th October 1888 appealable to the Divisional Court, irrespective of the value of the subject-matter involved. **Raja Ram v Prabh Dial, 98 P R 1908=159 P W R 1908.**

96.—C P C S. 351—If the Court is satisfied —Enquiry.

This is an appeal from an order rejecting the application of the appellant for declaration of insolvency under Chapter XX of the Code of Civil Procedure on the mere unsupported allegations on oath of one of the opposing creditors. *Held* that, there being no tangible material upon the record upon which the correctness or otherwise of the order may be judged. it must be set aside.

Syed Muhammad Yakub v Jado Rai 5 W N 275.

97.—C P C S. 351.-The Court may reject the application if in its view the assets exceed the liability, though none of the grounds mentioned in s 351 may be shown. (4 All 337; 14 Cal 691; 19 All 125 referred to.) **Jwala Prasada v Manikchand. 21 W N 79.**

98.—C P C (1882) S 352—Appeal—Revision.

An order rejecting an application to prepare a schedule of creditors under s. 352 of the Code of Civil Procednre is appealable under s. 588, cl. (17) of the Code and therefore cannot be made the subject of an application for revision under S. 622. **Nonnidh Ram v Hira Lal 13 W N 64.**

99—C P C S.353—Insolvency—One creditor's claim challenged by another creditor to prove his claim.

Under Sec 353 C P C when any creditor

Civil Pro Code (1882)-*Contd.*
S. 353-*Concld.*

requires any other creditor to prove his claim the onus is upon the creditor who has to prove his claim to establish it. It is a matter to be dealt with by the Judge upon the evidence for the coming in the case, **Ram Komal Saha v Bank of Bengal of Akyab.** **5 C W N 91.**

Notes:—Ref 8 C W N 468.

100—C P C Sections 353 and 588—Insolvent—Schedule.

To entitle a creditor to appeal under Sections 353 and 588, he must show that a Schedule of the insolvent's creditors has been prepared under Section 352-that his name is entered in it-that the names of his opponents are also entered in it that he applied to the lower Court to alter the Schedule as regards the amount, nature and particulars of the debt of his opponents and that the Court passed an order on his application adverse to his interests. In the present case no Schedule having been prepared. *held*, that the appeal did not lie

Ram Chand v Johri Mal. **120 P R., 1889.**

101—C P C—(1882) Ss. 355, 356 358—Insolvency—Discharge of insolvent-Order not expressly made—Appeal—Revision.

The insolvent applied to the Insolvent Estates Court, Delhi, for an order to the Receiver to pay him the surplus in his hands. The application was rejected and the order was confirmed on appeal. *Held*, that it must be assumed that the Court did pass an order of discharge under S. 355, of the C.P.C. 1882, as soon as the conditions laid down in that section had been complied with, that S. 358 would therefore apply, and under S. 356 the petitioner was entitled to receive the surplus in the hands of the Receiver.

Held, also that the Divisional Judge was right in holding that no appeal lay to him from the order of Insolvent Estates Court, but, as the order appealed against was obviously wrong, it must be set aside on revision. (43 P. R. 1894 Fol). **Harji Mal v. Receiver of the Insolvent Debtor's Estate.** **26 P L R 1910.**

Note—Repealed by Pro. Insolvency Act 1907.

101A—C P C S. 357—Applicability of Act XV of 1877.

S. 357, Code of Civil Procedure, provides a limitation of its own and in supersession of the rules prescribed by Act XV of 1877 in respect of the execution of decrees. **Lalman v. Gopi Nath.** **19 All 144, 17 W N 18.**

Civil Pro. Code (1882)-*Contd.*
S. 357-*Contd.*

102—C P C—(1882), S. 357:—Creditor whose debt is not included in the schedule debt can proceed with the execution of his decree. A creditor whose debt has not been included in the scheduled debts within the meaning of sec. 357 of the Code of Civil Procedure is entitled to proceed with the execution of his decree against the insolvent's property notwithstanding his discharge. **Amthalal v Cursetji.** **9 Bom L R 466.**

103—C P C—(1882). S. 357—Effect of discharge-Insolvency—Debt not included in the schedule-Discharge of insolvent debtor—Right of creditors not in the Schedule, against the discharged insolvent's property.

A creditor whose debt has not been included in the scheduled debts within the meaning of S. 357 of the Code, is entitled to proceed with the execution of his decree against the insolvent's property notwithstanding his discharge (16 Cal. 592 and 21 All. 227 referred to). **Ashrafuddin Ahmed v. Bepin Behari Mullick** **30 Cal 407.**

Notes.—Fol. 9 Bom L R 466.

104—C P C S. 357—Discharge of Insolvent from liability.

Held, that the proper construction to be put upon Sections 357, 358 of the Civil Procedure Code when read together is that as soon as it appears that one-third of the aggregate of scheduled debts, including secured debts, has been discharged from the Insolvent's property, he is absolved from further liability. The sections cannot be read as entitling any creditor to take action through the Court under Section 357, until the third of his individual debt shall be realized.

Hakim Rai v. Mussammat Thakri.
14 P R., 1887.

105—C P C—(1882) Ss. 357 & 358, Civil Procedure Code, 1882, Chapter XX—Insolvency—Return of property in hands of Court after payment of one-third of schedule debts.

C was declared insolvent under the provisions of Chapter XX, Civil Procedure Code, 1882, and was discharged with an order of protection under

Civil Pro. Code (1882)-*Contd*, S. 357-*Concld*.

Sections 357 and 358 of the Code. C. then claimed to be entitled to a return of the property in the hands of the Receiver, on the ground that his scheduled debts had been satisfied to the extent of one-third, and that he was absolved from further liability in respect of such debts.

Held, that this contention was not well founded. Property vested in the Receiver is an exception to the rule prescribed in Sections 357, 358, of the Code, regarding non-liability of property to attachment. **G E Coates, Insolvent. 91 P R 1891.**

106—C P C—(1882) S 358—Insolvency—Order discharging insolvent, appeal from—Agreement to satisfy debts—Property vested in Receiver—Future salary of insolvent.

Held, that though an order discharging an insolvent from further liability under Section 358 of the Civ Pro Code is not appealable under Section 588 of the Code as an "order," such order falls within the definition of a "decree" in Section 2 of the Code and is appealable as such.

Held, further, that although an order of absolution from further liability contemplated by Section 358 of the Code cannot affect property which has vested in the Receiver under Section 354 and is, or may hereafter become, liable for distribution under Section 356, an insolvent's future salary which may or may not accrue due, is not "property" which under Section 354 vests in the Receiver for an unknown and unlimited time the effect of the attaching order, in such case, being to vest the salary in the Receiver as it accrues and not before.

(5 All. 258, and 91 P R., 1891, referred to.)

Hukam Chand v. Robinson. 43 P R., 1894.

107—C.P.C. (1882) S.359-Imprisonment, simple or rigorous—Order, subsequent, declaring it rigorous unauthorized, may be discharged under Sec. 622 Civil Procedure Code.

Imprisonment under section 359 of the Civil Procedure Code may be either simple or rigorous. The order must specify the character of the imprisonment; if it omits to do so, the imprisonment must be taken to be simple.

A Judge, after having made an order for imprisonment under section 359 of the Civil Procedure Code, cannot subsequently by a separate order declare it to be one for rigorous imprisonment. If he does so, his order is not authorised by any provisions of the Civil Procedure Code, and may be discharged by the High Court in the exercise of its revisional jurisdiction. (18 W R Cr. 3 Fol.) **Amir Ali v Mithu Sahu. 5 C L J 445=11 C W N 740.**

Civil Pro. Code (1882)-*Contd*, S. 359-*Concld*.

108—C. P. C.—(1882). Ss. 359, 343.—The fact that a Court dismisses an application under S. 343 of the Civil Procedure Code, for declaration of insolvency does not deprive the Court of the jurisdiction in the matter, so as to disempower it to entertain a subsequent application from the creditor under S. 359 of the Code. *Held*, also, the object of S. 359 being punishment of an offence, it is quite fitting, suitable and legal that the punishment should be by imprisonment either simple or rigorous, in the Criminal Jail. (14 All 145, Ref.) **Sha Maung v T A Agamberan Chetty. 3 L B R 172.**

Note.—This Section is repealed by the Pro. Insolvency Act 1907.

109—C, P. C. (1882) S. 360—Jurisdiction conferred on Small Cause Court after notice issued to objectors—Civil Procedure Code (Act XIV of 1882) S. 360—Notification conferring jurisdiction after repealing the section—Effect of.

A petition in insolvency, addressed to a District Judge, was presented to a Judge of the Court of Small Causes, who ordered notices to be issued, and subsequently adjudicated the petitioner to be insolvent. The District Judge on appeal affirmed the order of the Judge of Small Cause Court. In neither Court was any plea as to jurisdiction taken. It was objected, before the High Court in revision, against the order adjudicating the petitioner insolvent, that, on the date on which the petition was presented to the Judge of Small Causes, no jurisdiction under S. 3. cl. (1) of the Insolvency Act, III of 1907, had been conferred on him. Such jurisdiction was, however, conferred upon him a few days after the presentation of the petition, so that he possessed it on the date on which he directed notices to be issued and gave his final decision. Having regard to the very last stage of the case at which the objection was raised, and also to the fact that the petition was addressed to the District Judge who had jurisdiction, and that, at any moment after the jurisdiction, had been conferred upon the Judge of Small Causes, the case could have been transferred to his Court, *held*, that the case had been properly entertained and decided by the Judge of Small Causes. **Debi Prasad v Stanley Ray. 6 A L J 483=2 Ind Cas 223.**

Civil Pro. Code (1882)-*Contd.*
S. 360-*Concld.*

—s. 364 (1859, s. 101).

See (1) Limitation—Question of Limitation. **12 Cal 642.**

(2) Parties—Adding Parties to Suits—Defendants. **12 Cal 642.**

110—C. P. C. s. 407—Application to sue as pauper—Enquiry-Jurisdiction Proper exercise.

An application was made by a person for permission to sue as a pauper. The suit was for construction of a Will and other reliefs; the plaint contained certain allegations upon which the Plaintiff had a right to sue. The lower Court was satisfied that the applicant was a pauper but rejected the application on the ground that he had no right to sue expressing its opinion upon the merits of the suit itself: *Held* That the lower Court applied to the matter before him a course of enquiry which was entirely foreign to the enquiry which he was called upon to make under sec. 407, C. P. C. (2 C W N 474 (1898), followed.) The applicant was accordingly directed to be allowed to sue in *forma pauperis*

Gopal Chandra Neogy v Bigoo Mistry. 8 C W N 70.

—s. 505.

See (1) Cases under Appeal—Receivers.

(2) Receiver.

111—C. P. C. (1882) S. 505—Report recommending appointment of a receiver—Order refusing to make the appointment—Appeal.

Where a Subordinate Judge recommended a person to the District Judge for receivership, and the District Judge declined to appoint a receiver and the petition was then dismissed, *held*, no appeal lies against the District Judge's order under S. 505 refusing to authorize the appointment of a receiver. (10 Mad 179 (180) (F B) (foot note), Fol.)

Kayarunnisa Begum v Sakina Bivi. 20 M L J 78=5 Ind Cas 991.

112—C. P. C. Ss. 505, 582—Jurisdiction of Dismissal Court to appoint a Receiver—Enquiry to be made under Section 503.

Held, that the direction contained in Section 505 of the Civil Procedure Code, that the powers conferred by Chapter XXXVI should be "exercised *only* by High Courts and by District Courts," does not preclude a Court superior to the District Court and hearing an appeal from the decree of that Court, from appointing a Receiver under Section 503 by virtue of the powers obtained under Section 582 of the Code, and that the word "only" in Section 505 must be regarded as intended to exclude Courts subordinate to a District Court, but not superior Courts of appeal. The question whether the appointment of a Receiver is necessary for any of the purposes stated in Section 503 of the Code is one to be determined judicially, and if the necessity of the appointment is in dispute between the parties, the question can only be determined after enquiry with reference to the evidence. **Budh Parkash v Sant Rain. 102 P R of 1885.**

113—C. P. C. (1882) Ss. 562, 564, 566—Power of appellate court to remand for trial on the merits otherwise than under the provisions of S. 562.

S. 564 of the Code of Civil Procedure must be read subject to the other provisions of the Code, for example, those contained in S. 27, S. 32 or S. 53. An appellate court has power to make an order under any of those sections, and in order to give effect to the provisions of the section which is applicable it is necessary that it should in certain cases send back the case to the court of first instance. Under such circumstances S. 564 of the Code will not preclude an appellate court from remitting a case to the Court of first instance.

(12 All 510; 1891 A W N 105; 17 All 29; 18 All 131; 18 All 332; 19 All 396; 10 Bom 399 and 19 Mad 157 ref. to.) The appellate Court has no inherent power to remand *'evidendi institut'* apart from the Civil Procedure Code.

Habib Bakhsh v Baldeo Prasad. 1901 A W N 39=23 All 167.

Notes.—Rel. 28 Mad 437=15 M L J 236; 30 Mad 55 F B, 33 Cal 927=3 C L J 67. Fol: 16 M L J 479 F B=1 M L T 268.

114—C. P. C (1882) S. 564—Appeal—Order of remand directing addition of parties—Preliminary point—Legality of order.

An order of remand under S. 564, C. P. C. by appellate Court directing addition of new parties is an order upon a point which is necessarily preliminary to the proper decision and trial of the suit and is prefectly legal. (23 All 167, Fol.)

Jadab Gobinda Singh v Anath Bandu Saha 37 Cal 171=5 Ind Cas 998.

115.—C.P.C. (1882) S. 564—Limit to remand Estoppel-suit not decided or preliminary point—Remand—Consent of parties——Illegality—Waiver—Effect of setting aside remand—

Civil Pro. Code (1882)-*Contd.*
S. 564-*Contd.*

Per Subrahmanya Aiyar, J. A remand in contravention of S.564 of the Civil Procedure Code is a violation of a mandatory provision of the law and is as such not a mere irregularity, but is illegal and the remand and all proceedings taken thereunder can be set aside at the instance of a party entitled to object to such a procedure. The doctrine that consent does not give jurisdiction, only applies where the court has no inherent jurisdiction over the subject matter and does not apply to violation of rules of procedure, though they are not mere irregularities. The doctrine does not apply to an illegal order of remand so that if a remand is made at the request of both parties the same cannot be set aside at the instance of any of them, although it may be contrary to the provisions of S 564 C P C. Where a suit was not disposed of on a priliminary point by the court of first instance and the appellate court, finding the main question for the defendants (the appellant before the court) remanded the suit at the request of both the parties for trial on other points and in second appeal the plaintiff's vakil stated that he wanted a decision on the merits on the main question and that if the decision on the same went against him, he did not intend to object to the order of remand, there was a waiver of the defect and the plaintiff was estopped from afterwards questioning the propriety of the order of remand. Where a Judge in appeal gives a certain finding upon a question of fact and remands the suit although it was not disposed of on a preliminary point, and such finding of fact is such as cannot be questioned in second appeal in an appeal against the order of remand the finding of fact must be accepted and the appeal sent back to the Appellate Judge for disposal according to law of other points. An order of remand which is illegal cannot affect what has already been properly done and the Appellate Judge cannot be directed to direct the trial of the entire appeal *de novo*. Per *Moore*, J. Where the order of remand is illegal under S 564 of the Code, consent of parties cannot make it legal. Where an order of remand is set aside as illegal, the whole appeal must be left open for fresh decision by the Appellate Judge. **Manager of the Court of Wards v Ramasami Reddi 15 M L J 236=28 Mad 437.**

Note.—This section is repealed by the New Code.

Civil Pro. Code (1882)-*Contd.*
S. 564-*Contd.*

116—C. P. C. S.564—Not raising and deciding issues in appeal—Opportunity to respondent to appeal on merits.

The Court of First Instance found against plaintiff on an issue of limitation and in his favour on the merits, but the findings on merits were not embodied in the decree. The Lower Appellate Court found in his favour as to limitation and awarded his claim on Lower Court's findings on the merits. *Held*, that defendant had never had an opportunity of appealing on the merits, and the Lower Appellate Court should have raised and decided those issues itself. **Mahomed v Nakhwa 1886 P J 64.**

117—C. P. C. S 564.

Where what might have been a suit between landlord and tenant became an action of ejectment on title by the course taken by the plaintiff, and the acceptance on both sides in the Court of First Instance of an issue as to his ownership; and the Lower Appellate Court refused to go into that issue; *held*, that the Lower Appellate Court was bound to try that issue, whether or not there were other sharers or claimants to shares. **Vishwanth v Kashinath 1886, P J 213.**

118—C.P.C S 564-Objection as to want of cause of action raised for first time by Court of Appeal *proprio motu*.

Where the plaintiff alleged that his right of way was obstructed in 1871, that he took no proceedings then to enforce his right because the question was raised by defendant's suit which was then pending, that his right was since declared by the decree of 1882 in that suit and prayed for an injunction restraining the defendant from obstructing it in the future; and the defendant by his written statement confined himself to denying the plaintiff's right and did not dispute the plaintiff's claim to an injunction on any other ground; *held*, that under the circumstances it might well be that the defendant had threatened to obstruct the plaintiff's right as contemplated by S 54 of the Specific Relief Act, which would be ground for granting the injunction prayed for and although such threat not have been distinctly alleged in the plaint it was certainly not a case in which the Court of Appeal should have taken upon itself to raise the very technical objection that there was no cause of action without a fresh obstruction. **Baji v Trimbuk. 1887 P J 287.**

Civil Pro. Code (1882)-*Concld.* S. 564-*Concld.*

119—C.P.C.S.564-Issue not covered by pleadings. Plaintiff sued to recover certain lands as ancestral property. Defendant did not deny that they were so, but set up a gift and prescriptive title. Both these pleas failing, the Sub-Judge decreed for plaintiff. The Appeal Court framed an additional issue as to the plaintiff's ownership, found against defendant the issues of gift and prescription; and yet held the plaintiff's ownership not proved. *Held*, it was not right of the Appeal Court *proprio motu* to raise an issue as to the plaintiff's title contrary to the admissions and contentions of the parties and the conduct of the case in the Original Court. **Balu v Dhondi.1888 P J 369.**

—S.643 (Act XXIII of 1861. ss 16 and 19).

See (1) Division Bench of High Court. **23 Calc 532.**

(2) Sanction to Prosecution—Nature, Form, and Sufficiency of Sanction. **7 All 871.**

120—C P C (1882) S. 643. Act XXIII of 1861, ss. 16 and 19-Power of Civil Court to send case to Magistrate for perjury and forgery.

Under ss. 16 and 19, Act XXIII of 1861, Civil Courts had power to refer to Magistrates or to make commitments to the Sessions, in cases of perjury or forgery, only when they had come to some conclusion in respect of the guilt of the party concerned or the truth or otherwise of the document or evidence. **Huronath Roy. 7 W R 482.**

Notes:—Ex· 19 Cal 345.

—S. 651.

See (1) Appeal—Orders. **5 All 318.**
(2) Escape from Custody. **4 All 27 =5 All 318.**

—Sch IV Form 113.

See:-Plaint—Form and contents of Plaint—Name of Suits Generally **7 Calc 428**

—Forms 132 and 133.

See Partnership—Procedure. **7 Calc 428.**

—Forms 109 and 128,

See Interest—Omission to stipulate for or Stipulated Time has expired. **24 Calc 766=1 C W N 550.**

—Form 157.

See Account, Suit for. (Case No 13.) **7 Calc 654.**

—Form 156.

See Practice—Civil Cases—Commission. **23 Cal 404.**

Civil Procedure Code Amendment (Act VII of 1888.)

—C P C S. 46.

See Execution of Decree-Effect of Change of Law pending Execution.

—C P C s. 48.

See Appeal—Objections by Respondent

—C P C s. 49.

See Remand—Power of Remand.

Civil Procedure Code, Amendment Acts-*Concld.*

—C P C ss. 53, 66

See Abatement of Suit—Appeals.

—C P C s. 55.

See Jurisdiction of Civil Court—Revenue Courts—Orders of Revenue Courts.

—C P C ss. 55, 56.

See (1) Appeal—Appeal newly given by law.
(2) Appeal—Orders.
(3) District Judge Jurisdiction of.

—C. P. C. s. 57.

See Limitation Act. 1877, Art 177.

—C. P. C. s, 59.

See Review—Review by Judge other than Judge in Original Case.

—C. P. C. s. 60.

See (1) Reference to High Court—Civil Cases.
(2) Special or Second Appeal—Small Cause Court Suits—General Cases.

Civil Procedure Code Amendment Act X of 1888.

See District Judge, Jurisdiction of

—C P. C. s. 3.

See (1) Appeal—Orders.
(2) District Judge Jurisdiction of.

Civil Procedure Code Amendment Act VI of 1892.

—C. P. C. s. 3.

See Court Fees Act s 5.

—C. P. C. s. 4.

See (1) Execution of Decree—Application for Execution and Power of Court.
(2) Execution of Decree—Transfer of Decrees for Execution and power of Court etc.
(3) Limitation Act, Art 179—Step in aid of Execution.
(4) Res Judicata—Judgments on Preliminary Points.

C. P C. s. 5.

See Execution of Decree—Application for Execution and Power of Court.

Civil procedure Code Amendment Act V of 1894.

See (1) Execution of Decree—Effect of Change of Law pending Execution.
(2) Cases under Sale for Arrears of Rent—Setting aside Sale—General Cases.
(3) Cases under Sale in Execution of Decree—Setting aside Sale—General cases.
(4) Cases under Sale in Execution of Decree—Setting aside Sale—Irregularity.

THE CODE OF CIVIL PROCEDURE.

ACT V OF 1908.

CONTENTS.

PRELIMINARY.

Sections.

1. Short title, commencement and extent.
2. Definitions.
3. Subordination of Courts.
4. Savings.
5. Application of the Code to Revenue Courts.
6. Pecuniary jurisdiction.
7. Provincial Small Cause Courts.
8. Presidency Small Cause Courts.

PART I.

SUITS IN GENERAL.

Jurisdiction of the Courts and Res-Judicata.

9. Courts to try all civil suits unless barred.
10. Stay of suit.
11. *Res judicata.*
12. Bar to further suit.
13. When foreign judgment not conclusive.
14. Presumption as to foreign judgments.

Place of Suing.

15. Court in which suits to be instituted.
16. Suits to be instituted where subject-matter situate.
17. Suits for immoveable property situate within jurisdiction of different Courts.
18. Place of institution of suit where local limits of jurisdiction of Courts are uncertain.
19. Suits for compensation for wrongs to person or moveables.
20. Other suits to be instituted where defendants reside or cause of action arises.
21. Objections to jurisdiction.
22. Power to transfer suits which may be instituted in more than one Court.
23. To what Court application lies.
24. General power of transfer and withdrawal.
25. Power of Governor-General-in-Council to transfer suits.

Sections.

Institution of Suits.

26. Institution of suits.

Summons and Discovery.

27. Summons to defendant.
28. Service of summons where defendants resides in another province.
29. Service of foreign summonses.
30. Power to order discovery and the like.
31. Summons to witnesses.
32. Penalty for default.

Judgment and Decree.

33. Judgment and decree.

Interest.

34. Interest.

Costs.

35. Costs.

PART II.

EXECUTION.

General.

36. Application to orders.
37. Definition of Court which passed a decree.

Courts by which Decrees may be Executed.

38. Court by which decrees may be executed.
39. Transfer of decree.
40. Transfer of decree to Court in another province.
41. Result of execution-procedings to be certified.
42. Powers of Court in executing transferred decree.
43. Execution of decrees passed by British Courts in places to which this Part does not extend or in foreign territory.
44. Execution of decrees passed by Courts of Native States.

Sections.
45. Execution of decrees in foreign territory.
46. Precepts.

Questions to be Determined by Court executing Decree.

47. Questions to be determined by the Court executing decree.

Limit of time for execution.

48. Execution barred in certain cases,

Transferees and legal representatives.

49. Transferee.
50. Legal representative.

Procedure in execution.

51. Powers of Court to enforce execution.
52. Enforcement of decree against legal representative.
53. Liability of ancestral property.
54. Partition of estate or separation of share.

Arrest and Detention

55. Arrest and detention.
56. Prohibition of arrest or detention of women in execution of decree for money.
57. Subsistence-allowance.
58. Detention and release.
59. Release on ground of illness.

Attachment.

60. Property liable to attachment and sale in execution of decree.
61. Partial exemption of agricultural produce.
62. Seizure of property in dwelling-house.
63. Property attached in execution of decrees of several Courts.
64. Private alienation of property after attachment to be void.

Sale.

65. Purchaser's title.
66. Suit against purchaser not maintainable on ground of purchase being on behalf of plaintiff.
67. Power for Local Government to make rules as to sales of land in execution of decrees for payment of money.

Delegation to Collector of power to execute decrees against immoveable property.

68. Power to prescribe rules for transferring to Collector execution of certain decrees.
69. Provisions of Third Schedule to apply.
70. Rules of procedure.
Jurisdiction of Civil Courts barred.
71. Collector deemed to be acting judicially.
72. Where Court may authorize Collector to stay public sale of land.

Distribution of assets.

73. Proceeds of execution-sale to be rateably distributed among decree-holders.

Resistance to execution.

74. Resistance to execution.

PART III.

INCIDENTAL PROCEEDINGS.

Commissions.

75. Power of Court to issue commissions.
76. Commission to another Court.
77. Letter of request.
78. Commissions issued by foreign Courts.

PART IV.

SUITS IN PARTICULAR CASES.

Suits by or against the Government or Public Officers in their official capacity.

79. Suits by or against Government.
80. Notice.
81. Exemption from arrest and personal appearance.
82. Execution of decree.

Suits by Aliens and by or against Foreign and Native Rulers.

83. When aliens may sue.
84. When foreign States may sue.
85. Persons specially appointed by Government to prosecute or defend for Princes or Chiefs.
86. Suits against Princes, Chiefs, ambassadors and envoys.
87. Style of Princes or Chiefs as parties to suits

Interpleader.

88. Where interpleader-suit may be instituted.

Sections.

PART V

SPECIAL PROCEEDINGS.

Arbitration.

89. Arbitration.

Special Case:

90. Power to state case for opinion of Court.

Suits relating to Public Matters.

91. Public nuisances.
92. Public charities.
93. Exercise of powers of Advocate General outside Presidency-towns

---

PART VI.

SUPPLEMENT PROCEEDINGS.

94 Supplemental proceedings.
95. Compensation for obtaining arrest, attachment or injunction on insufficient grounds.

PART VII.

APPEALS.

Appeals from Original Decrees.

96. Appeal from original decree.
97. Appeal from final decree where no appeal from preliminary decree.
98. Decision where appeal heard by two or more Judges.
99. No decree to be reversed or modified for error or irregularity not affecting merits or jurisdiction.

Appeals from Appellate Decrees.

100. Second appeal.
101. Second appeal on no other grounds.
102. No second appeal in certain suits.

Sections.

103. Power of High Court to determine issues of fact

Appeals from Orders.

104. Orders from which appeal lies.
105. Other orders.
106. What Courts to hear appeals.

General Provisions relating to Appeals.

107. Powers of Appellate Court.
108. Procedure in appeals from appellate decrees and orders.

Appeals to the King-in-Council.

109. When appeals lie to King-in-Council.
110. Value of subject-matter.
111. Bar of certain appeals.
112. Savings.

PART VIII.

REFERENCE, REVIEW AND REVISION.

113. Reference to High Court.
114. Review.
115. Revision.

PART IX.

SPECIAL PROVISIONS RELATING TO THE CHARTERED HIGH COURTS.

116. Part to apply only to certain High Courts.
117. Application of Code to High Courts.
118. Execution of decree before ascertainment of costs.
119. Unauthorized persons not to address Court.
120. Provisions not applicable to High Court in original civil or insolvent jurisdiction.

PART X.

RULES.

121. Effect of rules in First Schedule.

Sections.

122. Power of certain High Courts to make rules
123. Constitution of Rule Committees in certain Provinces.
124. Committee to report to High Court.
125. Power of other High Courts to make rules.
126. Rules subject to sanction.
127. Publication of rules.
128. Matters for which rules may provide.
129. Power of Chartered High Courts to make rules as to their original civil procedure.
130. Power of other High Courts to make rules as to Matters other than procedure.
131. Publication of rules.

PART XI.

MISCELLANEOUS.

132. Exemption of certain women from personal appearance.
133. Exemption of other persons.
134. Arrest other than in execution of decree.
135. Exemption from arrest under civil process.
136. Procedure where person to be arrested or property to be attached is outside district.
137. Language of subordinate Courts.
138. Power of Local Government to require evidence to be recorded in English.
139. Oath or affidavit by whom to be administered.
140. Assessors in cause of salvage, etc
141. Miscellaneous proceedings
142. Orders and notices to be in writing.
143. Postage.
144. Application for restitution.
145. Enforcement of liability of surety.
146. Proceedings by or against representatives.
147. Consent or agreement by persons under disability.

Sections.

148. Enlargement of time.
149. Power to make up deficiency of court-fees.
150. Transfer of business
151. Saving of inherent powers of Court.
152. Amendment of judgments, decrees or orders.
153. General power to amend.
154. Saving of present right of appeal.
155. Amendment of certain Acts.
156. Repeals.
157. Continuance of orders under repealed enactments.
158. Reference to Code of Civil Procedure and other repealed enactments

SCHEDULES.

The first Schedule.—Rules of Procedure.

Appendix A.—Pleadings.
Appendix B.—Process.
Appendix C,—Discovery Inspection and Admission.
Appendix D.—Decrees.
Appendix E.—Execution
Appendix F—Supplemental Proceedings.
Appendix G.—Appeal Reference and Review.
Appendix H.—Miscellaneous.

The Second Schedule.—Arbitration.
Appendix Forms,

The Third Schedule.—Execution of Decree by Collectors.

The Foruth Schedule.—Enactments amended.

The Fifth Schedule.—Enactments repealed.

Civil Procedure Code (Act V of 1908.)

A Comparative table showing the Sections of Act XIV of 1882 and the Corresponding Sections and Rules of Act V of 1908.

Section of Act XIV of 1882.	Section, Order, Rule of Act V of 1908.	Section of Act XIV of 1882	Section, Order, Rule of Act V of 1908.
1	Sec 1	31	O I, r 9
2	2	32	,, rr 8 (2), 10 (2), (3), (5), 11
3	Secs 154, 156, 157, 158	33	,, r 10 (4)
4	Sec 4	34	,, r 13
4A	,, 5	35	,, r 12
5	,, 7	36	O III, r 1
6, paras. (c) & (d)	Omitted	37	,, r 2
6, last para.	Sec 6	38	,, r 3
7	Cf Sec 4	39	,, r 4
8	Sec 8	40	,, r 5
9	Omitted	41	,, r 6
10	Omitted	42	O II, r 1
11	Sec 9	43	,, r 2
12	,, 10	44	,, rr 4, 5
13	,, 11	45	,, rr 3, 6
Expln. VI	,, 14	46, 47	Cf O II, rr 6, 7.
14	,, 13	48	Sec 26, O IV, r 1
15	,, 15	49	Cf Sec. 137
16	,, 16	50	O: VII rr 1, 2, 4, 5, 6
16A	,, 18	51	O VI, rr 14, 15 (1)
17	,, 20	52	,, r 15 (2), (3)
18	,, 19	53	,, r 17: cf O VII, r 11
19	,, 17	54	O VII, r 11; cf O VI r 18
20	Omitted	55	,, r 12
21	Omitted	56	,, r 13
22	Secs 22, 23 (1)	57	,, r 10
23	22, 23 (2)	58	,, r 9
24, paras. 1 & 3	22, 23 (3)	58 last para	O. IV, r 2
24, para. 2	Omitted	59	O, VII. r 14
25	Sec 24	60	,, r 15
26	O I, rr I, 4 (a)	61	,, r 16
27	,, r 10 (1)	62	,, r 17
28	,, rr 3, 4 (b)	63	,, r 18
29	,, r 6	64	Sec 27, O V, r 1
30	,, r 8 (1)	65	O V, r 2
		66	,, r 3
		67	,, r 4

Section of Act XIV of 1882.	Section, Order, Rule of Act V of 1908.	Section of Act XIV of 1882.	Section, Order, Rule of Act V of 1908.
231	O XX, r 15	273	O. XXI, r 53
232	,, r 16	274	,, r 54
233	Sec 49	275	,, r 55
234	Sec 50	276	Sec 64
235	O XXI, r 11 (2)	277	O XXI, r 56
236	,, r 12	278	,, r 58
237	,, r 13	279	,, r 59
238	,, r 14	280	,, r 60
239	,, r 26 (1) (2)	281	,, r 61
240	,, r 26 (3)	282	,, r 62
241	,, r 27	283	,, r 63
242	,, r 28	284	,, r 64
243	,, r 29	285	Sec, 63
244	Sec. 47	286	O, XXI, r, 65
245	O XXI, r 17	[illegible]	,, rr, 66, 70
245A	Sec. 56	288	Omitted
245B	O XXI, r 37	289	O, XXI, r 67
246	,, r 18	290	,, r 68
247	,, r 19	291	,, r 69
248	,, r 22	292	,, r 73
249	,, r 23	293	,, r 71
250	,, r 24 (1)	294	,, r 72
251	,, rr 24 (2), (3), 25 (1)	295	Sec 73
252	Sec 52.	296	O XXI, r 76
253	*Of* Sec. 145	297	,, r 77
254	O XXI, r 30	298	,, r 78
255	,, r 42	299	,, r 79 (1)
256	,, r 11 (1)	300	,, r 79 (2)
257	,, r 1	301	,, r 79 (3)
257A	Omitted	302	,, r 80
258	O XXI, r 2	303	,, r 81
259	,, r 31	304	,, r 82
260	,, r 32	305	,, r 83 (1), (2)
261	,, r 34 (1) to (4)	306	,, r 84 (1)
262	,, r 34 (5)	307	,, r 85
263	,, r 35	308	,, r 86
264	,, r 36	309	,, r 87
265	Sec. 54	310	,, r 88
266	Sec. 60	310A	,, r 89
267	O XXI, r 41	311	,, r 90
268	,, r 46	312	,, r 92
269	,, r 43	313	,, r 91
270	,, r 51	314	,, r 92
271	Sec 62	315	,, r 93
272	O. XXI, r 52	316	Sec. 65, r 94
		317	Sec. 66

Section of Act XIV of 1882.	Section, Order, Rule of Act V of 1908.	Section of Act XIV of 1882.	Section, Order, Rule of Act V of 1908.
318	O XXI, r 95	369	O XXII, r 7
319	,, r 96	370	,, r 8
320	Secs 68, 70 & 71	371	,, r 9 (1, 2)
321		372	,, r 10 (1)
322		372A	,, r 9 (3)
322A		373	O XXIII, r 1
322B		374	,, r 2
322C		375	,, r 3
322D		375A	,, r 4
323	The Third Schedule	376	O XXIV, r 1
324		377	,, r 2
324A		378	,, r 3
325		379	,, r 4
325A		380	O XXV, r 1 (1, 3)
325B		381	,, r 2
325C		382	,, r 1 (2)
326	Sec 72	383	O XXVI, r 1
327	,, 67	384	,, r 2
328	O XXI, r 97	385	,, r 3
329	,, r 98	386	,, r 4 & Sec 76
330	,, r 98	387	,, r 5
331	,, r 99	388	,, r 6
332	,, rr 100, 101, 103	389	,, r 7
333	,, r 102	390	,, r 8
334	,, *Cf:* rr 97, 98	391	Sec 78
335	,, *Cf:* rr 97, 99, 103	392	O XXVI, r 9
336	Sec 55	393	,, r 10
337	O XXI, r 38	394	,, r 11
337A	,, r 40	395	,, r 12
338	Sec 57	396	,, rr 13, 14
339	O XXI, r 39(1) to (4)	397	,, r 15
340	,, r 39 (5)	398	,, r 16
341	Sec 58	399	,, r 17 (1)
342		400	,, r 18
343	O XXI, r 25	401	O XXXIII, r 1
344-360A	Repealed by the Provincial Insolvency Act, 1907.	402	Omitted
		403	O XXXIII, r 2
361	O XXII, r 1	404	,, r 3
362	,, r 2	405	,, r 5
363	,, r 3 (1)	406	,, r 4
364	Omitted	407	,, r 5(A)
365	O XXII, r 3 (1)	408	,, r 6
366	,, r 3 (2)	409	,, r 7
367	,, r 5	410	,, r 8
368	,, r 4	411	,, r 10
		412	r 11

Section of Act XIV of 1882.	Section Order Rule of Act V of 1908	Section of Act XIV of 1882	Section Order, Rule of Act V of 1908,
413	O XXXIII, r 15	459	O XXXII, r 11 (2)
414	,, r 9	460	Omitted
415	,, r 16	461	O XXXII, r 6
416	Sec 79 (1)	462	,, r 7
417	O XXVII, r 2	463	,, r 15
418	,, r 3	464	,, r 16
419	,, r 4	465	O XXVIII, r 1
420	,, r 5	466	,, r 2
421	,, r 6	467	,, r 3
422	O. V r 27	468	O, V rr 28, 29
423	O XXVII, r 7	470	Sec 88
424	Sec 80	471	O XXXV r 1
425	*Cf:* ,, 81	472	,, r 2
426	O XXVII, r 8	473	,, r 4
427		474	,, r 5
428	Sec 81	475	,, r 6
429	Sec 82	476	,, r 3
430	Sec 83	477	O XXXVIII, r 1
431	Sec 84	478	
432	Sec 85	479	,, r 2
433	Sec 86	480	,, r 3
434	Sec 87	481	,, r 4
435	O XXIX, r 1	482	,, r 5
436	,, rr 2, 3	483	,, rr 5(1)(2), 6 (1)
437	O XXXI, r 1	484	,, r 5 (1) (3)
438	,, r 2	485	,, r 6
439	,, r 3	486	,, r 7
440	O XXXII, rr 1, 4 (2)	487	,, r 8
441	,, r 5 (1)	488	,, r 9
442	,, r 2	489	,, r 10
443	,, rr 3 (1), 4 (2)	490	,, r 11
444	,, r 5 (2)	491	Sec. 95
445	,, r 4 (1)	492	O XXXIX, r 1
446	,, r 9	493	,, r 2
447	,, r 8	494	,, r 3
448	,, r 10 (1)	495	,, r 5
449	,, r 10 (2)	496	,, r 4
450	,, r 12 (1)	497	Sec. 65
451	,, r 12 (2), (3)	498	O XXXIX, r 6
452	,, r 12 (4)	499	,, r 7
453	,, r 12 (5)	500	,, r 8
454	,, r 13	501	,, r 9
455	,, r 14	502	,, r 10
456	,, r 3 (2)(3), (4)	503	O XL, rr, 1 to 3
457	,, r 4 (1)	504	,, r 5
458	,, r 11 (1)	505	Omitted

Section of Act XIV of 1882.	Section Order Rule of Act V of 1908	Section of Act XIV of 1882	Section, Order, Rule of Act V of 1908
506	The Second Schedule.	552	O XLI, r 12
507		553	,, r 14
508		554	,, r 15
509		555	,, r 16
510		556	,, r 17
511		557	,, r 18
512		558	,, r 19
513		559	,, r 20
514		560	,, r 21
515		561	,, r 22 (1,2,3,5)
516		562	,, r 23
517		564	Omitted
518		565	O XLI r 24
519		566	,, r 25
520		567	,, r 26
521		568	,, r 27
522		569	,, r 28
523		570	,, r 29
524		571	,, r 30
525		572	Cf Sec 135
526		573	
527	O XXXVI, r 1; Cf: Sec 90	574	O XLI, r 31
528	,, r 2	575	Sec 98
529	,, r 3	576	O XLI, r 34
530	,, r 4	577	,, r 32
531	,, r 5	578	Sec 99
532	O XXXVII, r 2	579	O XLI, r 35
533	,, r 3	580	,, 36
534	,, r 4	581	,, 37
535	,, r 5	582	Sec 107 (2) O XXII r 11
536	,, r 6		
537	,, r 7	582A	Cf Sec 149
538	,, r 1	583	Sec 144 (1)
539	Secs 92 and 93	584	,, 100
540	,, 96 (1) (2)	585	,, 101
541	O XLI, r 1	586	,, 102
542	,, r 2	587	,, 108
543	,, r 3	588	,, 104, O XLIII, r 1
544	,, r 4	589	,, 106
545	,, r 5 (1) (2) (3)	590	,, 108, O XLIII, r 2
546	,, r 6	591	,, 105 (1)
547	,, r 7	592	O, XLIV, r 1
548	,, r 9	593	,, r 2
549	,, r 10	594	O XLV, r 1
550	,, r 13	595	Sec 109
551	,, r 11	596	,, 110

Section of Act XIV of 1882.	Section Order Rule of Act V of 1908	Section of Act XIV of 1882	Section, Order, Rule of Act V of 1908.
597	Sec 111	629	O XLVII, rr 7, 9
598	O XLV, r 2	630	,, r, 8
600	,, r 3	631	Sec 116
601	,, r 6	632	,, 117
602	,, r 7	633	*Cf*: ,, 122
603	,, r 8	634	,, 118
604	,, r 9	635	,, 119
605	,, r 10	636	O XLIX, r 1
606	,, r 11	637	Sec. 128 (2) (4)
607	,, r 12	638	,, 120 (1); O XLIX r 3
608	,, r 13		
609	,, r 14	639	Sec. 120 (2)
610	,, r 15	640	,, 132
611	,, r 16	641	,, 133
612	*Cf* S. 129	642	,, 135 (1) (2)
613	*Cf* S 130	643	Omitted
615	Omitted	644	O XLVIII, r 3
616	Sec 112	645	Sec 138 (1) (4)
617	,, 113; O XLVI, r 1	645A	,, 140
618	O XLVI r 2	646	Omitted
619	,, r 3	646A	O XLVI r 6
620	,, r 4	646B	,, r 7
621	,, r 5	647	Sec 141
622	Sec 115	648	,, 156
623	,, 114; O XLVII, r 1	649	,, 30, 37
624	O, XLVII, r 2	650	Omitted
625	,, r 3	650A	Sec 29
626	,, r 4	652	Secs. 122, 129, 130 and 131
627	,, r 5		
628	,, r 6	653	Sec. 59

A comparative table of the sections Orders and rules of the Civil Procedure Code 1908, and the corresponding Sections of Act XIV of 1882.

New Act.	Old Act.	New Act.	Old Act.
Sec 1	Sec 1	Sec 41	Sec 223 para 4
,, 2	,, 2	,, 42	,, 228
,, 2, (12)	,, 211, Exp	,, 43	,, 229
,, 3	,, 2	,, 44	,, 229B
,, 4	,, 4	,, 45	,, 229A
,, 5	,, 4A	,, 46	New
,, 6	,, 6 (last para)	,, 47	,, 244
,, 7	,, 5	,, 48	,, 230 paras 3 & 4
,, 8	,, 8	,, 49	,, 233
,, 9	,, 11	,, 50	,, 234
,, 10	,, 12	,, 51	New
,, 11	,, 13	,, 52	,, 252
,, 12	,, New	,, 53	New
,, 13	,, 14	,, 54	,, 265
,, 14	,, 13 (Exp 6)	,, 55	,, 336
,, 15	,, 15	,, 56	,, 245A
,, 16	,, 16	,, 57	,, 338
,, 17	,, 19	,, 58	,, 341,342
,, 18	,, 16A	,, 59	,, 653
,, 19	,, 18	,, 60	,, 266
,, 20	,, 17	,, 61	New
,, 21	,, 16A (2)	,, 62	,, 271
,, 22	,, 22	,, 63	,, 285
,, 23	,, 22, 23, 24	,, 64	,, 276
,, 24	,, 25	,, 65	New *Cf* s(316)
,, 25	,, New	,, 66	,, 317
,, 26	,, 48	,, 67	,, 327
,, 27	,, 64	,, 68	,, 320
,, 28	,, 85	,, 69	New
,, 29	,, 650A	,, 70	,, 320 paras 2, 3 & 4
,, 30	New	,, 71	,, 320 para 5
,, 31	New	,, 72	,, 326
,, 32	New	,, 73	,, 295
,, 33	,, 198	,, 74	,, 330
,, 34	,, 209	,, 75	New
,, 35	,, 220, (2) 222 (3)	,, 76	,, 386
,, 36	New	,, 77	New
,, 37	,, 649 (para 2)	,, 78	,, 391
,, 38	,, 223 para 1	,, 79	,, 416 para 1
,, 39	,, 223 paras 2, 3	,, 80	,, 424
,, 40	New		

New Act.	Old Act.	New Act.	Old Act.
Sec 81	Secs 425, 428	Sec 115	Sec 622
„ 82	„ 429	„ 116	„ 631
„ 83	„ 430	„ 117	„ 632
„ 84	„ 431	„ 118	„ 634
„ 85	„ 432	„ 119	„ 635
„ 86	„ 433	„ 120	„ 638 & 639
„ 87	„ 434	„ 121-128	New
„ 88	„ 470	„ 129	„ 652, para 3
„ 89	„ 506	„ 130	„ 652, para 2
„ 90	„ 527		
„ 91	New	„ 131	„ 652, para 4
„ 92	„ 539	„ 132	„ 640
„ 93	„ 539 (last para)	„ 133	„ 641
		„ 134	New
„ 94	New	„ 135	„ 642
„ 95	„ 491, 497	„ 136	„ 648
„ 96	„ 540	„ 137	„ 645
„ 97	New	„ 138	„ 185A
„ 98	„ 575		
„ 99	„ 578	„ 139	„ 197
„ 100	„ 584	„ 140	„ 645A
„ 101	„ 585	„ 141	„ 647, para 1
„ 102	„ 586	„ 142	„ 94
„ 103	New	„ 143	„ 95
„ 104	„ 588	„ 144	„ 583
„ 105	„ 591	„ 145	„ 253
„ 106	„ 589	„ 146-151	New
„ 107	„ 582	„ 152	„ *cf* 206 para 3
„ 108	„ 587, 590		New
„ 109	„ 595	„ 153	„ 3, para 3
„ 110	„ 596	„ 154	New
„ 111	„ 597	„ 155	„ 3, sentence 1
„ 112	„ 616	„ 156	„ 3, „ 2
„ 113	„ 617	„ 157	„ 3, para 2
„ 114	„ 623	„ 158	

THE FIRST SCHEDULE.

New Act.	Old Act.	New Act.	Old Act.
O I, r 1	Sec 26	O V, r 16	Sec 79
,, 2	New	,, 17	,, 80
,, 3	,, 28	,, 18	,, 81
,, 4	,, 26, 28	,, 19	,, 82
,, 5	New	,, 20	,, 82, (para 2) 83 & 84
,, 6	,, 29	,, 21	,, 85
,, 7	New	,, 22	,, 86
,, 8	,, 30, 32	,, 23	,, 85
,, 9	,, 31	,, 24	,, 87, 88
,, 10	,, 27, 32, 33	,, 25	,, 89
,, 11	,, 32	,, 26	,, 90
,, 12	,, 35	,, 27	,, 422
,, 13	,, 34	,, 28	,, 468 para 1
O II, r 1	,, 42	,, 29	,, 468 para 3
,, 2	,, 43	,, 30	,, 91 92
,, 3	,, 45	O VI, rr 1 to 13	New E Rules
,, 4	,, 44	,, 14	Sec 51
,, 5	,, 44	,, 15	,, 51
,, 6	*Cf* 46, 47	,, 16	New
,, 7	,, 46	,, 17	*Cf* s 53
O III, r 1	,, 36	,, 18	*Cf* s 53
,, 2	,, 37	O VII, r 1	Sec 50
,, 3	,, 38	,, 2	,, 50
,, 4 (1) & 2	,, 39	,, 3	New
,, 5	,, 40	,, 4	Sec 50 (para 4)
,, 6	,, 41	,, 5	,, 50 (para 5)
O IV, r 1	,, 48	,, 6	,, 50 (para 6)
,, 2	,, 58 last para	,, 7	New
O V, r 1	,, 64	,, 8	New
,, 2	,, 65	,, 9	Sec 58
,, 3	,, 66	,, 10	,, 57
,, 4	,, 67	,, 11	,, 53, 54
,, 5	,, 68	,, 12	,, 55
,, 6	,, 69	,, 13	,, 56
,, 7	,, 70	,, 14	,, 59
,, 8	,, 71	,, 15	,, 60
,, 9	,, 72	,, 16	,, 61
,, 10	,, 73	,, 17	,, 62
,, 11	,, 74	,, 18	,, 63
,, 12	,, 75	O VIII, r 1	,, 110
,, 13	,, 76	,, 2 to 5	New
,, 14	,, 77	,, 6	Sec 111
,, 15	,, 78		

New Act	Old Act
O VIII, r 7	} New
,, 8	
,, 9	Sec 112
,, 10	,, 113
O IX, r 1	,, 96
,, 2	,, 97
,, 3	,, 98
,, 4	,, 99
,, 5	,, 99A
,, 6	,, 100
,, 7	,, 101
,, 8	,, 102
,, 9	,, 103
,, 10	,, 105
,, 11	,, 106
,, 12	,, 107
,, 13	,, 108
,, 14	,, 109
O X, r 1	,, 117
,, 2	,, 118
,, 3	,, 119
,, 4	,, 120
O XI, rr 1 to 20	New E Rules
O XI r. 21	Cf s. 136
,, rr 22 & 23	New
O XII, rr 1 to 9	New
O XIII, r 1	Secs 138, 140
,, 2	,, 139
,, 3	,, 140
,, 4	,, 141
,, 5	,, 141A
,, 6	,, 142
,, 7	,, 142A
,, 8	,, 143
,, 9	,, 144
,, 10	,, 137
,, 11	,, 145
O XIV, r 1	,, 146
,, 2	,, 146 (para 6)
,, 3	,, 147
,, 4	,, 148
,, 5	,, 149
,, 6	,, 150
,, 7	,, 151
O XV, r 1	,, 152
,, 2	,, 153
,, 3	,, 154

New Act.	Old Act.
O XV r 4	Sec 155
O XVI, r 1	,, 159
,, 2	,, 160
,, 3	,, 161
,, 4	,, 162
,, 5	,, 163
,, 6	,, 164
,, 7	,, 165
,, 8	,, 166
,, 9	,, 167
,, 10	,, 168
,, 11	,, 169
,, 12	,, 170
,, 13	,, New
,, 14	Sec 171
,, 15	,, 172
,, 16	,, 173
,, 17	,, 174 (para 1) and 175
,, 18	,, 174
,, 19	,, 176
,, 20	,, 177
,, 21	,, 178
O XVII, r 1	,, 156
,, 2	,, 157
,, 3	,, 158
O XVIII, r 1	,, 179 (Exp)
,, 2	,, 179 & 180
,, 3	,, 180
,, 4	,, 181
,, 5	,, 182
,, 6	,, 183
,, 7	,, 185A (3)
,, 8	,, 184
,, 9	,, 185
,, 10	,, 186
,, 11	,, 187
,, 12	,, 188
,, 13	,, 189
,, 14	,, 190
,, 15	,, 191
,, 16	,, 192
,, 17	,, 193
,, 18	,, New
O XIX, r 1	Sec 194
,, 2	,, 195
,, 3	,, 196

New Act	Old Act	New Act	Old Act
O XX r 1	Sec. 198	O. XXI r. 29	,, 243
,, 2	199	,, 30	,, 254
,, 3	,, 202	,, 31	,, 259
,, 4	,, 203	,, 32	,, 260
,, 5	,, 204	,, 32 (5)	,, O. 42 r. 30
,, 6	,, 206,221	,, 33	*Cf.* 42 & 48 Vict
,, 7	,, 205		c 68, ss. 2 to 4
,, 8	,, New	,, 34	Sec. 261
,, 9	,, 207	,, 34 (4)	New
,, 10	,, 208	,, 34 (5)	Sec. 262
,, 11	,, 210	,, 35 (1)	,, 263
,, 12	,, 211,212	,, 35 (2) & (3)	New
,, 13	,, 213		
,, 14	,, 214	,, 36	Sec 264
,, 15	,, 215	,, 37	,, 245B
,, 16	,, 215A	,, 38	,, 337
,, 17	,, New	,, 39	,, 339
,, 18	,, New	,, 39 (5)	,, 340
,, 19	Sec. 216	,, 40	,, 337A
,, 20	,, 217	,, 41	,, 267
O XXI r 1	,, 257	,, 42	,, 255
,, 2	,, 258	,, 43	,, 269
,, 3	,, New	,, 44	New
,, 4	Sec. 223, (para5)	,, 45	New
,, 5	,, 223 (para 6)	,, 46	Sec 268
,, 6	,, 224	,, 47	New
,, 7	,, 225	,, 48	New
,, 8	,, 226	,, 49	*Cf.* 53 & 54 Vict
,, 9	,, 227		c. 39 s. 23
,, 10	,, 230 (para 1)	,, 49 (4, & (5)	*Cf* O. 46 r. I (a) & r. 26
,, 11 (1)	,, 256	,, 50	O 48a, r. 8
,, 11 (2)	235	,, 51	S. 270
,, 12	,, 236	,, 52	,, 272
,, 13	,, 237	,, 53	,, 273
,, 14	,, 238	,, 54	Sec. 274
,, 15	,, 231	,, 55	,, 275
,, 16	,, 232	,, 56	,, 277
,, 17	,, 245	,, 57	New
,, 18	,, 246	,, 58	Sec 278
,, 19	,, 247	,, 59	,, 279
,, 20	,, New	,, 60	,, 280
,, 21	Sec 230 (para. 2)	,, 61	,, 281
,, 22	,, 248	,, 62	,, 282
,, 23	,, 249	,, 63	,, 283
,, 24 (1)	,, 250	,, 64	,, 284
,, 24 (2)	,, 251 (para. 1)	,, 65	,, 286
25 (1)	,, 343 and latter part of 251.	,, 66	,, 287
,, 25 (2)	Sec 343	,, 66 (3)	,, 237 (last. p,)
,, 26	,, 239, 240	,, 66 (4)	,, 238 (last p;)
27	241	,, 67	,, 289
,, 28	242	,, 68	290

New Act	Old Act
O. XXI. r 69	„ 291
„ 70	„ 287 (last p.)
„ 71	„ 293
„ 72	„ 294
„ 73	„ 292
„ 74	„ New
„ 75	„ New
„ 76	Sec. 296
„ 77	„ 297
„ 77 (3)	„ New
„ 78	Sec. 298
„ 79 (1)	„ 299
„ 79 (2)	„ 300
„ 79 (3)	„ 301
„ 80	„ 302
„ 81	„ 303
„ 82	„ 304
„ 83	„ 305
„ 84	„ 306
„ 85	„ 307
„ 86	„ 308
„ 87	„ 309
„ 88	„ 310
„ 89	„ 310A
„ 90	„ 311
„ 91	„ 313
„ 92	„ 312, 314
„ 93	„ 315
„ 94	„ 316
„ 95	„ 318
„ 96	„ 319
„ 97	„ 328, 344
„ 98	„ 329, 330
„ 99	„ *cf* 331, 335
„ 100	„ 332
„ 101	„ 332 335
„ 102	„ 333
„ 103	„ 332, 335
O. XXII. r 1	Sec 361
„ 2	„ 362
„ 3	„ 363, 365, 366,
„ 4	„ 368
„ 5	„ 367
„ 6	O 37, r 1
„ 7	Sec 359
„ 8	„ 370
„ 9	Sec 371
„ 10	„ 372
„ 11	„ 582 (last para)
„ 12	New
O XXIII r 1	Sec 373
„ 2	„ 374

New Act	Old Act
O XXIII, r 3	„ 375
„ 4	„ 375A
O XXIV r. 1	„ 376
„ 2	„ 377
„ 3	„ 378
„ 4	„ 379
O. XXV r 1	„ 380, 381
„ 2	„ 381
O XXVI r 1	„ 383
„ 2	„ 384
„ 3	„ 385
„ 4	„ 3 8
„ 5	„ 387*cf* O 37 r 6(a)
„ 6	„ 388
„ 7	„ 389
„ 8	„ 390
„ 9	„ 392
„ 10	„ 393
„ 11	„ 394
„ 12	„ 395
„ 13	„ 396
„ 14	„ 396paras 2 & 3
„ 15	„ 397
„ 16	„ 398
„ 17	„ 399
„ 18	„ 400
O XXVII r1	New
„ 2	Sec 417
„ 3	„ 418
„ 4	„ 4 9
„ 5	„ 420
„ 6	„ 421
„ 7	„ 4 3
„ 8	Sec 426.427
O XXVIII r1	„ 465
„ 2	„ 466
„ 3	„ 467
O XXIX r 1	„ 435
„ 2	„ 436
„ 3	„ 437
O XXX, rr 1-10	New
O XXXI, r 1	Sec 437
„ 2	„ 438
„ 3	„ 439
O XXXII, r 1	„ 440
„ 2	„ 442
„ 3	„ 443.456
„ 3(4)	New
„ 4	Sec 440.443 445.456
„ 5	„ 441.444 461
„ 6	

New Act.	Old Act.
O XXXII, r 7	,, 462
,, 8	,, 447
,, 9	,, 446
,, 10	,, 448 449
,, 11	,, 458 459
,, 12	,, 450 to 453
,, 13	,, 454
,, 14	,, 455
,, 15	,, 460,463
,, 16	,, 464
O. XXXIII, r. 1	,, 401
,, 2	,, 403
,, 3	,, 404
,, 4	,, 406
,, 5	,, 405,407
,, 6	,, 408
,, 7	,, 409
,, 8	,, 410
,, 9	,, 414
,, 10	,, 411
,, 11	,, 412
,, 12to14	,, New.
,, 15	Sec. 413
,, 16	,, 415
O. XXXIV, r. 1	Act IV of 1882 S 85
,, 3	Sec 87
,, 4	,, 88
,, 5	,, 89
,, 6	,, 90
,, 7	,, 92
,, 8	,, 93
,, 9	,, New
10	IV 1882, S. 94
11	New
,, 12	IV 1882, S. 96
,, 13	,, 97
,, 14	,, *Cf* s. 99
O. XXXV, r. 1	Sec 471
,, 2	,, 472
,, 3	,, 476
,, 4	,, 473
,, 5	,, 474
,, 6	,, 475
O. XXXVI, r. 1	,, 527
,, 2	,, 528
,, 3	,, 529
,, 4	,, 530
,, 5	,, 531
O. XXXVII r. 1	,, 538
,, 2	,, 532

New Act.	Old Act.
O XXXVII r 3	,, 533
,, 4	,, 534
,, 5	,, 535
,, 6	,, 536
,, 7	,, 537
O. XXXVIII, r. 1	,, 477,478
,, 2	,, 479
,, 3	,, 480
,, 4	,, 481
,, 5	,, 483 & 484
,, 6	,, 485
,, 7	,, 486
,, 8	,, 487
,, 9	,, 488
,, 10	,, 489
,, 11	,, 490
,, 12	New
O. XXXIX, r. 1	Sec. 492
,, 2	,, 493
,, 3	,, 494
,, 4	,, 496
,, 5	,, 495
,, 6	,, 498
,, 7	,, 499
,, 8	,, 500
,, 9	,, 501
,, 10	,, 502
O. XL, r. 1	,, 503
,, 2	,, 503
,, 3	,, 503
,, 4	New
,, 5	Sec. 504
O XLI, r. 1	,, 541
,, 2	,, 542
,, 3	,, 543
,, 4	,, 544
,, 5	,, 545
,, 6	,, 546
,, 7	,, 547
,, 8	New
,, 9	Sec. 548
,, 10	,, 549
,, 11	,, 551
,, 12	,, 552
,, 13	,, 550
,, 14	,, 553
,, 15	,, 554
,, 16	,, 555
,, 17	,, 556
,, 18	,, 557
,, 19	,, 558
,, 20	,, 559

New Act.		Old Act	
O XLI r.	21	„	560
„	22	„	561
„	23	„	562
„	24	„	565
„	25	„	566
„	26	„	567
„	27	„	568
„	28	„	569
„	29	„	570
„	30	„	571
„	31	„	574
„	32	„	577
„	33	O. 58, r.	4
„	34	Sec.	576
„	35	„	579
„	36	„	580
„	37	„	581
O. XLII r.	1		New
O. XLIII r.	1	„	588
„	2	Sec.	590
O. XLIV, r.	1	„	592
„	2	„	593
O. XLV, r.	1	„	594
„	2	„	598
„	3	„	600
„	4,5		New
„	6	„	601
„	7	„	602
„	8	„	603
„	9	„	604
„	10	„	605
O XLV r	11	„	606
„	12	„	607
„	13	„	608
„	14	„	609
„	15	„	610
„	16	„	611
O. XLVI r.	1	„	617
„	2	„	618
„	3	„	619
„	4	„	620
„	5	„	621
„	6	„	646A
„	7	„	646B
O. XLVII r.	1	„	623
„	2	„	624
„	3	„	625
„	4	„	626
„	5	„	627
„	6	„	628
„	7	„	629
„	8	„	630
„	9	„	629,last para.
O. XLVIII r.	1	„	93
„	2	„	94
„	3	„	644
O XLIX, r	1	„	636
„	2		New
„	3	Sec	638
O L, r.	1		New
O. LI, r.	1		New

THE SECOND SCHEDULE.

Rule	1	Sec	506
„	2	„	507
„	3	„	508
„	4	„	509
„	5	„	510 507 (2)
		„	511
„	6	„	512
„	7	„	513
„	8	„	514
„	9	„	515
„	10	„	516
„	11	„	517
„	12	„	518
Rule	13	Sec	519
„	14	„	520
„	15	„	521
„	16	„	522
„	17	„	523
„	18	*cf* s 19 Act IX of 1899	
„	19	Sec	524
„	20	„	525
„	21	„	526
„	22	*cf* s 3 Act IX of 1899	
„	23	New	

THE THIRD SCHEDULE

Rule	1	Sec	321
„	2	„	322
„	3	„	322A
„	4	„	322B
„	5	„	322C
„	6	„	322D
„	7	„	323
„	8	Sec	324
„	9	„	324A
„	10	„	325
„	11	„	325A
„	12	„	325B
„	13	„	325C

Civil Pro. Code (1908)-*Contd.*

Construction & interpretation.

1—A code of procedure should not be construed as taking away or affecting existing substantive rights, unless it says so,

Rai Budreedas Mukim Bahadur v Chunilal Johurry. 10 C W N 581.

2—C. P. C.—The Civil Procedure Code does not affect pre existing power of the Court unless it takes them away. **Rash Behary Dey v. Bhavani Churn Bose 34 Cal 97.**

See also. 34 Cal 101.

3—C. P. C. Whether exhaustive—Equitable powers of courts inherent where no express provision is made.

The Code of Civil Pro. is not exhaustive ; it binds the Courts only so far as it goes. The court does not affect powers previously possessed, unless it expressly takes them away. It does not affect the power and duty of the Courts to act according to equity and good conscience in cases for which no express provision is made. The Court has an inherent power to do that justice for the administration for which alone it exists **Hukum Chand v Kamalanand Singh 3 C L J 67=33 Cal 927**

See also Panchanan v Dwarka Nath 3 C L J 29

Also Per Mukerjee J and Rampini J in **Rasik Lall Dutt v Bidhu Mukhi Dasi, 4 C L J 306=33 Cal 1094= 10 C W N 719**

See also Gurdeo Singh v Chaudrikat 5 C L J 611=11 C W N 856= 34 Cal 860.

But See 33 Cal 985=4 C L J 219, where it is held that Equity will not contravene the positive enactments or requirements of law.

4-5—C.P.C. (Act V of 1908) S. 1—Retrospective effect of—No vested right in procedure—Liability incurred under the old Code to pay amount within a time not a matter of procedure

A liability incurred under the old Code to pay an amount, the consideration for a sale in a pre-emption suit, within a certain time, is not a matter of procedure **Jug Ram v Jewa Ram. (1909) 6 A L J 647.**

Civil Procedure Code, Act XIV of 1882 (Act X of 1877) S. 2 of 1908.

See Bhootan Duars Act. Case No. (1) **4 C W N 287.**

—s. 2 (Civil Procedure Code, 1859, s. 356.)

See (1) Appeal—Decree.
(2) Appeal—Orders.

C. P. C. (1908) s. 2-Foreclosure application to re-open-Execution.

See C P. C. (1908) S. 47. Case No. (383). **29 Cal 644.**

C. P. C. (1908) S. 2-Order for stay of sale of property in execution of mortgage decree-Appeal.

See C P C (1908) s. 47. Case No (378). **31 Cal 373.**

6 7—C P C S 2 cl. 2 (1908)—Order 20=(1882 ch. XVII)—Appeals against orders under S. 244—Applicability of, to proceedings other than suits—Separate Judgment and order.

An order determining any question referred to in s. 244 C P. C is a decree under s. 2 C. P. C., when therefore an appeal is preferred against such an order, it is sufficient to attach to the memorandum of appeal a copy of the order itself and it is not necessary to attach to the memorandum, a copy of the decree, even though such a decree may have been drawn up In the case however of a suit or proceedings which have the character of a suit (e g. contentious probate proceedings &c.) it is necessary to file a copy of the decree **Khirode Sundari Debi v Jnanendra Nath Pal Chowdhri 6 C W N 283.**

Notes—Fol 8 C W N 230, 6 C L J 111. Dist 32 Cal 175.

8-9.—C P C S. 2, cl 2—O 9, r 9, r 13, S 47. S. 96=(1882 Ss 2 103,108, 244 (c) 540, 647)—Order dismissing objections to execution—Appeal.

An order dismissing for default objections by the judgement debtor to an execution application is appealable under Ss 2, 244 (c) and 540. *Ex parte* orders under s 244 (c) are appelable. The explanation added to s 540, C P C must be read with the addition made to s. 540 by Act VII of 1888, and Ss. 103 and 108 have no application to or-

Civil Pro. Code (1908)-S. 2-*Contd.*

ders under s. 244 (c) (15 All 359 reasoning dissented from: 23 Cal 115 and 23 Cal 827 distinguished) **Lal Narain Singh v Muhomed Rafiuddin. 28 Cal 81.**

10-11.—C P C S. 2 cl.2 (1908)—Decree of Assistant Collector class 1, order in execution-Appeal to District Judge Civil Procedure Code, ss 2, 244-Decree. An order made by an Assistant Collector of the first class in execution of a decree for over Rs. 100 in a suit falling under groups A and B of schedule IV N W P Tenancy Act is a "decree" within the meaning of section 177 of that act and an appeal will lie therefrom to the District Judge (unreported (1) approved).

Kharag Singh v Pala Ram.
I A L J 305=1904 A W N 156=27 All 31. overruled by 1906 A W N 223=3 A L J 569 F B.

Notes:—27 All 31=1 A L J 305=(1904) W N 156. Fol 2 A L J 130=(1905) W N 55. Doubt 28 All 131=2 A L J 361=(1905) W N 213. Over 28 All 753 F B=3 A L J 569 =(1906) W N 223. Ref 31 All 445; 6 A L J 552.

C. P. C. (1908) S. 2 cl 2.

Notes.—The word "within" has been substituted for "mentioned or referred to in" with a view to bringing within the definition of decree orders against sureties and orders as to court-fees in pauper suits and thus providing for appeals therefrom.

The only other modification is for the purpose of excluding a right of appeal from an order of dismissal for "default."

C P C S 2 (1908) Cl 2.

See.—C P C (1908) S. 2. Cl 14. Case No (55) **30 Cal 660 F B.**

12-C P C (1908) S. 2 Cl 2-Decree.-Definition of Orders in a suit or in execution of decree —

Per Jackson, J.—The word "decree," as defined in Act X of 1877, does not include "orders," either original or appellate, upon matters arising in the course of a suit or in execution of a decree.

Runjit Singh v Meherban Koer. 3 Calc; 662: 2 C L R 391.

Notes:—Appl: 13 Cal 86 Fol: 3 C L R 208, 4 C L R 23, 5 Cal 259. Ref. 4 C L R 18; 4 Cal 825; 16 Cal 267 F B; 22 Cal 364; 12 Bom 449; 5 C L J 550; 34 Cal 636.

Civil Pro. Code (1908)-S. 2-*Contd.*

13-C P C (1908) S. 2 cl 2.—The definition of "decree" in s 2 of the Civil Procedure Code means that, where the proceeding of the Court finally disposes of the suit, so long as it remains upon the record it is a decree. **Williams v Brown. 8 All 108.**

Gulab Rai v Mangli Lal 7 All 42,
Bandhan Singh v Solhu. 8 All 191.
Raynor v Mussoorie Bank. 7 All 681.
Rahima v Nepal Rai, 14 All 520.
Kedar Nath v Lalji Saha. 12 All 61.

Notes—Dist 18 All 101 F B. Ref; 19 Bom 307.

14.—C P C S. 2 Cl. 2=(C C S. 2, Ss 53, 54.)—C P Code, rejecting, a plaint. The words 'rejecting the plaint' in s 2 are not limited to the cases provided for in ss 53 and 54 **Beni Ram Bhutt v Ram Lall Dhubri 13 Cal 189.**

Notes.—Ap: 20 All 162. Ref: 19 Mad 127; 13 Bom 7.

15—C P C S. 2 cl 2=(O C ss 2, 253)—Order refusing to grant execution against surety—"Party to the suit"—Decree.

Held, that an order refusing to grant execution under Section 253 Civil Procedure Code, against one who is sought to be charged as having become surety for execution of the decree before such decree was passed, is an order made against a "party to the suit" under Section 244 of the Code, and consequently falls under the definition of "decree" contained in Section 2 of the Code. **Muhammad Sadik v Haji Ata Muhammad. P R 104 of 1886.**

16-C P C *S. 2* cl 2, S. 115—Preliminary issue whether a party is an agriculturist—Decision on that issue——Dekkhan Agriculturists Relief Act XVII of 1879, Sec, 53—Revisional application to the District Judge—High Court—Revision.

The plaintiffs, filed a redemption suit as agriculturist. A preliminary issue as to whether the plaintiffs were agriculturists and found it in the plaintiffs' favour. The defendant applied to the District Judge in revision under s. 53 of the Dekkhan Agriculturists' Relief Act. But he declined

Civil Pro. Code (1908) *Contd.*
-S. 2 cl 2-*Contd.*

to interfere on the ground that the decision was not a "decree". The defendant applied to the High Court under s. 115.

Held, (1) that the formally expressed decision upon the point would be a preliminary decree within the meaning of s. 2 of the Civ, Pro. Code 1908, being an adjudication which, so far as regards the Court expressing it, conclusively determined the rights of the parties with regard to the manner in which accounts between them should be taken notwithstanding the written contract that they had entered into before suit.

That therefore, the District Judge should not have declined Jurisdiction in the case.

Krishnaji v Maruti. 12 Bom L R 762.

17.—*C* P C S.2 cls. 2, 14. O 9 r 8 (1882) Ss.2 & 102)-Order dismissing a suit for default-Whether decree—Provincial Small Causes Courts Act s. 17.

Held by Full Bench (Birks J dissenting) that an order dismissing a suit under *S.* 102 of the Code does not necessitate a decree & even if a decree is passed it is not a decree passed *ex-parte* and therefore the proviso to sub-sec I of s. 17 of the Provincial Small Cause Courts Act does not apply to it. **Maneck Bai v P L S A Moothiah Chetti 4 L B R 17 (F B).**

18—C P C (1908) S. 2 Cl. 2 (1882 S. 2)—Deree-Settled accounts, order directing re-opening of.

Plaintiff, a solicitor, advanced money to a client on a mortgage bond and three further charges. The consideration for the third further charge was not paid in cash, but was made up of (1) amounts due to the plaintiff on several promissory notes in the plaintiff's favor, (2) certain promissory notes executed by the client in favor of a third party, which the plaintiff is said to have "taken up" (3) balance of amount due as interest on the mortgage and 2 further charges, and (4) a certain amount stated to have been found due to the plaintiff as costs for acting for him in various suits, upon a settlement made of amounts due under various taxed and untaxed bills, a large remission having been allowed in consideration of all the bills not being taxed. In a suit by the plaintiff against the heirs of his deceased client to realize the amount due on the mortgage and the three further charges, the plaintiff obtained a decree on the 1st three bonds, but the 4th bond was ordered to be re-opended and it was directed that the plaintiff "do get all his bills of costs up to the 3rd August 1905 taxed by the Taxing Officer of the High Court, and then refile the bills in this Court," that then a Commissioner be appinted to take accounts in the light of the observations in this case, that after the Commissioner's Report is received and the parties are heard thereon the final decree will be drawn up under s. 89 of the Transfer of Property Act. *Held* that this order was a decree. The fact that the Subordinate Judge intended hereafter to adjust the equities arising out of the contract, did not in any way do away with his adjudication that the contract, as it stood, was not binding on the defendants. (9 Bom 183 dist, and doubted 15 Bom 155 s. c L R 18 I A 6 at p 8.). **Shamuldhone Dutt v Srimutty Susila Bala Debi. 12 C W N 1102=36 Cal 493=2 Ind Cas 553.**

19—C P *C*—S. 2 cl 2—O. 35 r. 3, s. 104. O. 42 r. 1=(1882) ss. 474 and 588 cl (23)—Interpleader suit.

An order dismissing an interpleader suit as not sustainable is a 'decree' as it is the formal expression of the adjudication of the Lower Court on the defence set up in the suit and the suit was decided so far as that Court was concerned.

Orr v. Chidambaram Chettyar. 7 M L T 49=4 Ind Cas 319=20 M L J 36=33 Mad 220.

30—C P *C*—S. 2 cl 2—Decision of Collector in summary suit.

A decision of a Collector in a summary suit is a decree within the meaning of S. 2 *C.P. C.* and decides a civil right

Veerasami v. Manager, Pittapur Estate. 13 M L J 296=26 Mad 518.

21 *C* P C—S 2 cl 2—The plaintiff in a suit for arrears of rent obtained a decree in the Assistant Collector's Court for a certain amount on the 19th August 1896. The plaintiff appealed from this decree to the District Judge who on the 4th October 1897, made an order of remand under S. 562, Civil Procedure Code The defendants appealed from the order of remand to the Court of Judicial Commissioner. Before the appeal was decided the Assistant Collector, acting under the order of remand, passed a decree in favour of the plaintiff on the 20th January 1898, for a larger

Civil Pro. Code (1908)-*Contd.*
-S. 2 cl 2-*Contd.*

amount than he had previously decreed. On the 13th April 1898 the Judicil Commissioner set aside the order of remand and restored the first decree, of the Assistant Collector. On the 6/10th April 1901 the plaintiff applied for execution of the first decree. It was contented by the defendant that the application for the execution of the first decree was barred by the law of limitation. *Held*, that the order of the Judicial Commissioner, dated the 18th April 1898, was a "decree" within the meaning of the definition of that expression in s. 2 of the Code of Civil Procedure, that it was the final decree of the Appellate Court, and that under Art. 179, sch. II, Indian Limitation Act, the period of Limitation would run from its date. *Held*, further, that where there has been an appeal, the decree which should be executed is the decree of the Appellate Court.

Lal Raghubar Singh v. Har Parshad.
5 O C 301.

22—C P C—*S.* 2 (2)—'Decree' (preliminary) —Rights of parties—Meaning—Provision for appeal against decree—Interlocutory order—No revision.

The 'rights of the parties' referred to by the definition of the term 'decree' in S. 2 (2), Civ. Pro. Code (1908), must be taken to be the rights of the parties *inter se* in regard to the subject-matter of the suit.

An interlocutory order passed by a Court on any objection raised by the defendant, however frivolous, cannot be treated as coming within the definition of a decree and therefore justifying an immediate appeal to a Higher Court.

Ooders made with reference to

(1) an objection as to part of the suit based upon the terms of the Pensions Act,

(2) a question as to how that portion of the claim dealing with profits is to be determined;

(3) a demand by the defendant that security should be taken from the plaintiff before the case proceeds further; and

(4) an allegation that the stamp fee required from the plaintiff was largely deficient;

do not amount to 'preliminary decrees' within the meaning of S. 2 (2), and are not appealable.

Where an appeal lies against the decree that might be passed in a suit, the Court will decline to interfere in revision with interlocutory orders passed in that suit. (146 P R 1908, Dist.).

Mir Umar Ali v. Mussammat Nasib-un-nissa
82 P R 1911.

23—C P C. 1908 S. 2 (2)—Interlocutory order—'Decree'—Preliminary decree.

The definition of decree is not intended to include an interlocutory decision in ordinary suit upon each and every point in controversy between the parties, even in those cases, where the decision upon any such question is embodied in a separate and distinct order passed during the pendency of the proceedings.

An order cannot be regarded as a decree unless it is formally drawn up as such or, at all events, unless it could be so drawn up.

A 'preliminary decree' properly understood is passed only in those cases in which the Court has first to adjudicate upon the rights of the parties and has then to stay its hand for the time being until it is in a position to pass a final decree in the suit. **Kashi Nath v Nathu Ram. 115 P L R 1911=41 P R 1911= 9 Ind Cas 1019.**

24—C P C S.2 cl 2-Order not having the force of a decree-Land Acquisition Act (I of 1894, Secs 18, 30, 53, 54. –

In a reference made under sec 18 of the land Acquisition Act, the District Judge valued the compensation to be given in case, at Rs 4,200 and the amount was placed in deposit with the Collector. One H, then applied to the District Judge for payment of the amount to him and the application was opposed by other persons who claimed a title to the property, some claiming the whole of the compensation—money and other portions of it.

The District Judge's order on the application was —"This suit be dismissed. The parties may seek redress in the Civil Court." H appealed to the High Court.

Held, (by Maclean, C J., and Benerjee J.) on a reference by the Registrar under Sec 5 Court Fees Act.—That the order of the District Judge was not a decree within the meaning of sec 2 of the Civil Procedure Code. **Harrish Chundra Chatterji v. Bhaba Tarini Debi.**
8 C W N 321.

Civil Pro. Code (1908)-*Contd.*
-S. 2 cl 2-*Contd.*

Notes:—Ref: 5 C L J 33; II C W N 201, 34 Cal 109. Ref: 9 C W N 571=I C L J 303; 7 C L J 593. Fol: 8 C W N 315.

25—C P C S 2, cl 2-O 9 rr 8; 9 s 104. O 43 r.1 (1882 ss 102, 104, 588)—Order under s. 102 whether a decree and appealable as such.

An order under s. 102, C. P. C., dismissing a suit is as much a decree as an order under any other section deciding a suit. The order comes within the definition of a decree and is appealable as such (9 All 427; 1883 A W N 171 Followed. 30 Cal 660 *referred to*) **Gosto Behary Sardar v Hari Mohan Adak, 8 C W N 313.**

26.—C. P. C. S 2 cl (2)=Civ Pro Code (1882) Ss. 244, 622 'Decree.'—Order to punish for contempt.

Proceedings, by the Court, in the exercise of its inherent power to punish for contempt, do not come under S. 244, Civ. Pro. Code, and an order passed therein is not a decree within the meaning of the definition in S 2. **Godu Ram v. Surajmal 2 A L J 18=A W N (1905), 10=27 All 380.**

27.—C P C Ss. 2 (2), 115—Decree—Order holding portion of claim not sustainable and directing amendment—Appeal—Revision—Specific Relief Act (I of 1877), Ss. 42, 54—Declaration—"Property" meaning of—Birt, right to—'Spes succession is'-Injunction when can be claimed—Birt, nature of.

Plaintiffs, as the heirs of a deceased *parohit*, sued for possession of his immoveable property and for a declaration that, as such heirs, they were entitled to realize *birt* offerings from the deceased's *jujmans*. On defendant's objection, the first Court held that plaintiffs could not ask for a declaration in regard to rights of *birt* which might exist hereafter but did not exist at the moment. The Court further held that plaintiffs should ask for an injunction and it directed the plaintiffs to comply with this order within a certain period.

Held, that as the order merely returned the plaint for amendment within a specific period it was not a decree, preliminary or otherwise, within the meaning of S. 2 (2) of the Civ Pro Code, and was consequently not appealable, nor was it open to revision. **Gurudas v Bhag. 216 P L R 1911=11 Ind Cas 231=143 P W R 1911.**

Civil Pro. Code (1908)-*Contd.*
-S 2 cl 2-*Contd.*

28.—C P C S 2 cl 2, O 9 r 13, S. 104; O 43 r 1—(1882 ss 108, 588).

Applicability of s 108 to execution proceedings—Appeal from order—Inherent power of Court to set aside its own order.

S 108 of the Code applies to execution-proceedings. When, therefore, an order was passed *ex-parte* in the execution proceedings, the order was one under S 244, C P C and was a "decree" within the meaning of s 2 of the Code, and if it was passed without service of any notice under s. 248 C P C upon one of the judgment-debtors he may apply under s. 108 C P C to have the *ex-parte* order set aside **Krishna Chandra Pal v Protal Chandra Pal 3 C L J 276.**

29—C. P. C. S. 2 cl. 2, O. 41 r. 33: S. 104; O 43 r 1 (1882 Ss 562, 588)—Claims, inconsistent—Plaint, order rejecting a decree—Appellate order admitting plaint, not a decree—Second appeal.

Where the Court of first instance rejected the plaint on the ground that it contained two inconsistent claims and the Court of appeal held that the plaintiffs were entitled to press both claims in one suit and directed the first Court to proceed with the trial of the suit on its merits.

Held, on appeal by the defendant that the order of the Court of first instance was an order rejecting the plaint and therefore a decree, and the order of the appellate Court was an order admitting the plaint which not being a decree nor an order under S. 562 of the C P C was not appealable. **Braja Lal Mitra v Upendra Krishna Mitra. 6 C L J 214.**

30.—C P C S 2 cl 2, O XLI rr 17, 19=(Civ Pro Code, 1882 ss 2, 556,558)—Order under s.556, Civ Pro Code, dismissing an appeal for default not a decree under s. 2.—

Where a special procedure is provided, the proper course is to follow that special procedure. An order under s. 556 is not a decree within the meaning of s. 2. It does not adjudicate upon a right claimed or defence set up, and is not specially declared in s. 2 to be a decree. (14 All

Civil Pro. Code (1908)-*Contd.*
-S. 2 cl 2-*Contd.*

361, 15 All 359, 23 Cal 115. Fol. 16 Bom 23, Diss).
Faten Shah v. Akbar Shah U B R 1897—1901 Vol II 206.

31.—C P C Ss 2 cl 2, 47, 104, 145, O XXI r 71, O XLIII, r 1 (=ss. 2, 244, 253, 293, 588)—Execution of decree—Defaulting purchaser—Loss by re-sale—No appeal from order under Civ Pro Code, ss. 293, 244, "decree"—Civ. Pro. Code, s. 244—"Representative" of judgment-debtor.—

No appeal lies from an order under s. 293 of the Civ Pro Code for recovering from a defaulting purchaser of a deficiency of price happening on a re-sale of the property.

Such an order is not a "decree" within the meaning of s. 2 of the Code. Where property is knocked down at a sale in execution of a decree, the maker of default in payment of the earnest money does not in fact become finally the purchaser, and cannot be treated as a "representative" of the judgment-debtor within the meaning of s 244 of the Code.
Soudagar Mal v Abdul Rahman Khan A W N 1890, 85.

Notes—Appl 14 All 201, F B, 12 All 397; Fol 13 All 569.

32.—C P C S. 2 Cl 2—Collector's appellate order returning plaint—Appeal to District Judge-C P C Ss. 2, 588—Under S 180 (cl 2 U P Tenancy Act.) no appeal lies to the District Judge from an appellate order of the Collector as distinguished from a decree. An order returning a plaint for representation to the proper court is not a decree within the meaning of the sections providing for appeals in the U P Tenancy Act. In order to decide what are 'orders' and what are 'decrees,' under the U. P. Tenancy Act, 1901, the definitions contained in C P C Section 2, must be applied. **Dhani Ram v. Bhola Singh. 1904 A W N 152=1 A L J 308=27 All 21.**

33.—S. 2 cl 2 (1908)—Leave to bring suit for accounts-Grant of leave-Order, if a decree—Civil Procedure Code (Act XIV of 1882), section 2)—Appeal, Act XX of 1863 (Religious Endowments Act) makes no provision for appeal and an order granting leave to bring a suit for the purpose of having the accounts of a certain religious endowment not being a "decree" within the meaning of section 2 of the Code of Civil Procedure, no appeal lies against such an order. **Mojaffer Ali v Mirza Hedayet Hossain. 5 C L J 641=34 Cal 584.**

Notes:—Ref 10 C L J 503.

34.—C P C Ss. 2, 47, O. XLI, r 5 (=ss. 2,244 and 545, Civ Pro Code, 1882)—Order of appellate Court refusing stay of execution of decree under appeal——No appeal lies from such order— Exercise of discretion, interference with —Decree.

An order of an appellate Court refusing to stay execution of the decree under appeal is not decree within the meaning of sec. 2 of the Code. Nor is it an order under s. 244, since the appellate Court is not the Court executing the decree under appeal. No appeal, therefore, lies from such order. (12 Bom 279, *Doubted*). *Held*, further, that Courts of appeal should not lightly interfere with a discretion deliberately exercised by a lower Court. (26 All 238, P C, Appl). **Ramchandra v Balmukund. 29 Bom 71.**

35.—C.P.C.S.2, cl 2.-Objections against award —Order disposing of objections—Not a decree—No appeal or revision. **1 P L R 1911=9 Ind Cas 385=12 P W R 1911.**

36.—C P C S 2, cl 2—Order on an application under s 19, Arbitration Act, 1899 a decree. —Act IX of 1899, sections 2 and 19. **144 P R 1908.**

37.—C P C S 2, cl 2—Decree, meaning of—Pun Act XVIII of 1884, S 39, **4 P R 1887.**

38.—C P C S 2 cls. 2, 12—Pre-emtor not entitled to mesne profits in execution of decree—Appeal—Decree—Civil Pro Code (Act V of 1908) Secs 2, 47.

An order, declaring that a decree-holder is entitled to get mesne profits from the judgment-debtor is a decree within the meaning of S. 2 of Act V of 1908, and as such is appealable even before the exact sum to be paid to the former by the latter is ascertained.

The question, whether mesne profits should be allowed to a plaintiff in a pre-emption case for the period between the institution of his suit and the final obtaining of his decree on appeal is not included in the words "relating to the execution, discharge or satisfaction of the decree," and can be disposed of only by a separate suit. **Hoa Ram v Rana Paleya. 6 Ind Cas 648.**

Civil Pro. Code (1908)-*Contd.* -S. 2 cl 2-*Concld.*

39.—C P C S 2, cls 2, 14.—Decree—Default—Dismissal of suit.—

An order dismissing a suit for default is not a decree and neither appeal nor second appeal will lie therefrom. (23 Cal 115: 23 Cal 827 ref to) **Amrita Lal Mukherjee v Ram Chandra Roy (1901) 29 Cal 60.**

See also 28 Cal 81=12 M L J 473=8 C W N 313 (Affirmed by Cl (b) of S 2 New Code).

C P C (1908), S. 2. Cl. 2—Declaratory decree—Decision as to executability.

See C P C (1908), S. 47 Case No. 562.

10 M L T 437.

40—41.—C P C Sec 2, cl 3, S 47 O 21 r 16=C P C 1882 Ss 2, 244 cl (c) 232—Execution of decree—Assignees of decree—Estoppel—Jurisdiction—C P C S. 2. **3 O C 32.**

42.—C P C S 2-Chief Court, Punjab, Jurisdiction of, **98 P R 1909=172 P W R 1909= 4 Ind Cas 852.**

43—C P C S 2 cl 5-Injunction—Stay of suit—Foreign Court-Jurisdiction of the High Court-Persons outside jurisdiction power of the Court to restrain—C P C (1882)—Indian High Courts Act 1861 (24 and 25 Vict. C 104.)

The jurisdiction of the High Courts is what was formerly possessed by the Supreme Court at Calcutta and continued to it by the Indian High Courts Act 1861 (24 and 25 Vict C 104), viz over Bengal. Behar and Orissa; and for the purpose of restraining suits, any Court outside such jurisdiction is to be considered foreign Court.

The definition of "foreign Court" in S. 2, C P C 1882 is for the purposes of that Code only, and semble, does not apply to extend the jurisdiction of the High Court for the purpose of restraining suits pending in Court outside its jurisdiction under the charter.

A Court can restrain a person from proceeding with a suit in a foreign Court only when the person sought to be restrained is within its jurisdiction and not otherwise so that in the event of an injunction being granted against him and disobeyed by him he would be subject to the process of that Court for contempt. (5 H L C 416 Fol and 34 Cal 101 diss from). **The Vulcan Iron Works Co Ltd v Bisshumbher Persad 13 C W N 346=36 Cal 233= 1 Ind Cas 927.**

Civil Pro. Code (1908)-*Contd.* -S. 2 cl 9-*Contd.*

Notes:—See also cases under:—

(1) Foreign Court.
(2) Foreign judgment

44.—C P C S 2 (6)=1882 S 2 S 211, (1882 Ss 2, 13 Expl (6)—S 2—Foreign Judgment—Judgment of King's Bench Division of the High Court of Justice in England.

Judgment of the King's Bench Division of High Court of Justice in England is a 'Foreign Judgment' within S 2. **Moazzim Hossein Khan v Rapheal Robinson. 28 Cal 641= 5 C W N 741.**

Notes.—Ref : 31 Cal. 274=8 C W N 207= 19 M L J 457 ; 32 Mad 469=2 L B R 47 2 S L R 51.

See also " Foreign Judgment. "

44A—C P C S. 2 cl. 6—Judgment of Supreme Court of Mauritius if.

The jurisdiction of a Court, apart from statutory power, can only be exercised over persons who are within its territorial limits. L R 32 Ch D 131 (1886), referred to. The Supreme Court of Mauritius is a foreign Court within the meaning of sec. 2 of C, P.C. and as such its judgments, passed *in absentem* against a Defendant who at the time of the suit or judgment was neither resident in nor subject of the same country, are not enforceable against him in a Court in British India. (22 Cal 222 (1894); L R 6 Q B 155 (1870); L R 14 Ch D 351 (1880), relied on.) A person is no less a 'foreigner' within the meaning of the cases above referred to because he is the subject of the sovereign who is both the sovereign of the country in which the judgment was passed, and the country in which it was sought to be enforced. (67 L T N S. 767 (1892), referred to) **Hadjee Kaseem Mamooji v Hadjee Isup Mahomed Sulliman. 6 C W N 829.**

45.—C P C 1908 *S.* 2 cl (9)—O VIII, r. 10—Judgment, Court's power to pronounce, when written statement not filed—Material irregularity.

The defendant in this case did not file his written statement on the date on which he was ordered to file it, nor, on the date fixed for hear-

Civil Pro. Code (1908)-*Contd.*
-S. 2 cl 9-*Concld.*

ing. The Munsif therefore decreed the claim with costs under O. VIII, r 10, Civ, Pro Code. *Held*, that the aforesaid rule empowers the Court to pronounce judgment against the defendant, but as in this case there was no judgment within the meaning of the word as defined in S. 2 (9) of the Code, but merely an order decreeing the plaintiff's claim, the Munsif acted with material irregularity and the decision should be set aside.

Nanhe v Saiyid Tasaddup Husain,
15 O C 78.

46.—C P C S. 2 cl 11 (1908).—Meaning of legal representative.

The phrase should be liberally construed. See. s. 2 of the Civ. Pro Code (Act V of 1908).

Dinamoni Chaudhurani v Elahadut Khan,
8 C W N 843.

Notes:—Ref 34 Cal 642, F B=11 C W N 593, =5 C L J 491=2 M L T 207, 9 C L J 346; Dist 6 C L J 462.

47.—C P C S. 2 cl 11.—O 1 r 8—Practice—O XXII—Representative suit—Death of plaintiff—Member of the class entitled to continue—Legal representative.

S, a voter in a devastanam circle, instituted a suit with sanction under O 1 r 8 for a declaration that the election of a member of a Devastanam Committee was void and for an injunction to restrain him from exercising the office of such member. He died pending the suit and R, another voter was brought on record as the legal representative of S, and the suit was revived at R's instance. *Held* that R though not a legal representative within the definition of that term in S. 2 of Act V of 1908 could be allowed to continue the suit. Mere misdescription as legal representative would not in itself justify the setting aside of the order of revival. O 1 r 8 applies not only to cases where concurrent interests are concerned, but also where they are similar though distinct, and the sanction granted to a voter whose interest is personal to himself is not therefore bad.

A plaintiff who has obtained sanction under O 1 r 8 has so far as continuing or not continuing the suit is concerned an entire control of the action. In this sense he is undoubtedly *dominus litis* and not a trustee of the action.

It does not follow that other members of the

Civil Pro. Code (1908)-*Contd.*
-S. 2 cl 11-*Concld.*

class have no interest in the suit and such interest as they have still subsists after the death of the plaintiff so as to enable them to pursue the action. The Legislature has imposed no limit of time within which applications must be made by persons interested in such suit to be made parties and if any member of the class is competent by a future application to come in as a plaintiff or defendant in order to safeguard his interest or to get rid of the effects of improper conduct of the suit by the plaintiff it stands to reason that they should be allowed to do so in a case where the plaintiff is dead and his legal representative is not competent to maintain the suit. 23 Mad 28 (31) approved. 57 Eng Rep 320. I Ch 203. 96 Law Times 502, Ref: 17 Ch. D 19 Ref: **Sivagurunatha Chettiar v Ramaswami Iyengar,**
(1902) I M. W N 105=11 M L T 257.

48.—C P C S. 2 cl 11.—O XXII, r 5—Legal representative, determination of question as to—Decree—Appeal-Death of party before new Civ. Pro Code- Order after new Civ Pro Code—Application of new Code.

An order under r. 5 of O. XXII of the Code of 1908, determining the question as to who is the legal representative of a deceased party, is not a decree and is not appealable under the new Code, though it was appealable under the old Code.

Where the party died in 1908 but the order was passed in 1909 under O XXII, r. 5, *held* that the order must be treated as one under the new Code and it is not appealable.

Sital Prosad v Bajrangi Sahai,
13 Ind Cas. 70.

C P C (1908) Sec. 2 cl 12 & Or. 20 r. 12= 1882 Ss. 211 & 212.

See (1) Mesne profits—Right to and liability for.
(2) Mesne profits—Mode of assessment & calculation.
(3) Interest—Miscellaneous cases—Mesne Profits.
(4) C P C O. 20 r 12.
(5) C P C (1908) S 144 cl 1,

C P C (1908) S. 2 cl 12

See C P C (1908) S 34. Case No (112).
33 Cal 1232.

C P C (1908)-S. 2 cl 12-*Concld.*

See C P C (1908) S 2 cl 2 Case No (38),
6 Ind Cas 648.

49—C P C—S. 2 (12), O. XX, r. 12—Bur. Act II of 1876. **L B R 1872—1892, 451.**

50—C P C—S 2 (1908)—S. 2 (12), O. XX, r. 12—Decree—Decree, Construction of,
9 M L J 334.

51—C P C—S. 2 (12), O. XX, r. 12—Mesne Profits—Suit for mesne profits and Assessment in execution.
2 Bom L R 978, 8 Ind Cas 34.

C P C (1908) S 2 cl 14.

See C P C (1908) S 2 cl 2. Case no (39).
29 Cal 60.

—S. 2 cl 14 C P C (1908)—Suit by minor in forma pauperies—Order directing next friend to pay Court fees—Collectors application to execute dismissed—Appeal—Revision.

See C P C (1908) S. 47. Case No (565)
23 Mad 73.

C P C (1908) S 2 cl 14

See C P C S 2 cl 2. Case No (17). **4 L B R 17.**

51A.—C P C S. 2 cl. 14 (1908)—O 22 r 10; s. 104, O 43, r 1 (1882—Ss. 2, 372, 588)—Order allowing objection under S. 372—Order or decree—Appeal.

An order rejecting an application by an assignee under s. 372 C P C to be brought on the record in the place of the plaintiff is not appealable; nor is such an order a decree within the meaning of S. 2, C P C. (22 All 380 and 19 All 142 distinguished; 4 C W N 403 ref to.).
Tejsingh v Chebeli Ram.
(1902) A W N 84=24 All 342.

52—C P C (1908) S 2 cl 14—The second Schedule r. 20 (1882 S. 525)—Order refusing to file an award, decree—Appeal.

An order made on an application to file an award under S. 525. C. P. C., is a decree within the meaning of C P C., and an appeal lies, from an order refusing to file the award and setting it aside. (3 Mad 68 overruled. 29 I. A. 51 foll. 18 Cal. 414 declared not inconsistent with 29 I A 51.) **Ponnusami Mudali v. Mandi Sundara Mudali. 14 M L J 356=27 Mad 255.**

C P C (1908)-S. 2 cl 14-*Contd.*

Notes.—Ref: 2 C L J 80; 33 Cal 757 F B=10 C W N 603=3 C L J 450; 7 C L J 486: 19 M L J 394. Fol: *29* Mad *303*: 10 C W N 601=2 C L J 153.

53—C P C S 2 cls 2, 14 (1882 S. 2)—Order rejecting appeal as out of time-Decree-Second Appeal.

An order rejecting an appeal as being presented out of time is a decree, and a Second appeal lies to the High Court from such decree. (7 All 42; 9 Bom 452; 12 Cal 30; 16 Mad 285 and 22 Mad 156 Fol:). **Saminatha Aiyar v. Venkatasubba Aiyar. 13 M L J 300=27 Mad 21**

54—C P C—S 2 (14), O 9, r. 9: O 41 r. 17 r 19; O, 37 r. 4: s. 104, O. 43 r. 1 (1882 ss. 2, 103, 556, 558, 534, 588)—Appeal dismissed for default—Application to restore—Discretion of Judge—Order dismissing whether a decree—Whether appealable under s. 588.

Where an order was made before the recess adjourning a case to sometime after reopening of the court to fix the date of hearing and the appellant trusting to his vakil's clerk's word that the appeal would not be taken so early, did not appear.

Held, that the Judge rightly exercised his discretion in dismissing the appeal; and that a decision dismissing the suit under s. 102 for default of appearance of plaintiff or dismissing an appeal under sec. 556 for default of appearance by the appellant is not a decree within the meaning of sec. 2 of the Civil procedure Code. A decree passed *exparte* does not include a decree passed on default of appearance. (22 mad 221, 2 Mad 75, 8 All 354, Dist: 30 Cal 660, 16 Bom 23, 9 All 427 Dist:)

No appeal lies from such a decision.
Dakshinamurthy Pillai v The Municipal Council of Trichinopoly by its Chairman.
3 M L T 336=31 Mad 157.

55—C P C—S 2 cls 2, 14—O 41—r. 17 (1882 Ss. 2, 556)—Order dismissing appeal for default—Decree.

Held, by the Full Bench (*Prinsep* J. dissenting). An order dismissing an appeal for default is a decree. (23 Cal 115, 23 Cal 827 over, 16 Bom 13 appr.)
Radha Nath Singh v Chandicharan Singh
7 C W N 486=30 Cal 660 F B.

C P C (1908)-S. 2 cl 14 *Concld.*

Notes —Dist 31 Mad 157=3 L L J 330, 4 L B R 17 Ref 8 C W N 313, 34 Cal 403 F B=5 C L J 247=11 C W N 329 F B=2 M L T 123 10 P L R 160, 16 C L R 151 Dist 17 C P C R 1 121 P R 1907= 51 P W R 1907 F B

56—Ss 2 cl (14), 47 Order 21 r 5=(Ss 2,244, 291)—Order for stay of sale of property in execution of mortgage decree—Appeal

An order for stay of sale of mortgaged properties in execution of a mortgage decree is a decree virtually for stay of execution within the meaning of Cl (c) of S 244 C P C though the order is in terms one under S 291 and appeal lies from such order **Shyam Kishen v Sunder Koer (1901) 31 Cal 731**

57—S 2 cl 14 (75) Ss 47 104 O XXI r 72 O XLIII r 1 (=ss 2 241 294 588 (16) Civ Pro Code 1882)—Leave to appeal refusal of to decree holder—Appeal

No appeal lies against an order forbidding a decree holder to bid at a sale held in execution of a decree the matter being one of administration (13 Cal 174 Ref), **Ko Tha Hmyin v Ma Hnin I 15 C W N 862 P C**

57A—C P C S 2 cl 15 (1908)—Attorney and client and Code of Civil Pro Act XIV of 1882), ss 2 and 39 Appointment Attorney—Retainer how revoked—Continuance of authority—Taxation of costs time covered by—Cause by action—Limitation

An attorney's authority to act for a client does not terminate until the same is revoked with the leave of the Court by a writing signed by the client and filed in Court as provided for in Sec. 39 of the Code of Civil Procedure (Act XIV of 1882) The cause of action for attorney's costs arises when the work for which he was retained is completed (1 Q B 702)

In a suit if the decree directs that certain party thereof should pay certain costs, the authority of the attorney acting for such a party to the suit continues even after the judgment and covers the entire period taken by the taxation of such costs, for until taxation, the amount payable by the client under the decree could not be ascertained (L C 29 Ch D 351 referred to) **Atul Chunder Ghose v Lakshman Chunder Sen. 13 C W N 1172=36 Cal 609=2 Ind Cas 830.**

C P C (1908)-S. 2 cl 17-*Concld.*

57B—C P C S 2 cl 17 (1908)=(C P C XIV of 1882 Ss 2, 266)—Public officer—Attachment of moiety of pay of officer of Indian Staff Corps

The effect of S 136 of the Army (Annual) Act 1895, is to empower civil courts to attach one moiety of the salary of an officer in the Indian Staff Corps under S 266 (1) of the Code of Civil Procedure (26 Cal 102 foll) **Waston v Lloyd 25 Mad 402.**

C P C 1908) s 2 cl 14—Privy Council—Leave to appeal—Final & interlocutory orders—Remand—Cardinal Point

See C I C (1908) S 47 Case No (557) **6 A L J 786.**

58—Ss 2 (17) 80—Public servant—Cantonment Committee is a public servant—Notice of a claim—Notice compulsory—Actions ex delicto.

The Cantonment Committee, constituted under the Indian Cantoments Acts 1889, is, for the purposes of S 80 of the Civ Pro. Code 1908, a "public officer as defined in S 2 (17) of the C P Code.

S 80 of the Civ Pro Code 1908 applies to actions sounding substantially in tort, although the actions may by operation of law be treated for certain purposes as actions *ex contractu*—(20 Bom 697 Expl.) **Cecil Gray v The Cantonment Committee of Poona 12 Bom L R 615.**

59—S 2 (17) (1882 S 2)—Public Officer—Administrator—General

The Administrator—General is a "public officer" as defined by S 2 C P C. **Bholaram Chowdhury v Administrator General 8 C W N 913**

Notes —Ref 28 All 600.

60—Ss 2 cl 17 h—Public officer—Official trustee —Official trustee is a public officer within the definition given in s 2 of act X of 1877. **Shahunshah Begum v Fergusson 7 Cal 499.**

Notes —Fol 12 Mad 250, 14 Bom 395, 20 Bom 697 Dist 24 Cal 584. Ref 11 Mad 317, 13 Bom 343, 22 Bom 289 F B. 25

C.P.C. (1908)-S 2 cl 17-*Concld.*

Bom 142, 28 All 600=3 A L J 341=(1906) W N 107, 32 Cal 1130=1 C L J 542 26 All 220.

61—S. 2 cl 17 h (1882-S 2)-"Public officer"-Official Assignee.

The Official Assignee is a public officer within, S 2 C P C. **Joosub Haji Ali v N W Kemp 4 Bom L R 929=26 Bom 809.**

62—S 2 cl 20—"Stamped"—"Person referred to."—(Act X of 1877)

Held that the word "stamped' in s 2 of Act X of 1877 is not limited to the person who is not able to write (like the word marked) and that the expression "person referred to' means the person referred to in the subsequent sections, of the Code as being required to sign or verify certain documents and that it was not a condition precedent to such person being able to use a stamp that he should be unable to write his name **Maharaja of Benares v Debi Dial Nama. 3 All 575=1 W N 96.**

63.—S 3=(s 2 of 1882)—Subordinate Court-Collector's Court—Bengal Civil Courts Act, 1871, s. 15

A collector's Court, although it exercises certain powers under the Civil Procedure Code, is not a Civil Court within the meaning of s 15 of Act VI of 1871, nor is it subordinate to a District Court within the meaning of Act X of 1877, s 2. **Bodru Rohman 3 C L R 508.**

64.—Ss. 4, 100—Mad Act VIII of 1865, s. 69 **10 M L J 398.**

65.—Ss. 4, 120 (2), 141, O XLI, r. 5-Applicability of, to insolvency proceedings in Rangoon **3 L B R 241**

—s. 6 (1859 s. 383).

See Deputy Commissioner of Akyab **4 Cal 94.**

C P C (1908) s 6=s 6 (1882).

See Execution of decree-Transfer of decree for execution of **9 P R 1901= 1 P L R 1901.**

—S. 7 of 1908=S 5 of 1882

See (1) Local Government, Power of. **9 Mad 112.**

C.P.C. (1908)-S.7=(1882, S. 5)-*Concld.*

(2) Small Cause Court, Mofussil-Practice and procedure—Miscellaneous Cases. **2 Bom 641.**

—S 9=s 11 (1859, s 1)

See (1) Cases under Jurisdiction of Civil Court

(2) Cases under Right of suit.

See (1) Bengal Tenancy Act s 101-111A, C o (1366) **28 Cal 28**

(2) Bombay Municipal Act sec 38. **See** Case No (1) **31 Bom 604.**

(3) Decree **8 C W N 473.**

(4) Evidence **13 C W N 501.**

(5) High Court, Jurisdiction of—Calcutta (Civil) **30 Cal 369.**

(6) Maintenance—Suit for **32 Cal 479,**

(7) Caste

(8) Defamation

—C P C (1908) s 9=S 11 (1882)

See (1) Central Pro Tenancy Act s 36 Case No (44) **5 N L R 176.**

(2) Res judicata **112 P R 1882.**

( ) Jurisdiction **2 L B R 140.**

—s 10 of 1908=s 12 of 1882)

See Res Judicata—Matters in issue **8 Cal 602=11 Mad 256=11 All 148.**

—C P C (1908) s 10=1882 s. 12

See Written statement **59 P R 1892.**

66-68—S 10=(1882 S 12)—Applies only when the plaintiff and the defendant in the second suit are also the plaintiff and the defendant in the first suit **Rango v Vishnu. 1890 P J 302.**

69—S. 10-(1882, S 12)—Suit for mesne profits during suit for possession

The pendency of a suit for possession of land in one Court does not under section 12 Civil Procedure Code preclude the trial of a suit for mesne profits of the same land in another Court. **Motiram Seth v Chunilal Seth. 4 C P L R 27.**

See 11 All 148; Select Cas No 11; Appeal No 302 of 1883.

C. P. C. (1908)-S. 10=(1882, S. 12) -Contd.

70.—S. 10 of 1908=(s. 12 of 1882)—Necessity of instituting suit within proper time.

S. 12 of the Civil Procedure Code (Act XIV of 1882) only provides that no suit shall be tried if the same issues are involved in a previously instituted suit. It does not dispense with the institution of a suit within the proper time when the law requires such institution. **Nenagauda v Paresha.** **22 Bom 640.**

Notes.—Fol; 27 Cal 714. Dist: 1 A L J 531.

71.-S.10-Applicability to arbitration proceedings. **4 S L R 187.**

72.—C P C S. 10 (1882—S. 12)-Suit filed in one Court pending in another Court for the same relief against the same defendants —Procedure.

Where a suit is barred by sec, 12 of the Civil Procedure Code, the proper procedure is to dismiss the suit so barred, and not to stay proceeding or transfer such suit to the Court wherein the other suit is pending.

Venkappachari v Manjunatha Kamti. **2 M L T 40=16 M L J 526.**

73.-S.10=(1882-S, 12) Suit for cancellation of putni and for mesne profits-Second suit for rent for the same period, maintainability of.

Plaintiff in the first instance sued the defendant for the cancellation of the *putni* lease which the latter held under him and for mesne profits. He also brought a second suit against the defendant to recover arrears of rent for the same period. *Held*, that S. 12, C. P. C., was no bar to the maintainability of the second suit and that plaintiff could simultaneously prosecute the two suits. The decree of the second suit was not, however, allowed to be executed till the first suit was finally decided in appeal Plaintiff brought the suit in the double capacity viz., in his own right and as *shebait* of a certain deity, though his name was not registered in that double capacity under Act VII of 1870(B.C.), *Held*, that it was sufficient for the purpose of bringing the suit that plaintiff's name was registered as *Shebait* of the deity. **Raja Ranjit Singha v Bhagbutty Charan Roy.** **7 C W N 720.**

Notes.—Ref: 6 C L J 273 F B; 11 C W N 983 F B; 5 C L J 270; 35 Cal 34 F B. Dist: 34 Cal 305. Appr: 8 C L J 303.

C. P. C. (1908)-S. 10=(1882, S. 12) -Concld.

74.—C P C S. 10 (1882 S.12)-Court of Political Agent at Muscat.

The jurisdiction of the British Indian Court is not ousted by a prior suit pending in the Muscat Court, by reason of S.12, C.P.C. **Rahimutullah Mukhi Ramzon v Damodhar Dharamsi.** **1 Sind L R 166.**

75.—C P C Ss. 10,11 (1882, Secs. 12 and 13)-Resjudicata-Rent, suit for-Mesne profits, suit for.

A purchased a tenure at a sale for arrears of rent, and some time after, served a notice upon B, an under-tenure-holder, under section 167 of the Bengal Tenancy Act. A then sued to eject B and to recover mesne profits. The Court made a decree for ejectment and allowed mesne profits from the date of the service of notice under section 167 if preferred an appeal during its pendency, A sued B for rent for the period between the date of his purchase and the date of the service of notice.

Held, (1) that the suit was not barred under section 13 of the Civil Procedure Code; (7 C W N 720 Appl).

(2) that the suit was not barred under section 13, Civil Procedure Code, as A could not join claims for rent and mesne profits in the previous suit. **Naffar Chander Pal Chowdhry v Munshi Mahomed Kayun.** **8 C L J 303.**

76—C. P. C. Ss. 10, 11 (=Civ. Pro. Code, 1882, ss. 12, 13)—Suit for account against agent —Cross-suit by agent—Separate trial, if illegal —One suit if should be stayed pending decision in the other—Res judicata.

C, being sued as agent to account for moneys given to him, instituted a separate suit claiming to recover a certain sum which he alleged was due to him from the principal over and above the amount in respect of which account was sought from him; *Held*—That the decision in the former suit cannot operate as a bar to the trial of the latter on the principle of *res judicata*; that, though it was desirable that the two suits should have been tried together, there was no legal bar to their being tried separately, though the same ground might have to be traversed over again. S. 12, Civil Pro. Code, has no application to suits of this kind. **Chandra Kumar Majumdar v. Pramatho Nath Ray.** **15 C W N 930.**

C P C. (1908) S.11=(1882, S.13)-*Concld.*

C. P. C. S. 11 of 1908=1882 s. 13 (1859, s. 2).

See (1) Estoppel—Estoppel by Judgment. **7 B L R 673; 14 All 64.**

(2) Res Judicata.

C. P. C. (1908) S. 11.

See C. P. C. (1908) S. 10. Case No 76. **15 C W N 930,**

C. P. C. (1908). S. 11.

See C. P. C. (1908) S. 10. Case No. (75) **8 C L J 303.**

C. P. C. S. 11=C. P. C. S. 13 (1882).

See Boundaries——Evidence——Civil Case Maps. Case No (4) **7 Ind Cas 147.**

C. P. C. S. 11=C. P. C. S. 13 (1882).

See Bengal Tenancy Act S 69. Case No (290) **7 C L J 254.**

C. P. C. S. 11=C. P. (1882) s. 13 ex II.

See Central Pro. Land Revenue Act s. 138. Case No (20) **5 N L R 189.**

C. P. C, (1908) S. 11=(1882 S. 13 ex II).

See Set off. **35 Cal 862.**

C P C (1908) S 11—Execution proceedings—Regular suit mistake now plaint not inconsistent with original case.

See C P C (1908) S. 47 Case No. (789). **10 Ind Cas 891.**

C P C (1908) S. 11—Cause of action and relief in two suits different, no resjudicata.

See C P C (1908) S. 47. Case No (804). **1890 P J 72.**

C. P. C. (1908) S. 12.

See Bengal Tenancy Act S. 183-B. Case No. (606) **14 C W N 864= 5 Ind Cas 781.**

C. P. C. (1908) S. 13 - S 14 (1882))
See Foreign Court, judgment of.

77—C. P. C. S. 14—Reversal of decree—— Right of restitution—No remedy by suit- Execution. **10 M L T 568.**

C. P. C. S. 15.

Note:—The decision is under the old code and the question cannot arise for consideration under the new code.

C P. C (1908) S. 15-*Concld.*

C. P, C. S. 15 (1908) (1859, s. 6 first paragraph),

See Subordinate Judge, Jurisdiction of. **7 All 230, 17 Calc 155, 23 Mad 367.**

78—C P C S. 15. The rule laid down by S.15 is one of procedure, and does not go to the jurisdiction of the Court; but it ought not to be exercised and the direction in S. 15 should be followed as soon as the Court becomes aware of the irregularity of procedure. **Baburav v Sarjeant E J Ring. 1889 P J 325.**

79—C. P. C. Section 15—And Section 578—Suit heard by Court other than the Court of the lowest grade competent to hear it—Irregularity not reversal of decree.

Held, that the object of the provisions of Section 15 of the Civil Procedure Code, that every suit shall be instituted in the Court of the lowest grade competent to try it, is merely directory to regulate the procedure of Courts, and it does not deprive a Court of jurisdiction which it may otherwise possess; and further, if there be any irregularity, as a matter of procedure, in a Judge taking up a case in contravention of the terms of the section and trying it himself, such irregularity would be cured by Section 578 of the Code, and would not justify the reversal of the first Court's decree by an appellate Court.

Mirza Najib Beg v Jodha P R 184 of 1888.

C. P. C. Ss. 15, 20=(C. P. C. Ss. 15 & 17 (1882).

See Bengal Tenancy Act S. 114. Case No (431) **30 Cal 453=7 C W N 402.**

80—C. P. C. S. 15—Effect of provisions relating to arbitration—High Court, Jurisdiction of, Bombay, **11 Bom L R 273=34 Bom 13= 3 Ind Cas 837.**

81—C. P C. (1908) Ss. 15,24, 99 Case tried by Court of higher grade than that ordinarily having jurisdiction—Court in which appeal should be brought—Remand by appellate Court for further evidence—Ss. 566, 569,—C P. C. **2 L B R 1903—1904, 117.**

82—C. P. C. (1908) S.15 referred to procedure only and did not affect the jurisdiction of Courts of higher grade.

Tangor Majhi v Jaladhari Deari, 14 C W N 322=5 Ind Cas 691.

C P C. (1908) S. 16-*Concld.*

C. P. C. S. 16.

Note:—This section corresponds with section 16 of the C. P. Code, 1882. The changes introduced in this section are, the addition of the words, "*with or without rents or profits*" in clause (a); and the addition of the words "*sale*" "*in the case*" and or "*charge upon*" in clause (b).

C. P. C. s. 16, (1859, s. 5).

See (1) Jurisdiction—Causes of Jurisdiction -Dwelling, Carrying on Business, etc.

(2) Jurisdiction—Causes of Jurisdiction —Dwelling, Carrying on Business, etc.

(3) Cases under Jurisdiction—Suits for Land.

33—34—C. P. C. S. 16—Wrong to immoveable property—Suit for compensation—Venue of suit—Jurisdiction—Question of jurisdiction, **12 C P L R 48.**

C P C S. 17

Note—This section corresponds with section 19 of the C. P. Code, of 1882. The changes introduced in this section are the omission of the words "*within the limits of a single district but*" from the first para, and the entire omission of the third para of s. 19 of the old Code.

C. P. C. S. 17 of 1908=1882 s 19 (1859 parts of ss. 11 and 12).

See Execution of Decree—Transfer of Decree for Execution and Power of Court as to Execution out of its Jurisdiction. **14 Calc 661, 21 Cal 639, 22 Calc 871.**

C. P. C. S. 17=(1882 s. 19).

See also Jurisdiction-Causes of jurisdiction-Suits for land-Property situate in different districts.

C. P. C. S. 18.

Note-This section corresponds with section 16A of the C P C, of 1882. The changes introduced in this section are the substitution of the word '*where*' for the word '*when*' in the beginning; the substitution of the word '*unless*' for the word '*if*' and the substitution of the word '*no*' for the word '*any*' in the latter part of clause (2); and also the addition of the words '*and unless*

C P C. (1908) S. 18=(1882 S. 16-A)-*Concld.*

there has been a consequent failure of justice' after the word 'thereto' in the last line.

C. P. C. S. 18 of 1908=1882 s. 16A.

See Jurisdiction—Suits for Land—Property in different Districts. **24 Calc 449.**

C P C S 18=C. P. C. (1882) S. 20.

See (1) Stay of proceedings.

(2) Jurisdiction-Question of jurisdiction -Consent of parties and waiver to objection of jurisdiction.

C. P. C. (1908) S. 19=S. 18 (1882).

See Jurisdiction-Causes of jurisdiction.

Note:—This section corresponds with section 17 of the C.P.Code, of 1882. Several changes have been introduced in this section. The word '*every*' has been substituted for the words '*all other*' in the first line; the order in which the clauses (*a*), (*b*) and (*c*) stood in the old Code has been changed; the words "*or each of the defendants where there are more than one*", have been added to clause (*a*), the words "*or where there are more than one*", have been added to clause (*b*); and the words, "*wholly or in part*" have been added to clause (*c*). In Explanation I, the word "*residence*" has been substituted for the word "*lodging*"; and the word "*company*" has been omitted from Explanation II, of the old Code.

Explanation III, in section 17 of the old Code, has been omitted. As it has become unnecessary owing to the addition of the words "*wholly or in part*" to sub-clause (*c*).

—S. 20 of 1908=S. 17 of 1882.

See (1) Jurisdiction—Causes of Jurisdiction.

(2) Small Cause Court, Mofussil—Jurisdiction — Dwelling or Carrying on Business. **6 Bom H C R A C 131, 258: 3 Mad H C R 374: 18 W R 312.**

C. P. C. S. 20 (1908).=S. 17 of (1882).

See Jurisdiction. **8 A L J 1160.**

C. P. C. S. 20 (1908).=S. 17 of (1882).

See Registration Act, S. 33. **A W N 1896, 170.**

C. P. C.(1908)S.20=(1882, S. 17)-*Concld.*

C. P. C. S. 20 (1908)=S. 17 of (1882).

See Provincial Small Cause Courts Act, S.21. **A W N 1888. 59.**

—S. 20=C. P. C. (1882) S. 17.

See Cause of action, Case No. (40).

25 All 48=A W N (1902), 79.

85—C.P.C. S. 20 (*c*)—Breach of contract—Compensation—Commission agent - Cause of action—Revenue—Jurisdiction. **2 A L J. 1160.**

86—C.P C., S. 20 (c) (17, Expl III)—Contract Act, S. 212 — Suit by principal against agent for compensation — No duty of agent to seek out principal for payment.—

A suit, brought under S. 212 of the Contract Act for compensation which the agent is bound to make to his principal in respect of the direct consequence of his own neglect or want of skill or misconduct, is a suit not for an amount payable "in performance of" but in breach of the contract; and consequently, it is not governed by Cl. III of S. 17, C.P C. There is no authority for the position that a party committing a breach of contract should seek the other party to the contract and pay him at his residence compensation or damages for such breach of contract.—

Kamisetti Subbiah v. Katha Venkatasawmy, 27 Mad 355 at 358.

Notes:—Ref: 36 P R 1908=85 P W R 1908.

C P C S. 22.

Note:—This section is new. It has been substituted for sec. 20 of the C.P. Code, 1882; but its provisions are quite differen from the provisions of that section, which contained provisions as to "*stay of proceedings*" which have been altogether omitted from this section.

"We have omitted clause 22 of the Bill, (which corresponded with sec. 20 of the old Code), as in our opinion it is unnecessary. We think that sufficient provision is made for transfers under the succeeding clause". *Report of the Select Committee.*

—C P C Ss. 22, 23 (3) of 1908=1882—S. 24 (1859), s. 13.

See Transfer of Civil Case—General Cases.

C. P. C.(1908)S.22=(1882, S.24)-*Concld.*

C P C (1908) Ss. 22, 23 (1)=S. 22 (1882).

See Jurisdiction — Causes of jurisdiction—Suits for land.

87-90—C. P. C. (1908), Ss. 22, 23 (3)—Small Cause Court—Mofussil, Jurisdiction.

24 P R 1896.

C P C (1908), S. 23.

See C.P.C. (1908), S. 22. Case No. (86-90).

24 P R 1896.

C P C S 24.

Note:—"The words 'at any stage' have been added to clause (1) to remove the difficulty created by the view that a suit cannot be transferred after the hearing was once commenced, as to which there is a conflict of decision". *Report of the Committee.*

This section corresponds with section 25 of Act XIV of 1882. Material changes have been made in this section to set at rest the conflicting decisions. Under the old Act, there was diversity of judicial opinion as to whether the District Judge had power to transfer execution proceedings and hence the words "*other proceeding*" have been added.

Then there was also diversity of judicial opinion as to whether the District Judge after withdrawing a suit or appeal could re-transfer it or not, and hence the word "re-transfer" has been added.

Again there was also diversity of judicial opinion as to whether a District Judge could transfer a suit pending in his own Court to any Subordinate Court, as it was held in some cases that a District Judge could only transfer a case pending in a Subordinate Court and that he could not transfer a case pending in his own Court. In order to set at rest all the conflicting decisions, the present section has been made more comprehensive, so as to include all the debatable points. The conflicting decisions have also been inserted under this section, to enable the readers to understand the object of the changes made.

C P C (1908) S. 24=1882, S. 25)

See (1) C P C (1908), S. 38. Case No. (127). **31 All 1.**

C. P. C.(1908)S.24=(1882, S. 25)-*Contd.*

(2) C P C (1908), s. 15. Case No. (81).

2 L B R 1903—1904, 117.

91-94—C P C (1908) S. 24 (=old s. 25)—Power to transfer case — Punjab Courts Act, Ss. 33, 34.—

S. 25, Civ. Pro. Code, read with ss. 33, 34 of the Punjab Courts Act, gives to the District Judge power to transfer a case from a Small Cause Court to his own. **Musst. Begam v. Major Cook, 77 P R 1889.**

C. P. C. S. 24 of 1908=1882.—S. 25 (1859, s. 6, latter part).

See (1) Execution of Decree — Transfer of Decree for Execution etc.
(2) Transfer of Civil Case.

95—C P C S 24 (= s. 25) Mamlatdar's Court—Applicability of section.—

S. 25, C P C, does not apply to Mamlatdar's Court. **Bhawandas v. Jedu, 3 Bom L R 970.**

96—C P C S 24=(S 25 1882). A Court invested with the jurisdiction of a Court of Small Causes is not a Court of Small Causes within the meaning of S. 25, last clause, of the Civil Procedure Code. The expression "Courts of Small Causes" in the Section means Courts properly and strictly so called, and does not include Courts only invested with the jurisdiction of Courts of Small Causes. **Ramchandra Krishna Rajwade v Ganesh Bapuji Dhavale, P J (1898), 266.**

97—C P C Ss 24, 115—Revision—General.

A W N 1882, 62.

98—C P C S. 24, O II, rr. 3, 6—Misjoinder of plaintiffs and causes of action. **1 A L J 188.**

99—C P C S. 24—Letters Patent, High Court 1865—Bombay, cl. 13. **7 Bom L R 143**

100—C P C S. 24—Presidency Small Cause Courts Act, 1882, s. 31 cl. (b). **14 C W N 662 =6 Ind Cas 97=37 Cal 574.**

101—C. P. C. S. 24—Judge personally interested in suit in his Court—Transfer of case—Bur Act VI of 1900. **2 L B R 231.**

102.—C P C S 24 (1908)-Small Cause Court, Mofussil, Jurisdiction. **2 O C 143.**

C. P. C.(1908,S 24=(1882, S.25)-*Concld.*

103.—C. P C S 24 (1908)—U P Act III of 1901, ss. 191 and 192. **7 O C 142.**

104.—C. P.C. S 24 (1908)—Provincial Small Cause Courts Act, 1887, s 31 (1).

127 P L R 1903, 31 Cal 1057.

105.—C P C S. 24 (25) Mamlatdars' Court—Applicability of section :—

S. 25, C P C, (1822) does not apply to Mamlatdars' Courts. **Bhagwandas v Jedu.**

3 Bom L R 970 at 971.

C P C S 25 1908.

Note:—This section is new. There was no similar provision in the Old Code. "We think that the exercise of such a power may some times be necessary and it has been brought to our notice that the absence of any provision on the point in the existing Code, has given rise to difficulty. The new section proceeds on the analogy of sec 24, Cr P Code 1898." See the *Report of the Select Committee.*

C P C S 26.(1908)

See cases under :—C P C (1908) O 4 r 1.

106.—C P C S 26 (1908). O IV, r 1, O. VII, r 11, O VI, r 18-Presentation of insufficiently stamped plaint-Making up of stamp duty subsequent to the period of limitation for the suit—Validity.

123 P R 1907=82 P W R 1907= 3 M L T 63.

107.—C P C S 26 (1908). O IV, r 1—A suit is commenced by the presentation of the plaint—Letters Patent 1865—Madras High Court cl 12. **1 M L T 71=16 M L J 238= 29 Mad 239.**

108.—C P C S. 26 (1908.) Civ Pro Code (1908).

14 Bom L R 128.

1909.—C P C Ss 27, 32 (1908)—Addition of plaintiff after period of limitation—Whether suit barred. **8 Ind Cas 890.**

C P C S 28.

See cases under. C P C(1908) O 5 r 21,

110.—C P C S 28 (1908). Test under—

9 M L T 467.

Civil Pro. Code (1908) S. 32.

See cases under.

C P C (1908) O 16 r 10 to 13, 17, 18.

C P C (1908) S 32.

See C P C (1908) S 27. Case No. (109).

8 Ind Cas 890.

—S 33, O XX r 1=C P C (1882) S 198

See Dismissal of suit. **82 P R 1901.**

C P C (1908) Sec 33, O 20, r 1=1882 S 198.

See (1) Judgment Form and contents of Judgment.

(2) Judgment—Civil cases-Pronouncement of Judgment.

(3) Judgment—Civil cases-what amounts to.

C P C S. 34.

Notes :—No material changes have been made in this section. It is almost similar to sec. 209 of Act XIV of 1882. A decree for payment of money does not include a decree for sale in enforcement of a mortgage or charge. See the *Report of the Select Committee.*

—C. P. C. S 34 of 1908=1882 S 209 (XXIII of 1861 S 10).

See Cases under Interest, Omission to stipulate for, etc. **3 Mad 125=12 Cal 569.**

111.—C P C S 34=S 209 (1882)

Section 209 of the Civil Procedure Code, 1882, relates to a decree for money ; and a mortgage-decree, until it reaches the stage shown by S 90 of the Transfer of Property Act, 1882, cannot be so termed. **Hargovandas v Mohanbhai 2 Bom L R 225.**

112.—C P C Sec 34, S 2(1)—O 20. Ss.2, 12=(1882) Ss. 209,211,& 212—Interest—Future mesne profits.

There is no analogy between interest awarded under S 209 and mesne profits awarded under Ss. 211 and 222 C P C. Such interest is no part of the claim or relief as in the case of mesne profits (24 Cal 173 Fol : 2 All. 682 ; 15 Bom 416 Fol) **Dwarka Nath Biswas v Debendra Nath Tagore. 33 Cal 1232.**

Notes :—Appr: 6 C L J 255 F B. Ref: 34 Cal 954 F B.

113.—C P C S 34=(1882 Section 209).—

The words of Sec 209 of the Civil Procedure Code, 1882, are large enough to include the case of a sum of money payable to the plaintiff out of a sum, and it may be that the legislature considered that the power of the Court to allow interest after the fixed day was sufficiently provided or prescribed by that section, the two Acts being co-temporary. Or it may be that the provisions of the Transfer of Property Act are not exhaustive and were not intended to overrule the established practice. **Rani Sunder v Rani Sham Krishen. 9 Bom L R 304=17 M L J 43=2 M L T 75=34 Cal 150=11 C W N 249=4 A L J 109=5 C L J 106.**

114.—C P C S. 34=(1882 S 209)-Applicability to mortgage suits.—Per Subramanya Aiyar J—S 209, C P C, is not applicable to mortgage suits. **Giriya Chettiar v Sabapathy Mudaliar. 29 Mad 65.**

115.—C P C S 34 (1908)—Discretion of Court in matters of interest in special cases—Mortgage. **10 C L J 208.**

116.—C P C Ss 34 and 35 (1908)-Transfer of Property Act, 1882, Ss 68, 88. **2 O C 37.**

117:—C P C S 34 (1908)—Hindu Law—Stridhanam. **3 O C 130.**

118.—C P C S 34—Interest from one not holding under a written lease. **9 Ind Cas 221.**

C P C S 35 cl 3.

Note:—The provisions of sections 220 and 222 of the C P Code of 1882, have been summarized in this section with some additions and alterations.

C P C S 35; O 20 r 6 (3)=1882-Ss 219, 220, 221, 222 (1859 s. 187).

See Cases under:—Costs—Special Cases.

C P C (1908) S.35=(1882. S.219)-*Concld.*

C P C (1908) S 35,

See C P C (1908) S 34. Case No (116)
2 O C 37

119—C P C S 35 (1908)-O XX r 6 (3) O XXII, r 11, O XLI r 23.— A W N 1892, 215

C P C Ss 36, 37=1882 s. 649 (1859 s 296)

See (1) Costs **Bourke O C 154.**

(2) Execution of Decree—Application for Execution and Power of Court
6 Calc 513, 17 Bom 162

(3) High Court Jurisdiction of—Calcutta—Civil 6 Calc 201

(4) Insolvent Act, s, 86 3 Bom 511.

(5) Munsif Jurisdiction of 19 Mad 445

(6) Sale in execution of Decree—Invalid Sales—Want of Jurisdiction
17 Calc 699

—C P C (1908) ss 36 37=1882 s 649

See Execution of decree—Transfer of decree for execution 31 Mad 517
28 Cal 238

—C P C (1908) s 38

See C P C (1908) s 38 (Case No (123).
31 Mad 537

120—C P C Ss 36 37=(1882) 649—C P C (Act V of 1908) s 151

A writ of attachment was issued for the recovery of an amount drawn by a Commissioner in excess of what was allowed by the Court as his fees

Held, that the order was within s 649 of the Code of 1882 and is applicable

Held also, that the order must be taken to be one which is contemplated by s 151 of the Code of 1908 and valid under the inherent powers of the Court (31 Cal 850 Ref 10 C W N 856 Ref 10 C W N 234 Ref) **Upendra Mohan Das Gupta v Raja Jyoti Prosad Singh Deo**
6 Ind Cas 386

121—C P C (1908) Ss 37 38, O 21 r 16=(1882 Ss 649, 223)—The expression the Court which passed the decree in s 223, C P C includes the Court which by reason of a transfer of jurisdiction has jurisdiction in respect of the subject-matter of the suit

S. 649, C P C should if possible, be so construed as to make it convenient to parties to execute their decrees, the decree holders as well as the Judgment debtors **Udit Narain Chowdhary v Mathura Pershad Mahata.**
12 C W N 859=35 Cal 974.

C P C (1908) s 37=(1882, S. 649)-*Concld*

C P C (1908) s 37=(1882, S. 649)

See (1) C P C (1908) s 38 Case No (123).
31 Mad 537

See (2) C P C (1908) s 36 Case No (120)
6 Ind Cas 386.

—Ss. 38, 39, 41; O 21 rr 4, 5=1882 s. 223 (1859, ss 285, 286)

See Cases under Execution of Decree—Transfer of Decree for Execution, etc

C P C (1908) s 38=1882, S 223—Appeal—Rent decree application, for transfer of decree rejecting application

See C P C (1908) s 47 Case No. (493)
8 C W N 575.

C P C (1908) s 38

See C P C (1908) s 37 Case No (121)
35 Cal 974

123 C P C (1908) Ss 38 39, 41, O 21 rr 4, 5, S 7—223 258 649 of 1882 Court which passed decree—Transfer of jurisdiction—Limitation Act, Art 179 Cl 4—Step in aid—Application for transfer of decree—

A Court which passed a decree for sale of certain properties does neither cease to be the Court which passed the decree nor to have jurisdiction to execute the decree by the fact that the territory in which the properties were situate was transferred to the jurisdiction of another Court subsequent to the decree, and consequently, the original Court which passed the decree is competent to execute it, the transfer not having the effect of depriving the Court of its jurisdiction to execute the decree *Held*, also that an application to the original Court to transfer the decree for execution to the new Court having jurisdiction over the area was a proper one and authorized by S 223, C P C and that such an application is a step in aid of execution within the meaning of Cl 4, Art 179— **Panduranga Mudaliar v Vythilinga Reddi**
17 M L J 417;
31 Mad 537.

C P C (1908)-S.38=(1882,S 223) *Contd.*

124—Ss 38, 39, =S 21 rr, 4, 5 O. 223 – Transfer of local jurisdiction—Application for execution, where to be made.

An execution of a decree of the Court of the Munsif of Nawab gunge having been taken out in the Court of the Munsif of Maldah by reason of transfer of the local jurisdiction of the former by the Local Government under Act XII of 1887, a sum of money was paid in part satisfaction. A second application was objected to on the ground that the Maldah Court had no jurisdiction A fresh application with certificate transferring the decree from the Nawabgunge Court was resisted on the ground of limitation *Held*—That the Nawabgunge Court did not cease to have jurisdiction but that the decree could also be executed by the Maldah Court. (6 Cal 513 (1880), referred to, 25 Cal 315 (1897), distinguished), *Held, further*—That proceedings to enforce a decree taken *bona fide* before a Court which the party *bona fide* believes to have jurisdiction is a proceeding within the meaning of sec 14 of the Limitation Act. (3 All 702 s c L R 7 I A 167 (1880), refererd to) **Sheik Jafar v Kamalini Debi** **5 C W N 150= 28 Cal 238**

Notes—Ref 12 C W N 859 Fol 35 Cal 974 =9 O C 281.

125—C P C Ss. 2, 38 39, 41 O 21 rr 4, 5 S 44 =1882Ss 223, 229b -Execution of a decree Family Domains of Maharaja of Benares –Foreign territory Jurisdiction

The Code of Civil Procedure governs suits tried by the Court of the Native Commissioners within the Family Domains of the Maharaja of Benares

The Court of the Native Commissioners of Kondh a place situated within the Family Domains of the Maharaja of Benares, is a Court established by the authority of the Governor General in Council and is not a Court established in the territory of a Foreign Prince or State within the meaning of section 229 (B) of the Civil Procedure Code

A decree of the Native Commissioners of Kondh may be transferred to and executed by the Court at Saran, under section 223 of the Civil Pro. Code. **Maharaja Parbhu Narain Saligram 6 C L J 80=11 C W N 622=34 Cal 576.**

C P C (1908)-S.38=(1882,S.223)-*Concld*

126 C P C 1908 Ss 38, 39 = 1882 ss 223, 230 – Execution against surety Where at the instance of a decree holder execution has been used against a surety, any subsequent dispute between a transferee of the decree and the surety is invalid. **Chathoth Kunhi v Saidindavide** **26 Mad 258.**

127–C P C 1908 Ss 38, 39, 41, O 21 rr 4, 5, s. 13 O 46 r 1 S 94—(1882 Ss 223 and 25)—Decree by a Court of Small Causes – Attachment and sale of immoveable property—Decree sent for execution to Munsiff—Appeal Ss 27 and 35 Provincial Small Causes Courts Act.

A decree passed by a Court of Small Causes sought to attach and sell immoveable property and was thereafter sent for execution to the Munsiff's Court under S. 223 Code of Civil Procedure. Application was made for execution in the plaintiff's Court and judgment debtor raised certain objections which were overruled

Held that the appeal lay to the District Judge neither the suit nor the execution proceedings having been transferred to the Munsiff's Court, but the decree having been sent under S. 223 of the Code Had the suit or the execution proceedings been transferred to the Munsiff's Court under S. 26 of the Code or the execution proceedings instituted in the Munsiff's Court under S, 35 Provincial Small Causes Courts Act the proceedings held in the Munsiff's Court might be regarded as proceedings held by a Court of Small Causes.

Atwari v Maiku,
5 A L J 612=A W N (1908) 254=31 All 1 =1 Ind Cas 553,

128—C P C Ss 38 39, 41, O XXI, rr 4 and 5 –Limitation Act, 1908, art 183—Step-in-aid of execution **29 Cal 375=2 C W N 575= 55 P R 1904.**

C P C (1908)-S 39.

129 –C P C Ss 39 41, O. XXI, rr 4, 5— Limitation Act, 1908, art 183 **26 All 361= A W N 1904, 51=1 A L J 80.**

C P C [1908] S 39—Appeal rent decree, application, for transfer of decree rejecting application.

See C P C (1908) S 47, Case No (493)
8 C W N 575.

Civil Pro. Code (1908)-S. 39-*Contd.*

C P C (1908) S. 39.

See (1) C P C (1908) S. 38. Case No. (128).
22 Cal 375=8 C W N 575=55 P R 1904.

(2) C P C (1908) S. 38, Case No. (126).
26 Mad 258.

(3) C P C (1908) S. 38. Case No. (123).
31 Mad 537.

(4) C P C (1908) S. 38 Case No. (124).
28 Cal 238.

(5) C P C (1908) S. 38. Case No. (125).
34 Cal 576.

(6) C P C (1908) S. 38. Case No. (127).
31 All 1.

C P C (1908) S. 41--Appeal-rent decree, application for, transfer of decree rejecting application.

See C P C (1908) S. 47. Case No. (493).
8 C W N 575.

C P C (1908) S. 41.

See (1) C P C (1908) S. 38 Case No. (125).
34 Cal 576.

(2) C P C (1908) S. 38. Case No. (127).
31 All 1.

(3) C P C (1908) S. 38. Case No. (126).
26 Mad 258.

(4) C P C (1908) S. 38. Case No. (128).
22 Cal 375=8 C W N 575=55 P R 1904.

(5) C P C (1908) S. 39. Case No. (129).
26 All 361.

(6) C P C (1908) S. 38. Case No. (124)
28 Cal 238.

C P C (1908) S. 38. Case No. (123).
31 Mad 537.

C P C (1908) S. 42=(1882) S. 228.

The distinction between the phraseology of ss. 225 and 228, C P Code, 1882 (Or. XXI, r. 7 and s. 42) pointed out and the powers and the functions of the Court to which a decree is sent for execution explained.—
Bhagwantappa v. Viswanath, 23 Bom 378.

C P C (1908) S. 42=1882 S. 228.

See Execution of decree—Transfer of decree for execution &c.

C P C [1908] S. 42—Execution of decree—Power of Court executing transferred decree to implead representative of deceased judgment-debtor——Jurisdiction of Court to execute decree in excess of the limits of its pecuniary jurisdiction as an original Court.

See C P C (1908) S. 47. Case No. (203.)
70 P R 1897.

130—C P C (1908) S.42, O.21 r.16 =(1882.228, 232)—Application by transferee for execution:—

Quœre:—Whether under the old Code an application by a transferee of a decree for substitution of his name and execution can be entertained only by the Court which passed the decree. (27 Cal 488; 22 Cal 558 ref. to.—)
Monorath Das v. Ambika Kant Bose, 13 C W N 533=9 C L J 443.

—S. 43 of 1908=1882.—S. 229 (1859, S. 284).

See Cases under Execution of Decree-Transfer of Decree for Execution, etc.

131.—C P C S 43 of 1908=S, 229—Cooch Behar—Court of the Dewan Ahilkar—Jurisdiction,—

It not being shown that the Court of Dewan Ahilkar of Cooch Behar is a Court within the British territories, or a Court established by the

C P C (1908) S. 43=(1882 S. 229)-*Concld.*

Governor General in a foreign State,—*Held* the Judge of Rajshahye had no jurisdiction under S. 284, Act VIII of 1859 to execute a decree of that Court. **Jadab Chandra Toi Paramanik v. Dinanath Das. 4 B L R A C 134= 13 W R 154.**

132.—Ss 43, 45—Sikkim, Political Resident's Court at—Decree if may be executed in British India—Question of fact not raised in first Court if may be urged on appeal.

The Governor-General-in-Council having declared by Notifications that S 229-A of the Civ. Pro Code of 1882 (now S. 45) should apply to the Court of the Political Agent at Sikkim.

Held—that this showed that the Court of the Political Agent at Sikkim was a Court established or continued by the authority of the Governor-General-in-Council within the meaning of S. 43 of the Code, and a decree of that Court can be executed by the Court of the Subordinate Judge at Darjeeling.

The question whether the decree could "be executed within the jurisdiction of the Court by which it was passed" was one of fact, and the plea that it could, not having been raised in the lower Court, the High Court refused to entertain it. **Jamil Ahamad v His Highness the Maharaja of Sikkim, 15 C W N 992= 38 Cal 859.**

133—C P C S. 43—Partition—Agreement to give one brother Rs. 5,000 for daughter's marriage—Pro-note in pursuance of agreement—Suit for partition — Subsequent suit on pro-note—Causes of action different. **1 M W N 59.**

C P C (1908) S. 44.

See C P C (1908) S. 38. Case No. (125). **34 Cal 576.**

C P C (1908) S. 44=1882 S. 229 B.

See Execution of a decree—Transfer of decree for execution etc. **34 Cal 576.**

C P C (1908) S. 44=1882 S. 229 (b).

See C P C (1908) S. 48. Case No. (883). **12 Bom L R 844.**

C P C (1908) Ss. 45, 44=1882 Ss. 229A-229B.

See Execution of Decree—Decrees of Courts of Native States. **15 Bom 216.**

134—C P C S. 45—Novation — Remedy under new contract—Alternative prayer under old contract—Joinder—Validity. **8 N L R 7.**

C P C (1908) S. 45.

See C P C (1908) S. 43. Case No. (132). **38 Cal 859.**

134A—C P C Ss 45, 44=(1882 S. 229A, B), —Transfer of decree for execution to court outside British India—Absence of notification under s. 229A, 229B.—

There being no notification to the effect in the gazette under secs. 229A and 229B, Civ. Pro. Code, a Civil Court in British India has no jurisdiction to order its decree to be sent for execution by the Court at Mourbhunj. (12 Bom 230 foll.) **Khatoo Sahoo v. Ratan Mahanti, 6 C W N 573=29 Cal 400.**

C P C (1908) S. 46.

Notes:—"Though a system of execution based on precepts is, in the opinion of the committee, open to grave objection, they think that the idea may be utilised for the purpose of enabling a decree-holder to obtain an *interim* attachment where there is ground to apprehend that he may otherwise be deprived of the fruits of his decree. They have, for this purpose, introduced Clause 46 into the Bill. They think it expedient to fix a time for the continuance of this *interim* attachment, but at the same time they have empowered the Court to extend the period to meet the exigencies of particular cases.

After careful consideration they have come to the conclusion that notwithstanding attachment under a precept, re-attachment on the ordinary application for execution will still be necessary. Though at first sight it may appear a better course to provide that re-attachment shall not be necessary when the issue of the precept is followed by the ordinary application for execution, after careful consideration they have come to the conclusion that it will be safer to require re-attachment, having regard to the agency by which execution is carried into effect".—Report of the Special Committee.

Civil Pro. Code (1908) S. 46-*Concld.*

135—C P C Ss. 46, 138, O. 38, r. 5—Attachment before judgment of property situate outside Court's jurisdiction. **10 Ind Cas 794.**

C P C (1908) S. 47=(1882 S. 244.)

Notes.—The present Code effects several amendments. In the first place clause (a) of Sect 244 of the last Code has not been re-enacted. This clause ran: (a) "questions regarding the amount of any mesne profits as to which the decree has now been directed inquiry". All reference to mesne profits has omitted. This omission is due to the recognition of the principle that inquiries into the amount of mesne profits are properly not a matter for the execution department, but should be treated as an integral part of the suit, for the duties of execution do not properly arise until the amount of mesne profits has been ascertained and the successful party is in a position to apply to the Court with all the necessary formalities in order to realize the sum as though it were the subject of a decree for the payment of money. Under the former code the court might under Sect. 212 of the code have passed a decree for the property and directed an inquiry into the amount of mesne profits accrued due prior to the suit which under clause, (a) of s. 244 might have been determined by the court executing the decree, and under clause (b) of that section of the court of execution might also determine questions regarding the amount of mesne profits accruing after the institution of the suit as allowed by sect 211. Now the ascertainment of the mesne profits no longer forms part of the proceedings in execution but is a part of the suit itself. Under O. XX. r, 12 of the Present Code the Court, in the case of mesne profits accruing before the suit, may either determine the amount in the decree, or pass a preliminary decree of possession only. In the case of mesne profits accruing after the suit, it may pass such a preliminary decree. Whenever it passes a preliminary decree the court must then, in continuation of the suit, inquire as to mesne profits and dispose of the same by a final decree which is then capable of execution.

C P C (1908) S. 47=(1882 S. 244)-*Contd.*

On the same principle, viz that questions regarding the amount of both mesne profits and interest should be determined by the decree and not in execution, clause (6) of the former section has been omitted.

The reference to stay of execution has omitted, but this is a matter clearly coming within the words "all questions," etc.

The third sub-section has been re-drafted, and the Legislature has made it compulsory on the Court to determine questions arising as to representation of parties. It was considered in expedient that separate suits should be instituted for the decision of such questions, as the delay and expense were often very great and resulted in the needless protraction of litigation.

The second sub-section and the explanation are new. The first sanctions an existing practice and the latter is intended to end a conflict of Judicial decisions.

1 Applicability, Effect & scope of the section (136—224).

1 Meaning of section 136

2 Whether applies to agency tracts in Madras Presidency 137

3 Sale in execution——Application to set aside sale on the ground of fraud 138

4 Prior and puisne mortgage 139

5 Plea of agreement before decree not to execute 140

6 Applicability of, to sales under Bengal Act I of 1897 141

7 Attaching creditors—Representatives 142

8 Mortgage decree—S 244, applicability of 143

9 Applicability, conditions necessary for 144

10 Applicability—Essentials 145

11 Interpretation——setting aside sale order under s. 244 146

12 Interpretation decree, execution of 147

14 Construction 148

C. P. C. (1908)-S. 47=(1882 S. 244)-*Contd.*

14 Construction—Liberal to avoid multiplicity 149

15 Title, questions of 150

16 Matters falling within s. 244—Separate suit in respect thereof—Jurisdiction 150A

17 Suit may be treated as an spplication under S. 244 151

18 Plaint could not be asked for in separate suit—Plaint can be treated as execution petition 152

19 Circumstances under which plaint may be treated as an application under s. 244 153

20 Claim by legal representative of defendant for land sold in execution to be investigated under s 47=s. 244 154

21 Claim to deceased's property by legal representative—not for ning part of assets—determined under s. 244=s. 47 155

22 Claim to attached property on behalf of idol, if triable in execution proceedings 156—157

23 Competency of party to impeach validity in execution to want of evidence 158

24 Execution of decree—objection by judgment—debtor to execution—Matters falling within the scope of section-Remedy by separate suit 159

25 Powers of court in executing decree—Validity of a decree cannot be disputed 160

26 Validity of decree cannot be questioned in execution 161

27 Decree validity of—Execution of decree, scope of 162

28 S. 47 excludes all questions relating to invalidity of decree 163-163B

29 Adjusrment of decree out of court-not certified to court 164

30 No bar to suit to recover damages for breach of contract-not to execute a decree 165

31 Whether a bar to a civil suit 166

32 Bar-Auction sale-setting aside of-For fraud by stranger-Jurisdiction 167

33 Decree on a mortgage-Sale certificate not included in the mortgage-Whether s. 244 Civil Pro Code, bar 168

34 Bar erroneous by proceeding under s. 278; subsequent s. 283 is no bar for subsequent proceedings 169

35 Execution of decree—Party to suit—Proceedings under s. 278 & 283—Refusal of court to consider plaint under s. 283 as application under s. 244 170

36 Suit barred under—Whether—It can be treated as an application 171

37 Property attached—Legal representative—Plea that property attached is trust-property—Appeal-Execution of decree 172-173

38 Order absolute for sale—objection to execution of decree 174-176

39 Decree absolute—Execution—Decree nisi C. P. C. of 1882 s. 244 177

40 Execution of decree—Fraud 178

41 Alleged fraudulent execution of decree 179-180

42 Effect of satisfaction of decree 181

43 Satisfaction of decree not certified owing to decree-holder's fraud-Applicability after time to have certified 182

44 Execution proceedings-Jurisdiction of court to certain application after full satisfaction of the decree being entered 183

45 Payment not certified within time how proved 184.

46 Satisfaction of decree not certified—suit for declaring that decree is satisfied, maintain-ability 185—186.

47 Decree satisfied—Application by judgment—debtor for refund on the ground of fund—Jurisdiction of the Court 187.

48 Right of party defendant to object sale of property ordered to be sold by the decree 188-189.

49 Decree—Execution proceedings against a surety 190-194.

50 Execution against one who undertakes to satisfy a decree 195.

51 Mortgage decree, execution of, against the successor of the judgment-debtor—Fresh suit if neccessary, successor claims by survivorship—Decree 196

C. P. C. (1908)-S. 47=(1882 S. 244)-*Contd.*

52 Survivorship—Decree against father—Execution against son 197.

53 Partition decree—Partition under a decree 198.

54 Cancellation of license—Decree in favour of licensee, compensation 199.

55 Decree—Order to punish for contempt 200.

56 Contempt motion for execution of decree 201.

57 Compensation for injury in conducting sale of—Questions for Court executing the decree 202.

58 Execution of decree—Power of Court executing transferred decree to implead representative of deceased judgment-debtor—Jurisdiction of Court to execute decree in excess of the limits of its pecuniary jurisdiction as an original Court 203.

59 Duty of Court—to construe the decree & not to retry the suit 204

60 Application for execution of decree—Finding issues in a suit for mesne profits could be acted upon the same issues in the execution proceedings of other suit 205.

61 Sale of holding—Application to set aside sale on ground that holding was not transferable 206.

62 Purchase by mortgagee decree-holder benami in contravention of conditions imposed by Court—Fraudulent purchase 207.

63 Receiver taking possession 208.

64 Commissioner's fees—Nature of order to be passed—Right of commissioner to proceed in execution 209

65 Perpetual injunction, execution of decree for, on each successive breach of decree—Executing Court, duty not to go behind the decree. 210.

66 No necessity of fresh name on record 211.

67 Evidence admissible under, not restricted to documents on record 212.

68 Dispute in relation to execution also disputes before execution 213.

69 Miscalculation—Costs under decree—application for execution with reference to costs 214.

70 Assignee of decree-Whether separate

C. P. C. 1908-S. 47=(1882 S. 24)-*Contd.*

suit lies a question not of any practical importance—Equitable defences 215.

71 Application made by judgment debtor 216—218.

72 Transfer of decree for execution 219.

73 Proceeding in execution 220.

74 Order of lower Court awarding costs reversed on appeal 221.

75 Applicability to person 222.

76 Confirmation of sale 223.

77 Right of third party 224.

2 Parties 225—259.

1 Person against whom claim has been abandoned 225.

2 Preferring a claim against whom a suit is dismissed 226.

3 Person not party to decree—Party against whom suit dismissed 227-228

4 Party to a suit—Question relating to the execution of the decree—separate suit 229.

5 Auction purchaser at sale in execution 230.

6 Prohibits suit by party or his representative against auction purchaser 231—233.

7 Party to suit—Representative 234.

8 Legal representative of a deceased whether a family 235.

9 Decree against the Karnavan, execution of—Resistence by the members of the tavazi 236.

10 Exonerated defendants 237-238.

11 Parties to the suit—Subsequent suit by a defendant who had been exonerated in the former suit—Maintainability of such suit 239.

12 Defendant objecting that his property is not liable to attachment—Defendant setting up another interest 240.

13 Defendants 241—242.

14 Party to suit—Surety 243—244.

15 Person originally party but exempted afterwards 245.

16 Claim by third party to ownership of such party—Suit by decree-holder to establish mortgagor's right to property 246.

C. P. C. (1908)-S. 47=(1882 S. 244)- *Contd.*

17 Decree-holder also judgment—debtor —Right of appeal 247.
18 Judgment—debtor in possession as trustee—Personal decree against judgment—debtor—Parties to suit 248
19 Transferee of judgment—debtor 249.
20 Purchaser of decree 250.
21 Minor not a party to the decree under s. 47 251.
22 Party to suit—Question in execution of decree—Minor defendant objecting to sale in mortgage suit, but withdrawing his defence 252.
23 Meaning of—Proper representation necessary-Minor properly represented, no party 253.
24 Execution against party to suit, not party to Compromise—Resistence to execution Procedure 254.
25 Claim for rateable distribution by creditor rejected 255.
26—27 Petitioner, position of, when petition struck off 256—257.
28 Party unnecessarily added to suit 258—259.

3 Representative 260—364.

1 General 260—270.
2 Auction purchaser 271—299.
3 Private purchaser 300-326
4 Reversioners 327—228.
5 Heir 329—336.
6 Manager 337.
7 Karnavan 338.
8 Co sharer 339.
9 Ijaidar 340.
10 Benamidar 341.
11 Attaching Creditors 342-344
12 Official assignee 345-351
13 Transferee 352-360
14 Mortgagee 361-364

4. Questions relating to execution (365—423)

1 Carrying away some of materials purchased-Suit for damages 365
2 Damages resulting from acts done under cover of execution proceedings, suits for maintainability—Execution jurisdiction 366

C. P. C. (1908)-S. 47=(1882 S. 244)- *Contd.*

3 Pre-emption suit—Execution—Order allowing mesne profits to pre-emptor 367
4 Question as to amount received under mortgage 368-369
5 Mode of redeeming mortgaged lands in execution of former decree 370
6 Payment of money after date fixed in decree—Execution proceedings—Possession—Rate of interest 371
7 Contest between the holder of a decree for an undivided share of joint property and an auction purchaser—Pendente lite 372
8 Question between decree-holder & judgment-debtor as to saleability or otherwise of an occupancy holding 373—376
9 Question as to amount of security on stay of execution pending appeal 377
10 Order for stay of sale of property in execution of mortgage decree—Appeal 378
11 Question as to order absolute for sale 379
12 Power of court to correct its own mistake—Amendment of sale certificate including a property not sold 380
13 Application to recover proceeds of sale from decree-holder after sale has been set aside 381
14 Application by a subsequent purchaser in execution of another decree to set aside the sale on the ground that the ex parte decree had been set aside 382
15 Foreclosure application to re open—Execution 383
16 Power of court—Appeal 384
17 Question regarding satisfaction-No application for execution pending 385
18 Order under appeal 386
19 Mortgage decree—Purchase—Suit on a subsequent mortgage—Matter relating to execution-Sale-Obstruction—Claim allowed-Appeal 387
20 Suit barred—Restitution 388
21 No [illegible] Decree—

C P. C. (1908)-S. 47=(1882 S. 244)- *Contd.*

Bar by s.244, not strictly applicable to 389

22 Application for refund of money 390

23 Execution of decree—Restitution 391

24 Recovery of mesne profits for period between decree of High Court in appeal and decree in review—Separate suit—Application in execution 392.

25 Question as to whether debt was properly contracted 393

26 Legal representatives of debt-Decree-holder—Sons of deceased Hindu debtor can raise question of illegality or immorality of their father's debt 394—395.

27 Powers of Court executing decree—Hindu family—Objection by his son that his interest in the property mortgaged is not saleable in execution of decree obtained against his father 396

28 Money decree—Death of judgment-debtor—Ancestral property—Objection by judgment-debtor's heir on the ground of want of necessity 397

29 Legal representatives of the judgment debtor—Plea that the property survived to them by survivorship—Plea raised in execution proceedings 398—400

30 Preliminary objection to hearing of appeal—Right to begin—Interlocutory order in execution proceedings-Receiver—Appointment effective 401

31 Realization of the share of a sum found due, question of execution proceedings 402—406

32 Claim to attached property 407

33 Party attached in execution after satisfaction of decree from other sources 408

34 Question as to legality of purchase by judgment-debtors of right of some of decree-holders 409—410

35 Objection to claim to portion of the land 411

36 Alleged fraudulent execution of decree 412--414

37 Question after court has executed decree and became functus officio—Review 415

C. P. C. (1908)-S. 47=(1882 S. 244)- *Contd.*

38 Decree subsequently modified, question as to execution of 416

39 Question raised for first time in execution 417

40 Forfeiture, relief against—Non-payment of rent, though stipulation contained in compromise decree 418

41 Assignee of decree 419—421

42 Land not liable to execution under s. 9 of N. W. P. Rent Act-Land sold in execution-recovery of 422

43 Defaulting purchaser —Re-sale—Deficiency in price—Recovery of deficiency from defaulting purchaser 423

5. Any other Question. (424-483)

1 Adjustment between parties-Jurisdiction of court to deal with 424—425

2 Power to stay execution-Case in which decree is being executed is before appellate Court 426

3 Agreement antecedent to decree not to claim benefit of the decree how far within the section 427

4 Agreement to stay or not to enforce decree—Validity and existence of —Matter to be determined in execution—Not in separate suit 428

5 Suit maintainability conveyance, execution of, by court—Rights of parties under the conveyance, how to be enforced 429—431

6 Agreement to give time 432

7 Execution of decree passed on usufructuary mortgage—Application for order absolute—Mortgage in possession after decree-subsequent profits-Accounts 433

8 Objection by judgment-debtor to the executability of decree 434

9 Setting aside sale 435

10 Application to set aside sale in execution of an exparte decree subsequently set aside under s.108 C. P. C. 436

11 Purchase at execution sale by decree-holder Leave to bid—Necessity for setting aside of sale 437

C. P. C. (1908)-S 47=(1882 S. 244)-*Contd.*

12 Sale setting aside for fraud—Auction purchaser and decree-holder—Parties 438

13 Sale in execution, the judgment-debtor being ignorant of the execution proceedings though the fraud of the decree-holder–Setting aside proceedings in execution 439

14 Sale in execution of decree for arrears of rent—Fraud–Suit to set aside sale on the ground of fraud 440–442

15 Suit to set aside sale on the ground that property was not ancestral 443

16 Setting aside sale for irregularity 444

17 Saleable interest—Auction purchaser —Sale set aside on what ground 445

18 Saleable property-Sale of holding without consent of landlord-T.P.Act s.2 446–147

19 Sale brought about by fraud in execution 448

20 Order refusing to confirm a sale in execution of exparte decree set aside 449

21 Questions for court executing decree-Set aside sale confirmation in appeal –Non-payment of arise–Remedy 450

22 Suit to recover sum paid in excess under decree 451

23 Application by judgment-debtors to surplus from decree-holders 452–453

24 Excess sum retained by decree-holder after satisfying decree 454–455

25 Land taken in excess of decree 456

26 Compromise decree—Effect of compromise 457

27 Compromise as to possession after decree 458

28 Refund of proceeds of sale on ground of compromise 459

29 Restitution of amount paid under decree 460—461

30 Declaratory decree-Appeal 462

31 Step in aid in execution–Order in council, if includes provision of decree affirmed–Payments in satisfaction of a decree made out of court, if may be proved 463

32 Question arising after sale 464

C. P. C. (1908)-S. 47=(1882 S. 244)-*Contd.*

33 Confirmation of sale 465

34 Order absolute for sale–T. P. Act s. 88 466

35 Mismanagement of devasthan property 467.

36 Suit for restoration of property when decree is reserved 468

37 Decree wrongly executed 469

38 Lands in dispute whether covered by a decree 470

39 Retention by the Court of property not the subject-matter of a decree in the course of its execution—Dismissal of petition for delivery of possession 471

40 Cause of dispossession 472

41 Damage done by removal of crops for possession of which decree had been obtained 473

42 Damage for inquiry to goods under attachment 474

43 Question of liability for wrongful execution 475

44 Claim for damages for enquiry of goods wrongly attached 476

45 Monthly allowance payable under decree 477

46 Right to maintenance 478

47 Question as to validity of mortgage decree for sale on mortgage 479-480

48 Execution of Pottah by decree-holder in favour of judgment-debtor 481

49 Question in execution decree as to whether money paid in time 482

50 Order in execution giving mesne profits not given by decree-Order without jurisdiction 483

(6) Appeal and Second appeal (484—570).

1 Applicability of the section 484—485

2 Execution of decree-Appeal 486

3 Right of a mortgage to the benefit of S. 310A–Appeal against adverse to mortgagee 487

4 Parties relating to the execution of the decree—Application under s. 310A-C P C–Auction purchaser in Court sale–Appeal 488

5 Appeal—Locus standi 489

C. P. C. (1908)-S. 47=(1882 S. 244)-*Contd.*

6 Practice appeal (order in) execution —Application of judgment debtor to demolish certain building jurisdiction of Courts (revision) of decree 490

7 Appeal if lies—Maintainability of application—Withdrawal of application under C P C 491

8 Order setting aside under, sale in execution of a non-appealable rent decree 492

9 Appeal-Rent-Decree, application for transfer of decree rejecting application 493

10 Order by executing Court passed without jurisdiction-Appeal 494

11 Order of a District Judge refusing to execute an award under Act I of 1894 —One under s. 244 and consequence, appealable as a decree 495

12 Decree for sale—Direction by appellate Court to take accounts—Application by decree-holder to original Court Order declaring amount due—Appeal 496-497

13 Order whether a party applying for execution is not the representative 498

14 Auction purchaser-Representative Appeal 499—500

15 Decree passed against representative of debtor-Attachment of property as belonging to debtor-Objection to attachment by judgment-debtor selling independent title 501-503

16 Party on record though wrongly-Rights of appeal 504

17 Question between the legal representative and judgment debtors-Appeal 505

18 Application for execution of whole decree by one of several joint decree-holders-Dismissal of application-Appeal 506

19 Assessment of mesne profits—Interlocutory Order or order Under s 244-Appealability 507

20 Sale confirmation of-Whether order under s. 244—appealability 508

21 Confirmation of sale without payment of landlord's fee-Sale, validity of-

C. P. C. 1908)-S. 47-(1882 S. 244)-*Conta.*

Application for possession by auction purchaser 509

22 Decision purporting to be under appeal 510

23 Application to have set aside execution of decree 511

24 Application for amendment of sale proclamation-Appeal 512

25 Sale in execution-Collusion-Material irregularity-Second appeal, 513-514

26 Second appeal—Sale petition to set aside-Fraud alleged not proved-Sale set aside for irregularity 515-517

27 Second appeal-Application to set aside sale ground of fraud 518

28 Decree-Fraud-Questions relating to execution between parties to the suit -Auction purchaser a third party 519

29 Auction sale 520

30 Appeal against order setting aside sale 521

31 Execution sale-Collector's order setting aside-Appeal to District Judge 522

32 Application by prior purchaser to set aside a subsequent sale of same property-Sale set aside by Munsiff-Appealability of munsiff's order 523

33 Judgment-debtor, objection by Decree-holder-Small Cause Court suit-Second appeal-Revision-Separate suit 524-526

34 Appeal against order passed under s. 244 C P C 527

35 Objection by Judgment-debtor that more had been delivered to the auction purchaser than was included in his sale-Certificate-Objection disallowed 528-531

36 Objection by Judgment-debtor that he is trustee in respect of the property attached-Applicability of 532

37 Appeal from an order made on application for appointment of a commissioner 533

38 Partition decree-Application for appointing Commissioner Limitation Act Art. 178-Order rejecting on ground of limitation-Appeal. 534

C. P. C. (1908)-S. 47=(1882 S. 244)-*Contd.*

39 Sale under first Mortgage-Surplus sale proceeds—Second mortgagee entitled to appeal against order awarding surplus proceeds-Practice—Appeal treated as revision 535

40 Decree—Execution-Application by another decree-holder under s. 295 for rateable distribution—Proceedings transferred to the Collector-Refusal to set aside sale 536—537

41 An order passed under s. 295 between persons and decree-holders 538

42 Appeal—Question relating to execution-Order refusing to grant a certificate—No appeal-No revision 539

43 Order cancelling decree—Collector's certificate under s. 10 540

44 Appeal—Restitution—Claim for interest—Final adjudication as to interest 541

45 Order refusing to stay a decree—Impossibility of restoring status quo -Whether appeal lies 542

46 Order refusing stay of execution—Decree-Discretion of the Lower Court 543

47 Where the case in which the decree being executed, before the appellate Court, that Court has the power to stay execution 544

48 Direction by an appellate Court whether appealable——Reference by the Privy Council 545

49 Claim as by shebait —Decree for personal debt 546

50 Question as to the appointment of a manager of the property of a religious institution—Right of appeal 547

51 Redemption decree-Period for redemption—Enlargement of the period 548

52 Mortgage-sale, Confirmation of-Setting aside sale—Limitation-Partition of mortgaged property—Co-sharer if a necessary party--Redemption 549

53 Execution of decree incumbrances by third parties—S. 278 applies No. s. 244 therefore no appeal 550

C. P. C. (1908)-S. 47=(1882 S. 244)-*Contd.*

54 Order for stay of sale mortgaged propery in execution 551

54A-Application to re-open foreclosure 552

55 Petition to reopen execution—Receiver 553

56 Execution proceedings—Review-Appeal 554

57 Final order in execution proceedings 555—556

58 Privy Council, leave to appeal—Final interlocutory order—Remand-Cardinal point 557

59 Transferee's suit for declaration that an assignment of a decree is void —Maintainability of order under s. 232—Appealability 558

60 Order on petition objecting to the value in the sale proclamation 559

60A Higher grade causing property to be set up for sale in execution 560

61 Decree—Execution—Court to which a decree is sent for execution-Executing a decree-Jurisdiction of the first Court 561

62 Declaratory decree—Decision as to executability 562

63 Intermidiate between preliminary and final decrees 563

64 Application by Collector in pauper suit 564

65 Suit by minor in forma pauperis-Order directing next friend to pay court fees—Collector's application to execute dismissed-Appeal-Revision 565

66 Liability of defaulting purchaser—Appeal from order under s. 293—Resale 566

67 Decree for sale—Order absolute-Execution—Suit 567

68 Order passed in execution between parties to suit-Decree-Appeal—Execution of decree—Varying of Decree 568

69 Execution of decree—Attachment —Appeal 569

70 Decree for pre-emption 570

7. Separate suit lies 571—687

1 Formal possession under decree 571—573

C P. C. (1908)-S. 47=(1882 S. 244)-*Contd.*

2 Decree for delivery of possession of equity of redemption—Wrongful delivery of land—Suit by mortgagee for restitution of land so delivered 574—575

3 Decree set aside-Decree—Exparte-Second decree satisfied—Suit for possession by judgment—debtor—Not barred 576

4 Suit for possession—Delivery of formal possession 577

5 Delivery of symbolical possession-wrong delivery—No nullity—No bar to separate suit 578

6 Suit for refund of purchase money by auction purchaser sale being set aside—No bar 579

7 Refund of purchase money when Judgment debtor has no saleable interest in the property sold-Suit for such refund whether maintainable—Remedy 580

8 Attaching creditors. suit for refund money wrongly paid to him 581

9 Money paid in execution by mistake 582—584

10 Payment twice—Suit for recovery of that amount—Maintenance 585—586

11 Fraud—Cause of action—Regular suit 587

12 Sale certificate, suit to set aside when decree has ceased to be executable 588—589

13 Suit to set aside decree and sale for fraud 590

14 Suit to set aside court sale—Plaintiff no party to fraud-Effect 591

15 Suit to set aside sale possession of a grove not barred-must be tried on its merits 592

16 Non—service of notice under s. 10, Public Demands Recovery Act—Suit to set aside sale on ground of 593

17 Claim to attached property 594

18 Execution Fraudulent decree—Separate suit for application. 595

19 Sale in execution of decree—Tender of debt by transfer of property 596

C P. C. (1908)-S. 47=(1882 S. 244)-*Cont d.*

20 Defence if barred—Sale certificate no obstacle 597

21 Remedy of Judgment-debtor, on creditor failing to certify 598

22 Illegal sale—Separate suit 599

23 No bar—Suit by subsequent mortgagee for recovery of surplus sale proceeds 600

24 Puisne mortgage paying of decree, rights of, in execution 601

25 Mortgage—Redemption — Possession 602

26 Mortgage of decree by decree-holder—Attachment of decree on same date by decree—holder's creditor—Subsequent attachments by other creditors—Priority 603

27 Suit by partition for possession by purchaser of Co-parcener's rights in execution sale 604

28 Suit by assignee of a decree for declaration of validity of assignment—Maintainability 605

29 Compromise decree—Specific performance, suit for 606

30 Party against whom no decree was passed not precluded from bringing a suit 607

31 No bar—Decree-holder constructing in contravention of the directions in the decree 608

32 Question of mesne profits 609—611

33 Claim for mesne profits & interest by representatives in title of the Judgment—debtor—Decree holder's claim for interest on the purchase money 612

34 Recovery of mesne profits for period between decree of High Court in appeal & decree in review—Separate suit 613

35 Suit for money paid under decree afterwards reversed 614

36 Decree against a person personally—Sale of property—Claim by him as shebait 615—616

37 Decree for permanent injunction—Land purchased from decree-holder by another person 617

C. P. C. (1908)-S. 47=(1882 S. 244)-*Contd.*

37A Suit for administration by judgment-creditor against executor—Maladministration 618

38 Rival decree—holders 619

39 Dispute between decree—holder and purchaser of a share in joint property belonging to judgment—debtor and decree—holder 620—621

40 Razinama—Rights under—Suit for jewels—Not barred 622

41 Restitution 623

42 Restitution due in virtue of the modification in appeal of the decree of a rent—Procedure 624

43 Crops mis-appropriated while in possession under decree afterwards set aside on appeal 625

44 Execution of decree-Suit for value of crops cut while under attachment—Jurisdiction 626

45 Suit for recovery of mesne profits—Suit for value of crops—Wrongly appropriated 627

46 Question of title between decree—holder & third person 628

47 Objection raising question of title between party added as representative, and the person when he represents—Order disallowing objection 629

48 Decree for sale on a mortgage—Mode of intervention of third party claiming an interest by succession in the property decree to be sold 630

49 Impartible estate-Custom of inalienability-Objection and money decree distinction between 631

50 Suit to establish right to property released from attachment—Objection by a person not party to the suit 632

51 Execution proceedings—Objection to execution not allowed—Separate suit 633

52 Objection to execution by party who had been a defendant but had been excluded from proceedings in appeal 634

C. P. C. (1908)-S. 47=(1882 S. 244)-*Contd.*

53 Person constructing the decree-holder at the instigation of the judgment debtor—Suit by the person so obstructing 635

53A Issue in the form of an objection in separate suit 636

54 Omission to oppose execution of decree 637

55 Party wrongly appearing on record 638

56 Plaintiff suing in a character separate from that in which decree was passed against him 639

57 Insolvency petition—Vesting order composition with creditors-Dismissal of petition—Revesting—Attachment—Trustee's right to claim—Maintainability of suit 640

58 Decree-Execution surety-Surety bond liability of the surety under the bond—Suit can lie to enforce liability—Practice—Procedure. 641

59 Court-Sale-Defaulting purchaser-Resale-Deficiency in price-Recovery of deficiency from defaulting purchaser—Suit for recovery of amount so realized 642

60 Judgment-debtor-Question of right to possession 643

61 Questions relating to execution—Separate suit 644

62 Decree for moiety in favour of defendant—Right of such defendant to claim moiety of money realized in execution 645

63 Claimant in execution proceedings—Damages for tort—Party to suit 646

64 Auction purchaser not a representative of either party to a suit-Sale in execution of property belonging to a person other than the judgment-debtor 647

65 Consent decree—Claim to take all debts—Separate suit 648.

66 Decree against minor without proper representation suit to set aside, right of 649

C P. C. (1908)-S. 47=(1882 S. 244)-*Contd.*

67 Representation of deceased person 650

68 Death of party to suit before final decree in appeal-Subsequent proceedings in execution taken against representatives of such party 651—653

69 Assignment of decree—Execution—Separate suit 654

70 Transferee from auction purchaser 655

71 Application for execution by beneficial holder of decree—Application dismissed—Suit for declaration of applicant's right to execute the decree 656—657

72 Liability of property for debts 658—661

73 Decree against father—Execution against son—Assets—Separate suit against the son—Necessity of 662

74 Adjustment of a decree—Right to sue 663—676

75 Satisfaction or part satisfaction out of court, but not certified 677

76 Part satisfaction of decree out of Court 678—682

77 Sanction of Court—Absence of sanction, effect of decree—Entry of satisfaction 683

78 Satisfaction of decree out of Court 684

79 Money paid in satisfaction of decree out of Court 685

80 Value of elephant accepted in satisfaction of decree, but not delivered 686

81 Failure to apply within time, right to maintain a suit not affected—Execution sale—Unincumbered property sold—Presumption 687

8. Separate suit barred 688-793

1 Question relating to the execution of decree 688

2 No bar to suit on satisfied order of insolvent.—Court for costs 689

3 Question as to title raised and decided in execution proceedings 690

4 Suit brought under circumstances where the proper remedy was by application under sec. 244—Plaint may be treated as application 691—692

5 Loss or destruction of decree-Regular suit 693

6 Error of procedure-Jurisdiction 694

7 Illegal acts done in executing-Jewels taken but not mentioned in attachment 695

8 Suit to recover money wrongly realized not maintainable 696

9 Irregularities in the execution of, revised by decree affecting parties to the original decree 697

10 Land wrongly given to defendant in another suit 698

11 Question whether lands were included in decree 699

12 Suit for property wrongly taken in execution of decree—Right of suit—Question of Jurisdiction 700

13 Suit against auction purchaser to set aside sale barred, except in execution proceedings 701

14 Claim to set aside sale as wrongly made 702

15 Claim to have sale set aside as being under barred decree 703

16 Claim to have sale set aside as fraudulent 704

17 Suit to set aside sale on ground of fraud 705—708

18 Public Demands Recovery Act (I of 1895) s 10—Notice, non-service of. Effect of sale nullity-Suit to set aside -If bars a suit to set aside a certificate sale 709

19 Suit to set aside a sale in execution of a certificate 710

20 Irregular attachment and sale—Remedy in execution—Suit to set aside sale not maintainable 711

21 Decree for sale against Hindu father --Suit by son- Sale carried out and confirmed-Suit by mortgagor to set aside not maintainable 712

22 Auction sale setting aside of-Notice under s. 248, service of, object of-Objection not raised in first Court 713

C P C (1908) S.47=(1882 S.244)-*Contd*

23 Execution on the ground that the real purchasers were the decree-holders who had not obtained leave to bid–Proper remedy 714

24 Suit by judgment-debtor to set aside sale 715

25 Sale in execution confirmation—Suit to set aside 716

36 Suit to set aside certificate of sale on the ground of irregularity—Barred 717

27 Judgment—creditor being without-permission—No separate suit by judgment—debtor 718

28 Regular suit to set aside summary order 719

29 Suit to set aside order in execution of decree. 720

30 Order cancelling an execution sale of land—Subsequent suit for possession brought by judgment—debtor 721

31 Suit for cancellation on the ground of fraud of a sale held in execution of a decree–Proper remedy by application 722

32 Attachment released on the ground of tarwad property—Suit for cancellation of the order 723

33 Compromise for larger amount than that claimed 724

34 Contract superseding decree 725

35 Compromise effected by fraud 726

36 Consent decree—Execution proceedings–Separate suit 727

37 Refund of purchase money 728

38 Refund money wrongly realized under decree 729

39 Refund of money paid out of Court 730.

40 Co-defendants—Separate suit–Order, to refund purchase money 731.

41 Failure to execute decree—Suit after omission to execute decree 732.

42 Suit for possession after failure of attempt to execute decree giving possession 733.

43 Suit for possession which might have been had under decree 734.

44 Payment of such sum 735–738.

C P C (1908) S.47=(1882 S.244)-*Contd.*

45 Suit for possession of property purchased, not maintainable 739.

46 Agreement between decree-holder who is auction-purchaser and judgment-debtor not to take possession of property 740.

47 Decree-holder's taking possession of greater area than what was decreed–Suit by judgment-debtor for possession 741.

48 Proceedings for delivery of possession of property purchased by decree-holder 742.

49 Suit by auction-purchaser who was also decree-holder for possession of immoveable property purchased at execution sale 743.

50 Possession in execution of decree after sale—Question arising between the parties of their representatives—Separate suit 744.

51 Suit to obtain possession by assignee of auction-purchaser—Practice 745.

52 Sale not set aside—Auction purchaser's right to recover possession by suit 746.

53 Death of judgment-debtor pending execution proceedings — Questions arising between representatives of judgment-debtor & decree-holder 747.

54 Application to execute decree against alleged representative of deceased judgment-debtor 748.

55 Claim to legal representative to property 749.

56 Questions arising between the decree-holder & the representatives of the judgment-debtor 750–751.

57 Suit by representative against purchaser—Separate suit 752.

58 Purchaser of rights of Hindu widow —Representative 753.

59 Questions for Court executing decree —Representative 754.

60 Execution—Decree against sons as legal representatives of their father–Son's pious duty-father's debt—The question whether the property is self acquired or ancestral in the hands of sons can be gone into in execution proceedings 755–756.

61 Parties to the suit or their representatives 757.

62 Attachment, removal of — Application—Suit to remove the attachment 758.

63 Assignee of debt—Assignment without considerations sham transactions -Fraud—Benami transaction 759.

64 Surety of judgment-debtor—Suit for exemption from liability—Maintainability 760.

65 Claim to attached property—Questions arising between the parties or other representatives 761.

66 Question as to whether property belongs to judgment-debtor or not-Grounds of objection for attachment in execution 762.

67 Claim to attached property 763.

68 Objection that property belongs to Tavazhi—Question in execution 764.

69 Claim to attached property by representative of deceased judgment-debtor 765.

70 Resistence to execution as being cultivators 766.

71 Resistence to remove buildings found on land for which decree is given 767

72 Puisne Magistrate's rights-Separate suit to enforce those rights barred 768

73 Redemption-Prior mortgagee's rights to redeem in suit by puisne mortgagee 769

74 Sale in contravention of s. 99 T. P. A. 770

75 Sale in execution of a decree for rent—Landlord having a mortgage of portion 771

76 Sale by mortgagee in execution of decree-Sale contrary to provisions of s. 99 Transfer of Property Act 772

77 Decree for redemption—Omission to execute—Maintainability to subsequent suit on the same mortgage 773

78 Usufructuary mortgage--Mortgaged property taken on lease by mortgagor—Decree against mortgagor for arrears of rent-Sale of mortgaged property in execution of decree-Purchase by a third party 774

79 Sale by mortgagee of property not mortgaged—Validity of, where to be questioned. 775.

80 Mortgage—Second suit 776

81 One of two joint decree-holders recovering the entire decree amount-Maintainability of suit againt by decree-holder for his share 777

82 Part satisfaction of decree not certified to the court 778

83 Satisfaction reported—-Dismissal—Mistake in calculation-Petition to reopen exection 779

84 Application to certify payment under s. 258 C P C 780

85 Certifying part payment-Suit for declaration that the decree has been satisfied, s. 244 bar 781

86 Sale in execution of decree-Suit to impeach sale—Non-maintainability-Matter relating to execution. 782

87 Order in execution of decree-Surplus of sale—proceeds 783.

88 Money paid in excess under decree 784.

89 Interest on money taken out of Court in execution of decree—Separate suit 785.

90 Decree subsequently reversed or modified 786,

91 Not merely a declaratory decree—Remedy by way of execution & not by separate suit 787.

92 Suit by reversioner 788.

93 Execution proceedings-Regular suit-mistake-new plaint not inconsistent with original case 789.

94 Suit to enforce liability imposed by decree of Civil Court in moffussil 790.

95 Second suit for restitution of conjugal rights—Decree in former suit not executed 791.

96 Execution transferred to Collector—Private sale—Subsequent sale held by Collector—Remedy of purchaser at private sale 792.

97 Suit for administration in respect of barred decree 793.

C P C (1908) S.47=(1882 S.244)-*Contd.*

9 Resjudicata 794—810.

1 Assessment of execution of decree—Resjudicata 794.

2 Plaintiff's father sued as trustee-Suit dismissed—Second suit by plaintiff barred 795.

3 General principles of—Re-opening questions already decided 796.

4 Order under s. 244-final between parties 797.

5 Finality of decision of executing Court as to property being not ancestral 798.

6 Decree not in accordance with Act-money not paid within time-Subsequent suit of redemption not barred 799.

7 Questions for the court executing a decree-Defendant's plea by way of a separate suit 800.

8 Question as to what was sold at execution sale—Inherent power of Court to certify mistake—Question of mistake 801.

9 Administration, suit by—Decree—Satisfaction—Sanction of the Court 802.

10 Consideration for the bond — Resjudicata 803.

11 Cause of action and relief in two suits different—No resjudicata 804.

12 Finding of a Court cannot be disputed by the parties in the execution of decree 805.

13 Execution of decree — Procedure—Resjudicata Ch. VII of the Code does not apply to execution proceedings 806 807.

14 Resjudicata—Mortgage sale pending appeal against decree by mortgagee—Subsequent order directing auction purchaser to be placed in possession 808.

15 Representative of a party—Auction purchaser— Order in summary inquiry 809-810.

10 Estoppel 811-819.

1 Previous application barred—Notice on judgment debtor 811.

C P C (1908) S.47=(1882 S.244)-*Contd.*

2 Persons wrongly impleaded as defendants not estopped 812.

3 Party alleged to have been wrongly substituted in execution proceedings 813.

4 Estoppel—Application to have the sale held & application to set the sale aside 814.

5 Simple money decree against father—Objection to execution on sons—Estoppel 815.

6 Appeal—Claim—Debutter property—Right of suit 816.

7 Fraud—Sale in violation of S. 99 of T. P. Act—Objection that no suit lay when application puts in objection raised that a suit lay 817.

8 Right to show that previous proceeding and compromise were in fraud of applicant's right 818

9 Decree—Execution-Order under sec 244 C P C for transfer of execution -Confirmation of order in appeal—Application by decree-holder 819

C. P. C. (1908) S. 47=(1882) S. 244.

See Cases under:—

(1) Appeal-decrees.

(2) Appeal—Execution of decree.

(3) Appeal—Order.

(3A) Bengal Tenancy Act s. 173 (3). Case No. (571). **7 Ind Cas 769.**

(4) Civil Pro. Code (1882) s. 258=(1908) O 21 r 2 and s. 2 cl 2.

(6) Execution of decree—Execution by and against representatives.

(7) Interest-Miscellaneous cases—Mesne profits.

(8) Mesne profits—Assessment in execution and suits for—Mesne profits.

(9) Questions in execution of decree. **3 O C 32.**

(10) Sale in execution of decree-setting aside sale irregularity. **11 C W N 1011**

(11) Special or second Appel—Orders subject or not to appeal. **8 Ind Cas 3.**

(12) C P C (1908) S. 2 cl. 14. Case No. (57).
15 C W N 862.

(13) C P C (1908) S. 2 cl. 14. Case No. (56).
31 Cal 731.

(14) C P C (1908) S. 2 cl. 2. Case No. (40-41).
3 O C 32.

(15) C P C (1908) S. 2 cl. 2. Case No. (34).
29 Bom 71.

(16) C P C (1908) S. 2. Case No. (9)
28 Cal 81.

(17) C P C (1908) S. 2 cl. 2. Case No (31).
A W N (1890) 85.

1 APPLICABILITY, EFFECT & SCOPE OF THE SECTION

(1) Meaning of Section.

136-C P C S. 47.=S 244. of the Civil Procedure Code contemplates that there must be some question in controversy and conflict in execution, which has been brought to a final determination and conclusion, so as to be binding upon the parties to the proceedings, and which must relate in terms to the execution, discharge or satisfaction of the decree. **Hulas Rai v. Pirthi Singh.**
9 All, 500.

Notes.—Ref 14 All 350; 520, 25 Mad 244 F B, 300 F B: Ex 8 C W N 257.

136A.—C P C S. 47-Provisions of. not strictly applicable to arbitration proceedings.
4 S L R 196.

(2). Whether applies to Agency Tracts in Madras Presidency

137.-C P C S. 47=(244)-Applicability-Whether applies to Agency Tracts in Madras Presidency-Ganjam and Vizagaptam Agency Rules:-Sec.
17 M L J 147.

(3) Sale in Execution Application to set aside sale on the ground of fraud

138. C P C S. 47—(1882 s. 244)—Applicability.

(1) Applicability & Scope of the Section -*Contd.*

An application to set aside on the ground of fraud a sale held in execution of a decree can be made under s. 244 of the Code of Civil Procedure even after the sale has been confirmed. (26 Cal 326 and 26 Cal 324 foll. 19 Cal 683 ref to.)
Wahid-un-nissa v Girdhari.
1905 A W N 162=2 A L J 469=27 All 702.

(4) Proir and puisne mortgage.

139—C P C S.47 (1882 S.244)-Aapplicability.-A decree for sale and order absolute for sale had been passed against the mortgagor. He then borrowed more money on a mortgage of several villages, including those previously mortgaged, and applied a portion of such money in satisfying the previous decree for sale. The subsequent mortgagee then brought a suit upon the mortgage in which she sought to bring to sale the villages which were the subject of the previous mortgage and decree *Held* that she could do so, and that s. 244 of the Code of Civil Procedure did not apply (24 All 179 Distinguished.)
Tufail Fatma v Bitola.
(1904) 24 W N 284.

(5). Plea of agreement before decree not to execute,

140—C P C S.47=(1882 s.244)—Applicability—Remedy.

A court cannot inquire under s.244 into an objection that a decree cannot be executed by reason of an agreement entered into between the parties before the decree was passed that it will not be executed. The proper remedy is to sue to restrain execution (22 Bom 463 dissented from 29 Cal 810; 6 C W N 796 followed.) **Hassan Ali v Ganzi Ali Mir.** 31 Cal 179;

Notes —Fol 4 C L J 475. Ref: 5 C L J 328:17 M L J 288.

(6) Applicability of, to sales under Bengal Act I of 1897.

141.—C P C S. 47=(1882 s. 244)-Public Demands Recovery Act.

S. 244 Civil Procedure Code does not apply to the case of execution proceedings held under the Public Demands Recovery Act (29 Cal 94, 6 C W N 246, 5 C W N 331 relied upon.) **Ramrup Sahay v Khus Lal Misser,** 6 C W N 630.

C P C (1908) S.47=(1882 S.244)-*Contd.*

(1) Applicability, Effect & scope of the section—*Contd.*

(7) Attaching creditors—Representatives.

142.—C P C S. 47=(1882. S. 244)

To attract the applicability of section 244 of the Civil Procedure Code, it must not only be shown that the question relates to the execution of the decree but arises between the parties to the suit in which the decree was passed or their representatives.

Two attaching creditors of the judgment-debtors neither of whom was a party to the suit brought by the other, are not the representatives of the judgment-debtor within the meaning of section 244 of the Civil Procedure Code.

Ram Chandra v Mussammat Hamiran 6 C L J 437=11 C W N 433.

(8) Mortgage decree—Section 244, applicability of.

143. C P C S47, O 21 r 60=1882 sections 244 280.

Per Mookerjee J—S 244 of the Civil Procedure Code has no application to a case where the judgment-debtor tries to set aside the effect of the decree itself. In the case of a mortgage decree, the decree itself directs the sale of the property and if objection is taken that the property cannot be sold because it belonged not to the judgment debtor but to a party who is a stranger to the suit, the propriety of the decree is called in question. A question of this description must be tried in a regular suit and not in the execution proceedings which are based on the assumption that the decree is a good and valid decree.

Shib Lakshan Bhakat v Srimati Tarangini Dasi. 8 C L J 20.

(9) Applicability-Conditions necessary for.

144.—S. 47=(1882 S 244,)—Purchaser under decree of puisne mortgage obtaining possession of mortgaged property—Subsequent purchase under decree on the first mortgage—Suit for possession by subsequent purchaser—Redemption.

A puisne mortgagee obtained a decree against the mortgagor without impleading the first mortgagee, and bought the property in execution of his mortgage-decree and also obtained possession thereof.

C P C (1908) S.47=(1882 S 244)*Contd.*

(1) Applicability, Effect & scope of the section—*Contd.*

The first mortgagee then sued on his mortgage and bought the property in execution of his mortgage decree. The first mortgagee afterwards sued the puisne mortgagee, and claimed that the puisne mortgagee should either give up possession or redeem him.

Held, that the suit was not barred by S. 244 C P C.

In order that S. 244 Civ Pro Code, should apply, the conditions must be fulfilled:

(1) The question must relate to the execution discharge or satisfaction of the decree or stay of execution thereof;

(2) The question must arise between parties to the suit or their representatives.

In the present case the question at issue arose only after the satisfaction of the original decree, and it was not between the parties to the same suit or their representatives but between representatives of the same party.

Held, also that the defendant being a puisne mortgagee, his only right was to redeem the plaintiff. He was not concerned with the account taken in the plaintiff's suit to which he was not a party nor was he concerned with the price paid by the plaintiff at his purchase (25 Bom 631; 20 Bom 390; 19 All 527 and 33 Cal 590 Ref).

Thakurdas Wd Mulchad v Gangaram Wd. Tolaram, I Sind L R 172.

(10) Applicability—Essentials.

145—C P C—S. 47=(1882—S. 244)-Applicability—Essentials:—S 244 does not apply to a case where the decree itself is impeached, and no appeal lies from an order dealing with such objection. **Tallaprasada Sundarappa v. Sreeramulu. 17 M L J 288=30 Mad 402**

(11) Interpretation—Setting aside sale order under S 244.

146—C P C S. 47; O 21, r. 92; S. 144 (1); S. 104 O. 43, r. 1=(1882 Ss. 244, 312 583 and 588) Restitution of mesne profits to judgment-debtor—Auction purchaser.

Held, that an order setting aside the sale is an order under s.244 and consequently could be treat-

C P C (1908) S.47=(1882 S.244)-*Contd.*

(1) Applicability. Effect & scope of the section—*Contd.*

ed as a decree and application under s 583. C. P. C., is maintainable. **Thakur Kamakhya Singh v. Munshi Prag Narain. 8 O C 254.**

(12) Interpretation decree execution of.

147—C P C S.47=(1882 s.244):—S.244 of the Code pre-supposes a decree enforceable by the decree-holder, against a person between whom and the decree-holder the question has arisen, and does not apply to a question arising between a decree-holder and a person against whom there is no decree to be executed. (23 All 346 Fol)

Hence, where, in a suit for sale upon a mortgage, a person was impleaded as defendant against whom no relief was claimed, *Held* that a subsequent suit for redemption by him was not barred by s. 244, C P C, 1882. **Sheo Pargas Singh v. Nawab Singh 7 A L J 264=5 Ind Cas 496= 32 All 321.**

(13) Construction.

148—C P C—S. 47=(1882 S.244)—The Court should construe s.244 liberally and widely. An assignee of a decree-holder is a representative within the meaning of this section. **Jamai Nath roy v. Dharma Das Sur. 4 C L J 192= 33 Cal 857.**

(14) Construction—Liberal to avoid multiplicity.

149—C P C-S. 47=(1882 Sec.244.)—Section 244 of the Civil Procedure Code ought to be liberally construed in order to avoid multiplicity of suits

Where a judgment-debtor does not challenge the validity of a decree but contends that in execution thereof certain property should not be attached and sold, in consequence of circumstances arising subsequent to the decree, such contention ought to be dealt with under section 244 Civil Procedure Code, and not by a separate suit. **Rajbansi Roy v. Mahabir Roy. 9 C L J 358. 4 Ind Cas 121.**

(15) Title, questions of.

150—C P C—When the defendants in execution proceedings in a decree for partition contended that certain lands were their own and not family property, *held*, that the question should have been decided in the execution proceedings. **Keshavrav v. Gangadhar. 1886, P J., 116.**

C P C (1908) S 47=(1882 S 244)-*Contd.*

(1) Applicability. Effect & scope of the section—*Contd.*

(16) Matters falling within S.244—Separate suit in respect thereof - Jurisdiction.

150A—C P C—S. 47=(1882 S. 244) Time for objection to the maintainability of suit.

Where the plaintiff instead of proceeding by way of execution filed a suit and such a suit has been tried by the very Court which could have dealt with the matter in execution proceedings.

Held that the Court has not acted without jurisdiction, even though there was already an application under S. 244, on which an order was passed against the person bringing the suit.

The question is only one of procedure and does not affect the jurisdiction of the Court.

An objection as to the maintainability of a suit should be taken in the original Court (19 W R 90; 14 Cal 605, 22 Cal 483, 22 All 121, 22 Mad 347; 28 Mad 64. Ref: 19 W R 90; 14 Cal 605 (608), Fol:) **Yenkatakrishnama Charlu v. Krishna Rao 32 Mad 425=4 Ind Cas 723.**

(17) Suit may be treated as an application under S. 244.

151—C P C S 47, O.21 r,90; S.99=(1882)S.244—Rent decree ex-parte, fraudulent—Sale, collusive—Limitation Act Sch, II, Art, 178—Time from which limitation runs—Purchaser, remedy of-Remand if proper.

An execution sale may be challenged on the ground of fraud in the execution proceedings; it may also be challenged on ground that the decree, on which the proceedings are founded, is itself tainted with fraud. In the fomer case, the remedy is by an application under section 221, in the latter case, the remedy is by a regular suit.

If the decree is tainted with fraud, a suit will lie to set aside the execution sale even though the decree may have been previously set aside under section 108 of the Code and there is no subsisting decree to be set aside in the suit in which the sale is impeached.

Cases can only be enquired into under section 244, when the existence of a decree which is susceptible and capable of execution is conceded, and it does not apply to a case, when the object is to impugn the decree itself.

C P C (1908) S 47=(1882 S.244)-*Contd.*

(1) Applicability, Effect & scope of—*Contd.*

If there was fraud in the execution proceedings it would be open to the party affected by the fraud to make an application under section 244, if instead of an application, he presents a plaint in the Court competent to deal with the matter, the defect is one of form rather than of substance, and there is no real want of jurisdiction.

The application to have the sale set aside under section 244, may be made within three years from the date of the sale, under Art. 178 of Schedule II of the Limitation Act.

Section 578 of the Civil Procedure Code cures the defect in an irregular order of remand made by an appellate Court unless the merits of the case are shewn to have been affected in any way by the order. **Debendra Nath Bhattacharjee v Prasanna Kumar Chakravarti. 5 C L J 328.**

Notes:—Ref: 17 M L J 288.

See also cases under Limitation Act 1908 Art 181.

Notes: See the Express provision now made in Para 2 of s. 47.

(18) Plaint could not be asked for in separate suit—Plaint can be treated as execution petition.

152—C P C S.47=(1882 Civ. Pro.Code, S.244) —Where reliefs claimed in the plaint.

Where it appeared that the reliefs claimed in the plaint could not, under S. 244, Civ. Pro. Code, be asked for in a separate suit, it was held that it was competent to the Court to treat the plaint as an execution petition. (11 M L J 70; 1 All 161; 27 All 203 (249); 12 C W N 687 Ref: 1 W & J 233; 2 Ch 294; 5 B H C 128 (138); 8 Cal 138 Ref:) **T. R. Genesha Rao v T. V. Tuljaram Rao, 4 M L T 288=19 M L J 4= 1 Ind Cas 380=6 M L T 325.**

(19) Circumstances under which plaint may be treated as an application under S.244.

153—C P C S. 47=(1882 S. 244).—

Plaintiff's father took a loan from the defendant. The latter sued the plaintiff and his brothers, after the death of the father to recover the money, and obtained a simple money decree, in execution of which certain ancestral property was attached. Objection was taken to the attachment, but was dismissed by two lower Courts, whereupon the sons appealed to the High Court. Pending the decision of the High Court, the plaintiff deposited money in Court, which was realised by defendant. The High Court held that, on the true construction of the decree, the property could not be attached and sold.

The plaintiff then brought the suit to recover the money newly, because of the decision of the High Court. *Held*, that the suit was not maintainable, and the plaint could not be treated under the circumstances as an application under S. 244, Civ. Pro. Code, 1882. **Sheo Narain v Lalta Prasad, 6 A L J 641=3 Ind Cas 495.**

(20) Claim by legal representative of defendant for land sold in execution to be investigated under S. 47=(S. 244).

154—A claim preferred by the legal representative of a defendant, in a suit asserting a charge on land sold in execution of the decree in that suit, to the extent to which he relieved it of liability under a mortgage, should be regularly investigated under S.244, Civil Procedure Code, and not summarily disposed of under the claim sections of the Code. **T. Subrarmanya Aiyar v. Manika Mudely, 2 Ind Cas 432.**

(21) Claim to deceased's property—Legal representative—Not forming part of assets—Determined under S. 244=S. 47.

155—The claim by a person, who has been brought on the record as a representative of a deceased judgment-debtor, to property on the ground that it did not form part of the assets of the deceased must be determined under S. 244 and not by a separate suit. **Lallu v. Lallu, 1896 P J 754.**

(22) Claim to attached property on behalf of idol, if triable in execution proceedings.

156—C P C S. 47=(1882 Sec. 244)—Shebait, personal decree against.

An objection of a shebait on behalf of the idol to the attachment of immoveable property in

C P C (1908) S.47=(1882 S.244)-*Contd.*

(1) Applicability. Effect & spcoe of—*Contd.*

execution of a decree passed against him personally is triable under section 244 of the Code of Civil Procedure. **Jogendra Nath Sirkar v. Gobinda Chandra Dutt,** 7 C L J 537= 35 Cal 364=12 C W N 310.

156A—C P C S 47; O 21, rr. 57, 62=(Ss. 244, 278, 283)—Applicability of S. 244—Party claiming attached property in his character as trustee —Appeal—Wakf—Decree directing sale of wakf property:—

S. 244 has no application to a case where the judgment-debtor or his representati e asserts in execution that he holds the property attached in trust for some third person or body of persons or religious charity or institution. The claim must be investigated under Ss. 278, 283, C P.C, and the order passed therein cannot be challenged by an appeal, but must form the subject of a separate suit: — **Budrudin Sahib v. Abdul Rahim,** 18 M L J 21=31 Mad 125= 3 M L T 325.

157—S. 244 of Civil Pro. Code—Its scope.—S. 244 only deals with those questions as can be determined finally in execution proceedings. If they cannot be so determined it is not applicable. The Court has to draw its attention to the substance of the objection and not to the fact that it is taken by one person rather than another. (17 Mad 399 considered; 17 Cal 711 and 23 Bom 237 referred to). **Ramanathan Chettiar v. Levvai Marakayar,** 23 Mad 195= 10 M L J 64.

Notes:—Ref: 17 M L J 377; 30 Mad 215; 8 C L J 20; 31 Mad 125=18 M L J 21.Dist: 26 Mad 501.

(23) Competency of party to impeach validity in execution—Jurisdiction objection to—Want of evidence.

158—A party to the suit is precluded in execution from impeaching the decree which has been passed without opposition and which has not been set aside But he may impeach it on the ground that the court passing the decree had absolutely no jurisdiction to pass it, and that,therefore, the decree was a nullity. Where a court has jurisdiction to pass a personal decree, the passing of such decree without any evidence in support thereof will not make it one passed without jurisdiction. (8 C P 533, 21 Bom 205, 27 Mad 118, Fol: 26 Mad 31 Dist:). **Rangasamy Naicken v. Tirupati Naicken,** 14 M L J 413=28 Mad 26.

C P C 1908) S 47=(1882 S.244)-*Contd.*

(24) Execution of decree--Objection by judgment-debtor to execution—Matters falling within the scope of section-Remedy by separate suit.

159—C P C S. 244.—

In an execution proceeding, the judgment-debtor contended that he was entitled to deduct a larger sum than was allowed by the decree-holder on account of the transfer of certain properties by him to the decree holder, and that the interest was erroneously claimed at a higher figure than what was due. There was also the question raised as to the date upon which credit ought to be allowed for the consideration money for the transfer.

Held, that these questions were covered by S. 244 of the Civ. Pro. Code, 1882, and the Court should not decline to investigate into them on the ground that the remedy of the judgment-debtor was by way of a regular suit. **Surendra Nath Dutt v. Kumar Manmotha Nath Mitter,** 9 Ind Cas 382.

(25) Powers of Court in executing decree —Validity of a decree cannot be disputed.

160—C P C S. 47=S. 244 of (1882).

The validity of a decree of which execution is sought cannot be disputed in execution proceedings under S. 244 of the Code of Civil Pro. (Act XIV of 1882). **Chintaman Vithoba v. Chintaman Bajaji Dev,** 22 Bom 475.

(26) Validity of decree cannot be questioned in execution.

161—C P C S. 47 (1908)=(Act XIV of 1882, S. 244).

The validity of a mortgage decree cannot be enquired into in execution proceedings for the sale of the mortgaged premises, but the Court is bound to fully notify in the proclamation of sale that a claim has been put forward based on the invalidity of the decree, and that any one purchasing would buy subject to any subsequent

C P C (1908)-S.47=(1882,S.244)-*Contd.*

(1) Applicability, Effect & scope of the section—*Contd.*

decree declaring the decree against the mortgaged premises invalid. **Ma Kyi v. U Maung Gyi, 8 Ind Cas 610.**

(27) Decree validity of—Execution of decree, scope of.

162—C P C S. 47=(1882 S. 244).—

No question touching the validity of a decree can be raised in the course of proceedings in execution of that decree. **Rashbehari Singh v. Thakur Joynanda Singh, 4 C L J 475.**

(28) S. 47 Excludes all questions relating to the validity of decree.

163.—C P C S. 47=[1882 s. 244]—Decree containing penal clauses—Relief against penalty in execution—Assign of decree—Res judicata.

Where a decree contains penal clauses, relief as against the penalty cannot be granted in execution proceedings. The general rule is laid down in s. 47 of the Code, which has been generally held to exclude all questions relating to the validity of the decree. **Dayaram Jesamal v. Adamji Karimji, 4 S L R 1=7 Ind Cas 583.**

163*A*—C P C S. 47 (1908)=(1882)—S. 244—Execution Court if can try the validity of certificate under Act I of 1895—Amendment of pleadings. (Public Demands Recovery). **14 C L J 83.**

163*B*.—C P C S. 47=[1882 s. 244]—Validity of a decree sought to be executed cannot be impeached in execution under S. 244. **Chintaman v. Chintaman, 1896 P J 584=22 Bom 475.**

Notes:—Fol 6 C W N 796. Ref: 30 Bom 101 =7 Bom L R 659; 29 Mad 553.

(29) Adjustment of decree out of court—Not certified to court.

164—C P C S 47, O XXI, r 2, cls. (2) and (3)—Fraud of decree-holder, whether Court can enter into investigation of—Limitation Act [XV of 1877], s. 18—"Kept from knowledge of right"—"Exercise of right"—Difference between—Substantial compliance with cl. [2], r 2, O XXI.

II C.C. 101

C. P.C.(1908)S.47=(1882, S.244)-*Contd.*

(1) Applicability, Effect & scope of the section—*Contd.*

If the adjustment of a decree out of Court has not been certified as required by r. 2 of O XXI of the Code of 1908, the Court executing the decree cannot take notice of it. In such a case it is not open to the Court to investigate, under S. 47 of the Code, allegations of fraud made by the judgment-debtor against the decree-holder.

Even if it is established that the conduct of a decree-holder is fraudulent, the judgment-debtor is not entitled to obtain an extension of the time within which to make an application to the Court under cl. 2 of r 2 of O XXI because the judgment-debtor is not, by means of fraud, kept from the *knowledge* of his right to make the application, within the meaning of S. 18 of the Limitation Act, but from the *exercise* of his right to make the application.

In such a case it is open to the judgment-debtor to institute a suit for damages for the fraud. [12 C W N 485, Expl. 21 Mad 356, Diss: 21 Mad 409, 29 Mad 312, Ref: 4 Ind Cas 402; 11 C L J 91; 14 C W N 357; 12 C L J 65; 7 Ind Cas 258; 7 Ind Cas 55; 12 C L J 312 and 7 Ind Cas 625, Fol: 10 Cal 354, Fol:] **Biroo Gorain v. Jainurat Koer, 13 Ind Cas 63.**

(30) No Bar to suit to recover damages for breach of contract-not to execute a decree.

165—C P C S. 47=[1882 s. 244]—The provisions of S. 244 of the Civil Procedure Code are no bar to a suit to recover damages for breach of a contract not to execute a decree. **Manager Hanmant Dantaya Prabhu v. Subbabhat, P J (1898) 278.**

(31) Whether a bar to a civil suit

166—C P C S. 47; O 21 r 92=[1882 Ss. 244 and 312]—Whether a bar to a civil suit.

A suit to set aside an irregular sale of property in satisfaction of a debt is a suit of a civil nature within the meaning of S. 11 of the Code of Civil Procedure and is cognizable by the Civil Court, and such a suit is not barred by the provisions of s. 244 or 312 of the Code of Civil Procedure. [14 Cal 9] referred to and followed. **Ram Taruck v. Mosahebate, 6 C W N 246 =29 Cal 94.**

C. P.C. (1908) S.47=(1882, S.244)-*Contd.*

(1) Applicability, Effect & scope of the section—*Contd.*

Notes:—Fol: 6 C W N 630. Dist: 33 Cal 84 =10 C W N 130=1 C L J 538. Appr: 33 Cal 451=10 C W N 347=3 C L J 235. Ref 34 Cal 787=11 C W N 745; 29 Cal 73.

(32) Bar-Auction sale-Setting aside of-for fraud by stranger—Jurisdiction.

167—C P C S. 47=(1882 S. 244)-No collusion between decree-holder and third party.

When a judgment-debtor applies to have an execution sale set aside alleging fraud on the part of the auction-purchaser who happens to be his agent, and such application is opposed by the decree-holder, the question to be determined must be investigated under S. 244 C. P C, although no fraud may be alleged as against the decree-holder himself, (3 C, W N 403 foll.)

Adhar Mani Dassi v Monmotha Nath Bose 6 C W N 279.

Notes.—Ref: 6 C L J 111.

(33) Decree on a mortgage—Sale certificate not included in the mortgage-Whether s. 244 Civ. Pro. Code, bar.

168—C P C S.47=(1882 s 244)-Sale certificate including lands not included in the mortgage-Suit to recover possession of such land.

Held, that section 244, though it bars suits for the determination of certain questions mentioned therein, does not bar the trial of any issue involved in those questions, if the issue is raised at the instance of a defendant in a suit brought against him. (24 Cal 355; 26 Cal 946 Fol:) **Venkatramanachariar v Meenakshisundramaiyer. 4 M L T 285=19 M L J 1 =1 Ind Cas 193.**

(34) Bar-Erroneously proceeding under S.278-Subsequent S. 283 is no bar for subsequent proceedings.

169—C. P. C. S. 47; O 21, r. 58=(1882 ss. 244 278).

Where, a party to a suit erroneously proceeds under s. 278 instead of under s. 244, and his objection fails, s. 283 is no bar to his subsequent exercise of his rights under s 244. (15 C P L R 106 Fol. 39 Cal 696, and 30 Cal 135 dissented from 33 P L R 4 C1Cl 605; 22 Cal 483; 22 All 121

C P C. (1908) S.47=(1882 S.244)-*Contd.*

(1) Applicability, Effect & scope of the section—*Contd.*

22 Mad 347; 17 C P L R 1; 23 All 346; 12 Cal 458; 6 Bom 54; 6 All 269; 22 Cal 948; 22 Mad 259 Referred). **Balaram Kunbi v Sadoba Mali. 17 C P L R 178.**

(35) Execution of decree-Party to suit proceedings under Ss. 278 & 283-Refusal of court to consider plaint under s. 283 as application under s. 244.

170—C. P. C. S, 47, O. XXI, rr. 58, 63 (=Civ Pro Code, 1882, ss. 244, 278, 283).

Where a party, defendant to a suit, instead of applying under s. 244, of the Code of Civil Procedure for the exemption of certain property which he wished to save from execution filed an objection under s. 278 and subsequently on his objection being disallowed, brought a suit under s. 283, which he fought up to a second appeal, the Court held that this was not a case in which the plaint in the suit might be treated as an application under s. 244. (22 All 121. Dist.) **Puran Chandra v Bawan Das. A W N 1900, 196.**

(36) Suit barred under-Whether it can be treated as an application

171—C P C S 47=Civil Procedure Code (Act XIV of 1882), s. 244.

Where a plaint is barred under section 244 C. P C. it may be treated as an execution application under that section. **Poonthotath Ammalu Amma v Othalakattil T Mammi Kutti. 7 M L T 428=6 Ind Cas 776.**

(37) Property attached—Legal representative-Plea that property attached is trust property—Appeal—Execution of decree.

172- C. P. C. S. 47, O. 21, rr, 58, 60, 63=(1882 ss. 244, 278, 280 and 283)

An objection raised by the legal representative of a deceased judgment-debtor to the effect that the property attached is not the deceased's but that it is trust property which he holds as trustee, is not an objection falling under s. 244 of the Code, but under s. 278 of the same, and an order passed thereon is not appealable as a decree under s. 244, Civil Pro Code. (12 All 313 Fol.) **Ali Sajjad v Bhajan Singh. 3 A L J 370=A W N (1906) 157.**

C P C.(1908)S.47=(1882, S.244)-*Contd*

(1) Applicability, Effect & scope of the section—*Contd.*

173- C. P. C. (1908), S. 47, O. XXI, r. 50 = Civ. Pro. Code (Act XIV of 1882), ss. 244, 258—Judgment-debtor, objection by, how to be treated —Objection on the ground that judgment-debtor was holding property as trustee for religious purposes—Appeal against an order dismissing judgment-debtor's objection.

Where a judgment-debtor sets up a claim to the effect that the certain property attached in the execution of a decree is in his possession, not on his own account, but on account of or in trust for some other person, and in particular where he claims that the property in question has been set apart for religious charitable purposes and is held by him as a trustee, his objection must be treated as falling under O XXI, r 58 of the Code of 1908 (corresponding to s. 278 of the Code of 1882) and not under s. 47 of the Code of 1908 (corresponding to s. 244 of the Code of 1882). Consequently, no appeal lies from such an order.
Sajid Ali v Ali Mohammad Khan.
12 Ind Cas 411

(38) Order absolute for sale—Objection to execution of decree.

174—C. P. C. S. 47=(1882 S. 244)—Transfer of Property Act, s. 89.

Held, that an application under s. 89 of the Transfer of Property Act, for an order absolute for sale is an application for execution of the decree. **Allah Rakhi v Ranjit Singh.**
4 O C 123.

175—C. P. C. S. 47=1882 s.244 (c)-'Relating to the execution of a decree'—Order setting aside a sale in execution.

An order setting aside a sale in execution of a decree is an order relating to the execution of a decree within the meaning of S. 244 (c) C, P. C.
Monmohini Dasi v Lakhinarain Chandra.
(1900) 28 Cal 116.

176—C P C S. 47 (1908)—S made a gift of immoveable property to his two sons (the plaintiffs) then minors by a deed of gift dated 22nd January 1883. The said deed of gift was duly registered. Some years after this, S mortgaged the property to the defendant. The latter sued on his mortgage and obtained an *ex parte* decree for sale against the plaintiffs and their mother as

C P C (1908) S.47=(1882, S.244)-*Contd.*

(1) Applicability, Effect & scope of the section—*Contd.*

heirs of S. The plaintiff filed the present suit to have it declared that the mortgages were void and that the plaintiffs were entitled to the property under the said deed of gift:—

Held, that the order for sale under S. 89 of the Transfer of Property Act has nothing to do with the Civil Procedure Code, and the proceedings under s. 89 of the Act were not the proceedings in execution of a decree but in continuation of the original suit. **Mahomed v Bai Coverbai**
6 Bom L R 1043

(39) Decree absolute-Decree Execution—Decree nisi-C P C of 1882 s. 244

177—C P C s. 47=(1882)—An application for redemption or foreclosure under a decree *nisi* is not an application in execution under the Civil Procedure Code but must be made in Court under the Transfer of Property Act; and until a decree *nisi* is made absolute there is no decree capable of execution. (21 Cal 818; 22 Bom 77 Fol:)
Sir Jehangir v The Hope Mills Ltd.
10 Bom L R 1057=33 Bom 273=2 Ind Cas 296.

(40) Execution of decree—Fraud.

178—C P C—S. 47=(1882 S. 244)—Auction-purchaser, not a representative of the decree-holder.

Held, that, the question whether a fraud has been committed in an execution sale, either by the decree-holder alone or by the decree-holder and auction-purchaser together, is one triable under s. 244. But the question whether a fraud has been committed in connection with such a sale by auction-purchaser alone is not triable under that section.

Held further, that an auction-purchaser is not representative of the decree-holder (19 Cal 685; 24 Cal 707 Ref). **Muhammad Ahmad Jan v Bank of Upper India.** **12 O C 175 (B)**

(41) Alleged fraudulent execution of decree.

179—C P C (1908) s. 47=S. 244 of (1882) —Separate suit.

Certain property in the 24-Pergunnahs having been seized and sold in execution of a decree of

C P C (1908)-S.47=(1882,S 244)-*Contd.*

(1) Applicability, Effect & scope of the section—*Contd.*

the High Court, application was successfuly made to the District Judge to set aside the proceedings, on the ground that the execution was fraudulent and not warranted by the decree. *Held* that the Judge had no right to entertain such an application, or to re-open, at the instance of a third party, execution proceedings which had come to an end. The question could only be determined in a regular suit. **Luchmeeput Singh v Adoyto Churn Mullick. 24 W R 452.**

See Jogenarain Singh v Bhugbano. 2 W R Mis 13.

180-C P C S. 47 of 1908=(1882)S. 244-Fraud ground of application to set aside sale.

A judgment-debtor applied to have the execution sale set aside. He alleged certain circumstances which if found to be true would amount to fraud of the judgment-creditor or auction-purchaser. His application can come under S 244 although the question is between him and the auction purchaser who was not the decree-holder. (19 Cal 683 referred to.) **Nemai Chand Kanji v Denonath Kanji. 2 C W N 691.**

Rojoni Kant Bagchi v Hossani Uddin Ahmed. 4 C W M 538.

Notes:—Ap: 26 Cal 324: 539; 6 C W N 279; 283. Ref: 27 Cal 197; 28 Cal 4; 4 C W N 538; 5 C W N 124; 31 Cal 385; 5 C L J 328.

(42) Effect of satisfaction of decree.

181-C P C S. 74 of 1908=(1882) S 244—

The satisfaction of a decree prevents an application under S. 244 C P Code; because then there is no decree in existence, **Rash Behary Mondal v Rakhal Charan Mandal 1 C W N 708.**

(43) Satisfaction of decree not certified owing to decree-holder's fraud-Application after time to have certified.

182—C P C S. 47 (1908); O 21, r 2; S. 47 =(1882 Ss. 258 and 244.) Questions in execution of decree—

S. 258, of the C P, C. prevents an executing Court from taking cognizance of an uncertified adjustment of a decree. (8 C W N 395=31 Cal 480, *Expl;* 20 Cal 32; 15 Mad 302, Fol).

Where, however, the judgment-debtors complained that the decree-holder had by fraud kept them in ignorance till, within a month of their application, of the fact that the satisfaction of the decree had not been certified

Held,—That the matter could be investigated under S. 244 of the C P C. (19 Cal 683 Fol.). **Gadahar Panda v Shyam Churn Naik, 12 C W N 485.**

(44) Execution proceedings—Jurisdiction of Court to certain application after full satisfaction of the decree being entered.

183--C P C S.47. 1908—Procedure—Review-Appeal—Appeal from an order of declining to review the previous order.

Section 244 of the Civil Procedure Code does not apply to a Court which has fully executed a decree and has thereby become *functus officio*, it applies only to a Court executing a decree at the time when an application connected with execution is made; therefore, where a judgment-debtor after the final settlement had been effected and the execution proceedings terminated, full satisfaction of the decree being entered and the execution record being consigned to the Record-room, made an application to the Court for the refund of a certain amount alleged to have been recovered from him by the decree-holder in excess of the sum due under the decree, *held*, that the only course open to the judgment-debtor was to apply for a review of the order declaring the decree sasisfied and striking off the execution proceedings, but that where no objection to jurisdiction had been taken in the Court below and the *forum* for the application for review was the same as the form selected by the judgment-debtor for the application for refund, the latter application might be treated as an application for review.

Held, further, that an order declining to review a previous order was not appealable.

(10 Cal 538, 24 W R 193, and 14 Cal 605, followed. 80 P R 1893 distinguished.) **Chaudri Gurmukh Singh v Mussammat Mirza Nur 63 P R 1901=101 P L R 1901.**

(45) Payment not certified within time, how proved

184-C P C S.47 (1908); O 21 r 2: S. 47 (1882 Secs 244, 258)—Questions in execution of decree.

C.P.C.(1908)-S.47=(1882, S.244)-*Contd*

(1) Applicability, Effect & scope of the section—*Contd.*

A payment not duly certified under section 258, Civil Procedure Code, cannot be proved under section 244 where no application under the former section has been made within the period of limitation prescribed by Article 173A. To hold otherwise would be to render the Article null and void. (9 C L J 271, Fol: 30 Cal 979; 25 All 361 Dist: 8 Cal 218, Fol: 31 Cal 480; 31 Cal 437 Dist and Expl: 12 C W N 485, Dist: 20 Cal 32: 15 Mad 302, *relied upon.*). **Kamini Debi v Aghore Nath Mukherji. 11 C L J 91= 4 Ind Cas 402.**

(46) Satisfaction of decree not certified—Suit for declaring that decree is satisfied-Maintainability.

185—C P C—S. 47, O 21 r 2=(1882 Ss. 244, 258)—Specific Relief Act s 56.

S. 258, C P C, does not limit the operation of s. 244. A separate suit will not lie to declare that a decree has been satisfied though such satisfaction has not been certified under s. 258, C P C., *Per Hill* J:—s 56 of the Specific Relief Act precludes the court from granting an injunction proceedings in this case(21 Cal 437 approved of; 19 Cal 683: s c 19 I A 166 ref to; 15 Mad 302 followed.) **Dinabandhu Nundy v Hariman Dassee. 8 C W N 395=31 Cal 480.**

Notes.—Ex: 12 C W N 485.

186—C P C S. 47 (1908)—O XXI r 2 (=Civ Pro Code, 1882 Ss. 244, 258)—Decree, Execution of, application for—Certificate of adjustment—Application, if can be treated as one under s. 258—Fraud-Damages.

The provisions of s. 258—Civ Pro Code 1882, are express, and no payment or adjustment shall be recognised by the execution court unless it has been certified and therefore an alleged adjustment relied on by the judgment-debtor is no answer under s. 244 of the said Code to an application for execution of a decree. The application cannot be treated as one under s. 258 of the Code. If in point of fact the decree-holder agreed with the judgment-debtor that the matter should be settled between them, than if he broke, that agreement he would be liable for an action for damages **Bajrang Biharilal v Lachmi Narain. 15 C L J 88**

C.P.C.(1908)-S.47=(1882, S 244)-*Contd*

(1) Applicability, Effect & scope of the section—*Contd.*

(47) Decree satisfied—Application by judgment-debtor for refund on the ground of fraud-Jurisdiction of the Court.

187—C P C S. 47 (1882 s. 244).

A Court, to which a decree has been transferred for execution, is competent to entertain an application, by a judgment-debtor, to the effect that, when the decree was executed, it was barred by time, and he paid in the decretal amount on account of the fraud practised upon him by the decree-holder, in not mentioning the fact of a previous application being dismissed as barred by time, and asking for a refund of the amount paid by him. The jurisdiction of the Court does not cease by the fact that satisfaction of the decree was entered and execution proceedings had terminated. (24 All 239 Fol.) **Panna Lal v Chakkan Singh. 4 A L J 142=A W N (1907) 65.**

(48) Right of party-Defendant to object to-sale of property ordered to be sold by the decree.

188—C P C S. 47=(1882 s. 244 (c).

Where the objection is to the decree itself and not merely to the execution, discharge or satisfaction of the decree, s. 244 (c) does not apply to the case. Where a party defendant to a decree for sale of immoveable property objected to the sale on the ground that since the decree he has been adopted into another family and became entitled to the property as member of the adoptive family to which the property belonged: *Held* that the objection was to the decree itself and not to the execution, discharge or satisfaction merely, and that s. 244 (c) did not apply to the case. (19 All 480; 21 All 277; 25 Cal 133; 32 Cal 265 Fol: 7 Mad 255 Dist.)**Chinnaswamy Servaigaran v Sabapathy Chettiar. 30 Mad 26 =16 M L J 545.**

Notes.—Ref: 31 Mad 125=18 M L J 21= 3 M L T 325; 32 Mad 429=19 M L J 401=2 Ind Cas 18.

189—C P C S. 47; O 21. rr 88; 90=(1882 Ss. 244, 310, 311).

An application seeking to have the sale set aside on the ground that no notice had been issued to the applicant in the matter and that in

C. P.C.(1908)S.47 (1882, S.244)-*Contd.*

(1) Applicability, Effect & scope of the section—*Contd.*

consequence the property was sold at an undervalue, does not fall within the purview of s. 311 of the Civil Procedure Code, 1882; and an order dismissing the same is not covered by s. 312 of the Code. The order falls under s. 244 (c) of the Code, and is appealable as a decree.

The circumstance that a decree has already been executed does not make S. 244 (c) of the Code inapplicable where the question involved is none the less a question relating to the satisfaction of the decree. **Parashram v Balmukund 10 Bom L R 752=32 Bom 572**

(49)Decree-Execution proceedings against a surety.

190-C P C S. 47 of 1908=(1882)Ss, 244 & 253.

Where a surety has become liable for the performance of a decree passed prior to his entering into the obligation he cannot under S 253 of the Civil Procedure Code be proceeded against in execution of the decree. **Lakshman v Gopal. 8 Bom L R 367=30 Bom 506.**

191.—C P C S. 47=(1882 s. 244).

In an appeal against a presumption decree, the Court ordered execution to be stayed on appellant giving security for payment of mesne profits.

Held, that the surety could be proceeded against by way of execution: separate suit is not necessary. (109 P R 1906 (F B)=1 P L R 1907 Fol.) **S Faqir Ali Shah v Jassue Ram. 113 P L R 1909.**

192—C P C S.47. 1908=(1882 S. 244) Parties to Suits Surety.

A decree cannot be executed against one who. after decree passed, becomes surety for its performance. **Bunsidhar v Behari Lall. P R 62 of 1871.**

193—C P C S. 47 (1908)=(1882) S. 244,—Execution—Surety—Order under s. 253—Appealable as under Ss. 47, 52, 55=(1882 s. 244, 252, 336 and 349)—Security given under s. 336—Applicability of provisions of s. 253 to realization of security under s 336—Order directing security to be realized—Decree—Appeal.

An order against a surety under s. 253 C.P.C. is appealable in the same manner as orders passed under s. 244 C. P. C., in execution of decrees. S. 336 C. P, C. extends the provisions of s. 253 C. P. C, to the enforcement of the bond against the surety and an order against a surety under s. 336 is also, therefore, appealable. Where the Judgment-debtor applies within one month to be declared an insolvent the surety under s. 336 is discharged. (24 Mad 560, and 26 Mad 366 followed.) **Raja Ram v Bapu Chettiar. 13 M L J 484.**

C. P.C. (1908)S.47=(1882, S.244)-*Contd*

(1) Applicability. Effect & scope of the section—*Contd.*

194—C P C S. 47=(1882 s. 244)—Recovery of money from a surety of the judgment-debtor—Application in execution—Separate suit.

S brought a suit to recover arrears of maintenance and for declaration that her maintenance be made a charge on the family property in the hands of her husband's brother's sons. She succeeded. In the meanwhile one of the sons of her husband's brother sold some of the property to plaintiff who brought a suit to recover possession of the same, and as S sought to execute her maintenance decree against the property purchased by plaintiff she was added a co defendant. During pendency of plaintiff's suit in appeal he applied for an injunction to stay the execution of S's decree The Appellate Court ordered plaintiff to pay the decretal amount to S, on the latter furnishing a security and on condition that if the suit be decided against her she should refund the same to the plaintiff. The suit was decided against her; whereupon plaintiff applied for a refund of the said amount.

Held, that the proper remedy to recover the amount was by an application in execution of the decree of the Appellate Court and not by an independent suit. **Anant v Narayan. 3 Bom L R 549.**

(50) Execution against one who undertakes to satisfy a decree.

195.-C P C S. 47.1908=(1882) S. 244 Parties to suits—

Plaintiff obtained a decree against A personally for a sum of money. B., on the ground that A. was his (B'. s) agent, and that the subject matter of the suit concerned B. and not A.,agreed to satisfy the decree. *Held*, that execution of the decree could not be had against B., whose undertaking might furnish a separate cause of action. **Diwan Ram Chand v. Muhammad Sultan. P R 75 of 1876.**

C P C (1908) S.47=(1882 S.244)-*Contd.*

(1) Applicability, Effect & scope of the section—*Contd.*

(51) Mortgage decree, execution of, against the successor of the judgment-debtor—Fresh suit, if necessary, successor claims by survivorship-decree.

196.—C P C S. 47=(1882 s. 244)—When successor claims by survivorship under the Mitakshara Law.

A mortgagee is entitled to execute his mortgage decree against a successor of the judgment debtor, even when he holds the property by survivorship under the Mitakshara Law, without bringing a suit for a declaration that the property in his hands is liable to be sold in execution of the mortgage decree. It is open to the successor to take the very defences in execution proceedings which he might take in a fresh suit.

Chandra Prosad v. Sham Kocri 33 Cal 676=3 C L J 131.

Notes.—Ref: 5 C L J 491 F B; 11 C W N 593 F B; 34 Cal 642 F B; 19 M L J 401; 32 Mad 429.

(52) Survivorship-Decree against father—Execution against son.

197.—C P C S. 47=(1882 s. 244)-Hindu Law—Mitakshara.

A Mitakshara son, who has succeeded by right of survivorship, may be brought upon the record of the proceedings in execution of a decree against his deceased father, and execution can be carried on against the properties in his hands, coming by descent or survivorship, unless he can successfully raise the plea of illegality or immorality. (34 Cal 642 (F B); 11 C W N 593; 5 C L J 491; 2 M L T 207 rel on. 5 Cal. 148: 6 I A 88. 4 C L R 226; 18 Cal 157 (P. C.) 17 I A 195: Dist. 11 C W N 163; 5 C L J 80: 34 Cal 642. (F B.); 11 C W N 593; 5 C L J 491; 2 M L T 207 overruled).

Ratishwar Singh v Gulab Chand. 6 Ind Cas 582

(53) Partition decree-Partition under a decree.

198.—C P C S. 47 (=s. 244, Civ. Pro. Code, 1882.) Suit—Application.

Where a partition in interest is once effected by a decree between the co-parceners, a suit, and not an application under s. 244 of the Civ. Pro Code, is the proper procedure whereby to obtain a partition by metes and bounds.

Lade v Sadashiva, 6 Bom L R. 35.

C P C (1908) S.47=(1882 S.244)-*Contd*

(1) Applicability, Effect & scope of the section—*Contd.*

(54) Cancellation of license—Decree in favour of licensee—Compensation.

199.—C P C S. 47=(1882 s. 244)—Under s. 27 of Madras Act IV of 1889.

In a suit against the Secretary of State, for cancellation of his order resuming certain salt-pans and for possession. Plaintiff got a decree for possession, if the defendant failed to pay the value of the proprietary right in the land. *Held*, the Court executing such decree is competent to determine the value of such proprietary right and no separate suit was necessary.

Collector of Chingleput for the Secretary of state v Subraya Mudaliar. 29 Mad 181.

(55) Decree-Order to punish for contempt.

200.—C P C S. 47=(1882)—Ss. 244—622—Proceedings by the Court in the exercise of its inherent power to punish for contempt, do not come under S, 244; and an order passed therein is not a decree within the meaning of S. 2.

Godu Ram v Suraj Mall, 2 A L J 16 and 18=A W N (1905) 9 and 10 =27 All 378 and 380.

(56) Contempt. motion for execution of decree.

201-C P C S. 47 [1908]-Where there is a genuine dispute between the parties about the right way of executing a decree, it should be formally dealt with under S. 244 of the Civil Procedure Code 1882, and not brought indirectly and incidentally before a Judge on a motion for contempt.

Jamsetji v Sorabjee. 9 Bom L R 1361.

(57) Compensation for injury caused by irregularity in conducting sale of Questions for Court executing the decree.

202.—C P C S. 47=1882, S, 244.

Though Section 298 of the Civil Procedure Code allows a judgment-debtor to sue for compensation for injury sustained by him by reason of

C P C (1908) S. 47=(1882 S. 244)-*Contd.*

(1) Applicability, Effect & scope of the section-*Contd.*

any irregularity which has occurred either in the publishing or conducting of a sale of moveable property, that section must be read with Section 244 of the Code, which prohibits a suit from being brought to decide any questions between the parties which ought to have been decided by the Court executing the decree. **Atma Ram v Gulab, PR 14 of 1886,**

(58) Execution of decree-Power of Court executing transferred decree to implead representative of deceased judgment-debtor -Jurisdiction of-Court to execute decree in excess of the limits of its pecuniary jurisdiction as an original Court,

203.—C P C S. 47=Civil Procedure Code 1882, Ss. 244, 228, 232, 234, 235, 248—Court which passed the decree-Application for execution dismissed for default-Subsequent application without fresh certificate from Court which passed the decree.

The amendment of Section 244, Civil Procedure Code, by Section 26 of Act VII of 1888, has had the effect of practically doing away with the necessity of resorting to the Court which passed the decree, when the execution of such decree is pending elsewhere in order to implead the representative of the judgment-debtor if he happenes to die while execution is going on. In such a case, the Court executing the decree is enabled by virtue of the said section to implead such representative, and is not debarred from so doing by Section 234 of the Code, which is at best imperative only when no execution is pending but the decree has not been fully realized.

An application for execution of a decree which had been transferred to a Court for execution was consigned to the Record room by an order in the following terms:—'There has been no attachment, nor has property been pointed out on the spot, decree-holder or his mukhtar not present. Let the file be sent to the Record-room (*Ithaza misl dakhil daftar hoe*)". A subsequent application for execution having been made to the same Court and granted, it was objected on appeal that in consequence of the order above set forth the executing Court had become *functus officio* and could not proceed with the exeution without a fresh certificate from the Court which passed the decree.

C P C (1908) S. 47=(1882, S. 244)-*Contd.*

(1) Applicability, Effect & scope of the section—*Contd.*

Held, that the effect of such order was merely that the application "was struck off" the file of the business pending in the Court, but that the case really continued pending in the Court, which was therefore competent to proceed with the execution on a fresh application made to it within time.

Quære:-Whether as the law now stands, a Court to which a decree has been sent for execution has jurisdiction to execute such decree when it is in excess of the limits of its pecuniary jurisdiction as an original Court. **Gopal Das v Mussammat Gulab Devi. 70 P R 1897,**

(59) Duty of Court to construe the decree and not to re-try the suit.

204.—C P C S 47=Ss. 244, 13—Res judicata —Estoppel.

Held, that it is not necessary for the application of s. 13 Explanation II, Civil Procedure Code that the matter in question should have been finally heard and decided in the previous suit. *Held*, that Explanation II to s. 13 did not apply in this case All the cases to which, notwithstanding that the matter in question had not actually been heard and finally decided in the previous suit that explanation was applied, are cases in which the party against whom it was sought to apply the rule of Explanation II was unsuccessful in the previous suit. It cannot be applied against a person who in the previous suit has been successful. *Held* that disclaimer of title will not *per se* operate as an estoppel. *Held*, that under s. 244 Civil Procedure Code, it is the duty of a Court to construe the decree and give effect to it, not to re-try the suit. **Raja Ewaz Ali Khan v Bakar Khan 1 O C 22,**

(60) Application for execution of a decree-Findings issu s in a suit for mesne profits could be acted upon on the same issues in the execution proceedings of other suit.

205.-C P C S. 244 (c)-Another suit for mesne profits between the same parties.

The applicant applied for the execution of a decree for possession of a piece of land in the capacity of heir of the decree-holder under a will made in his favour by the decree-holder. Pending this application he brought a suit against the

C P C (1908) S 47=(1882, S.244)-*Contd.*

(1) Applicability, Effect & scope of the section—*Contd.*

same judgement debtors (opponents) for the recovery of mesnè profits of the same land. In this suit the question as to the validity of the will was gone into and decided in favour of the applicant. The Court, thereupon, granted the application for execution, taking into consideration the judgment as to the validity of the will in the suit for mesne profits and without taking any further evidence on the point in the execution proceedings.

Held, that the Court was justified in doing so, under S. 244, cl. (c) of the Code of Civil Procedure. **Bhawanishankar v Naranshankar. 1 Bom L R 36=23 Bom 536.**

(61) Sale of holding—Application to set aside sale on ground that holding was not transferable.

206—C P C S. 47 [1908]-Limitation-Want of judgment-debtor's knowledge of the order for sale—Civ. Pro. Code (Act XIV of 1882), S. 244.

When a judgment-debtor seeks to set aside a sale on the ground that the holding sold was not transferable, the application is one made under S. 254, C P C 1882, and may be presented within three years from the date of sale.

Before the judgment-debtor can ask for reversal of the sale, it has to be proved that he was not aware of the order for salè, because if he was aware of the order, he ought to have prevented the sale by an objection taken at the proper time (26 Cal 727; 3 C W N 586 Fol:) **Sadek Sardar v Kali Prasanna Saha. 7 Ind Cas 48**

(62) Purchase by Mortgagee decree holder benami in contravention of conditions imposed by Court-Fraudulent purchase.

207-C P C S. 47, O. 21, r. 72 (O C Ss. 244. 294)—Auction purchase by mortgagee decree-holder benami in contravention of conditions imposed by Court when granting leave to bid—Suit for possession by purchaser—Defence of fraudulent purchase—Onus. **Thathu Naick v Kondu Reddi. 32 Mad 242.**

(63) Receiver taking possession-wrongly

208-C P C S. 47 of (1908)=s. 244 (1882).

If a receiver appointed in pursuance of a decree

II C. C. 102

C P C (1908) S.47=(1882, S.244)-*Contd*

(1) Applicability, Effect & scope of the section—*Contd.*

taking possession of property other than that which he is entitled to take into possession the owner of the property has his remedy but not in execution of the decree. **Sevak Kirpashunker v Manohar. 1893 P J 440.**

(64) Commissioner's fees—Nature of order to be passed—Right of commissioner to proceed in execution.

209-C P C S. 47, O 26 r 15 (= Civ. Pro. Code 1882 ss. 244, 397)—

Where a Commissioner is appointed, the Court should provide for payment of the fees to the Commissioner into Court before the commission is proceeded with, or it is open to the Commissioner to sue to recover the money. An order for payment of fees to the Commissioner is not an order which can be executed at the instance of the Commissioner as if he were party to a decree. Where an appeal was preferred from an order granting execution of an order directing the payment of fees due to a Commissioner, it was not open to the Commissioner, who set the Court in motion, to say that his application was not made under s, 244 of the Code and that no appeal lay from the order granting execution **Venkatanarasimhulu v Narasimhamurti 10 M L J 241.**

(65) Perpetual injunction, execution of decree for, on each successive breach of decree-Executing Court, duty of, not to go behind the decree.

210-C P C S.47, O 21 r 32 (1882 s. 260)-Limitation of three years from every breach—On obtaining a decree for perpetual injunction, the holder of it may enforce the same on each successive breach of the injunction, under S, 260 of the Code and an application to so enforce it must be made, under Art. 178, Sch. II of the Limitation Act, within three years of the date of the particular breach of it which is the occasion for the application. The decree-holder, however, is not obliged to take action in regard to every petty infringement of the injunction on pain of allowing the decree to become altogether inoperative after three years from the date of the first petty breach and depriving the decree-holder of the fruits of his decree if a serious infringement of it were afterwards made.

C P C (1908) S.47=(1882,S 244)-*Contd.*

(1) Applicability, Effect & scope of the section—*Contd.*

Held, also, that it is not competent for an executing Court to go behind the decree, but such Court ought to give effect to the terms of the decree, without attempting to read into its limitations gathered from a reference to the records of the suit in which the decree was passed.

Venkatachallam Chetty v Veerappa Pillai. 29 Mad 314

(66) No necessity of fresh name on record.

211—C P C S. 47 of (1908)=s. 244—

Held, that it was a matter that can be dealt with under S. 244 of the Civil Procedure Code and did not involve the necessity of placing any fresh name on the record or determining what share the assigning plaintiff was entitled to in the lands decreed to the plaintiffs jointly.

Rangrao v Venkatrao. 1887 P J 146.

(67) Evidence admissible under, not restricted to documents on record.

212—C P C S. 47 of 1908=s. 244 of 1882-Clause (c)—

Held, that there is nothing in the law to restrict the evidence admissible under Section 244, clause (c) of the Civil Procedure Code to documents already upon the record **Bhagat Ram v Chint Ram. P R 28 of 1885.**

(68) Disputes in relation to execution also disputes before execution

213 C P C S 47=S. 244-Execution of decree-

In July 1895 the respondent obtained from the Rent Court a decree for Rs. 251-8-6 against the appellant, and in November 1896 realized the amount of his decree from a sum of Rs. 300 standing in deposit to the credit of the appellant, when full satisfaction was entered upon the decree some other creditors of the appellant brought a suit against the respondent alleging that they also were entitled to a portion of the Rs.300 in deposit. The appellant was a party to that litigation. The suit was decreed against the respondent, who again applied for execution of his decree against the appellant. *Held*, that the decree was capable of execution. S. 244 of the Code of Civil Procedure applies as well to a dispute arising between the parties contemplated by that section in relation to the execution of a decree after it has been

C P C (1908) S.47=(1882 S.244)-*Contd.*

(1) Applicability, Effect & scope of the section—*Contd.*

executed, as it would lead to a dispute between such parties relating to the execution of a decree before it had been executed. **Ram Kumar v Deputy Commissioner, Gonda, Manager, Ram Nagar Estate. 2 O C 366.**

(69) Miscalculation-Costs under decree -Application for execution with reference to costs.

214—C P C S. 47=s. 244.

When an execution of a decree was struck off as fully executed though, through miscalculation of the Court, the costs realizable under the decree had remained unrealized, it was *held* that the decree-holder could either apply for a revival of the execution case, or make a new application for execution with reference to the costs. **Seth Gopal Dass v Rao Naorihat Singh. 1879 Select Cases Part X No. 45**

(70) Assignee of decree-Whether separate suit lies, a question not of any practical importance-Equitable defences.

215—C P C S 47; O 2 r 21-

If an application under r. 2 of O 21 is not made within time the party concerned cannot indirectly obtain an extension of the period on the ground that the question falls within the scope of s. 47 and may be determined thereunder.

Where the contest lies between the assignee of the decree and the execution purchaser and the latter makes allegations of fraud and conspiracy between the decree-holder and the judgment-debtor O XXI, rule 2, does not apply and the matter may be investigated under s. 47.

The question whether the question of fraudulent assignment, is to be determined in execution proceedings or by a suit is not of any practical importance where the Court, in which the question has been raised, is the Court competent to execute the decree as also to entertain the suit. The matter is one of form, and the Court will not, by a strict adherence to the form defeat the ends of justice.

Under s. 49 of the Code, the assignee of a decree stands in no better position than the assignor. 8 Cal 51; 11 C L R 113; 8 I A 123;

C P C (1908) S 47=(1882 S.244)-*Contd.*

(1) Applicability. Effect & spcoe of the section—*Contd.*

6 All 269, 11 I A 37; 7 All 102, 11 I A 181 Fol. **Mon Mohon Karmakar v Dwarka Nath Karmakar. 7 Ind Cas 55=12 C L J 312.**

(71) Applications made by judgment-debtor.

216—C P C S 47=s.244-Applicability of section.

The provision in s. 244 of the Code of Civil Procedure that questions arising between the parties to the suit and relating to the execution, discharge, or satisfaction of a decree shall be determined by order of the Court executing the decree relates not only to proceedings initiated by the decree-holder, but also to applications made by the judgment-debtor. **Erusappa Mudaliar v Commercial and Land Mortgage Bank. 23 Mad 377.**

Notes—Disap. 24 Mad 96, 12 M L J 390 Over: 27 Mad 428. Ref: 17 M L J 163, 6 C L J 320 F B; 11 C W N 1011 F B, 30 Mad 313; 35 Cal 61 F B.

217—C P C s. 47=Ss.244 and 258—Transfer of Property Act,S,60-Money decree against mortgagor -Execution-Mortgagee purchasing in Court sale -Application to enter satisfaction-Equity of redemption.

The provision in S. 244, Civil Procedure Code, that all questions relating to the execution, discharge or satisfaction of a decree must be determined by the executing Court applies not merely to questions arising in the course of proceedings initiated by the decree-holder, but also to those arising in the course of proceedings set on foot by the judgment-debtor. **Erusappa Mudaliar v The Commercial and Land Mortgage Bank. 23 Mad 377,**

Notes-Disap: 24 Mad 96, 12 M L J 390, Over, 27 Mad 428. Ref 17 M L J 163; 6 C L J 320 F B; 11 C W N 1011 F B, 30 Mad 313; 35 Cal 61 F B.

218—C P C s. 47=s. 244-Suit for contribution against joint judgment-debtor.

S. 244 of the Code of Civil Procedure does not apply to a suit brought by one of two joint judgment-debtors who has been compelled to satisfy the decree in full against the other joint judgment-debtor for contribution. **Ram Saran Pande v Janki Pande. 18 All 106 15 W N 240.**

C P C (1908) S.47=(1882 S 244)-*Contd.*

(1) Applicability. Effect & scope of the section—*Contd.*

Notes Ref· 5 C L J 328

219—C P C S. 47=S. 244—Procedure of Court passing and Court executing transferred decree—Civil Procedure Code, ss. 243, 545.

The provisions of s. 244 of the Civil Procedure Code govern equally the procedure of the Court which passed the decree, when executing such decree, and the Court to which the decree is sent for execution. (6 N W 181 referred to.) **Ghazi-din v Fakir Baksh 7 All 73.**

Notes—Appr. 11 Bom 57. Fol 12 Cal 624; 13 Cal 111; 18 Mad 26, 20 Mad 366; 12 Bom 30, 10 All 389.

(73) Proceeding in execution.

220—C P C S 47 of 1908=S 244—Suit—Civil Procedure Code, 1882, s. 12.—

Semble—That a proceeding under s. 244 is not a suit within the meaning of s.12 of the Code of Civil Procedure. **Venkata Chandrappa Nayanivaru v.Venkatarama Reddi. 22 Mad 256.**

(74) Order of lower Court awarding costs reversed on appeal.

221——C P C S 47=Civil Procedure Code, 1882. Sections 244, 583, 590.—Restitution by summary process.

Held, that when an order of a lower Court awarding costs is reversed on appeal, assuming that Section 590, Civil Procedure Code, does not make the procedure provided by Section 583 of the Code applicable by analogy, the Court is authorised on general principles to compel by summary process restitution of such costs if already realised. **Thakar Mahan Chand v.Lala Ganda Mal. 49 P R 1896.**

(75) Applicability to person.

222—C P C S 47=S.244-Applicability to person not party to proceedings.—**Attachment—Priority of attachment. 17 M L J. 334=2 M L T 365=30 Mad 413.**

(76) Confirmation of sale.

223—C P C S.47—Knowledge of judgment-debtor of execution-proceedings—His failure to object—Effect of. **9 C W N 972.**

C P C (1908) S.47=(1882 S.244)-*Contd.*

(1) Applicability, Effect & scope of the section—*Concld.*

(77) Right of third party.

224—C P C S.47=S.244—Application to Agency Tracts—Right of third party to invoke s. 244 as a bar to suit **Ganjam and Vizagapatam Agency Rules.** **10 M L T 261.**

2 PARTIES.

(1) Person against whom claim has been abandoned.

225—C P C S. 47=(1882 S. 244)—Party.

A person against whom the plaintiff abandons the claim, not being able to serve him with notice, is not a party to the suit within the meaning of S. 244, C. P. C **Venkatapathy Naidu v Subraya Mudali.** **17 M L J 416.**

(2) Preferring a claim against whom a suit is dismissed.

226—C P C—S. 47—(1882 s. 244)—Parties—Attachment—Right of suit.

When a suit is dismissed against one of the parties, but decreed against the rest, that party cannot be regarded as party to the suit in relation to the execution, discharge or satisfaction of the decree within the meaning of S 244, C P C. So when a party against whom a suit is dismissed prefers a claim to a property which is attached by the decree-holder as being the property of the defendant against whom the suit has been decreed.—*Held*, that Ss. 278 and 280 and not s. 244 C P C applied to the case, (17 Cal 711; 6 C W N 10; 12 Cal 458; 23 All 346 ref to). **Mohamed Pahimuddin Sarkar v Lall Meah.** **6 C W N 727=29 cal 696.**

(3) Person not party to decree - Party against whom suit dismissed.

227—C P C S. 47 of (1908)=Ss. 244, 328, 332 of (1882)—A party to a suit against whom the suit is dismissed is not a party to the decree passed in the suit against other defendants and cannot therefore ask to have all the execution proceedings cancelled and the *darkhast* dismissed if he is dispossessed in execution proceedings, his only remedy being to obstruct and take the steps provided by sections 328 and 332. **Gajanan v Moreshwar.** **1893, P J 431.**

228—C P C S. 47=(1882 S.244)—Bar—Application for refund of money wrongfully taken in execution—"Parties to the suit in which the decree was passed".

C P C (1908) S.47=(1882 S 244)-*Contd.*

(2) Parties—*Contd.*

In execution of a simple money decree the decree holders attached certain money which had been paid into court to the credit of the judgment-debtors on account of a decree held by them in another matter. Subsequent to such attachment the decree under which it was made was declared null and void as against the representative of one of the judgment-debtors; but the money was nevertheless withdrawn from court by the decree-holders. *Held*:—That the remedy of the respresentative of the judgment-debtor in whose favour the decree had been declared null and void was by application under S. 244 C P C and not by separate suit, it being immaterial upon what date the attaching creditor withdrew the money so long as it was withdrawn, as in fact it was in execution of the decree. **Mahammad Ashan Khan v Haraka Chand.** **1904 A W N 55.**

(4) party to a suit—Question relating to the execution of the decree—Separate suit.

229—S. 47; O, 21 rr, 100, 101, 103=(1882 Ss. 244 and 332).

A defendant in a suit against whom no decree has been passed is still a party to the suit within the meaning of section 244 and is entitled to come in under that section if his rights are invaded in execution. (10 W. R. C R. 191; 16 All 52; 12 Cal. 458; 11 All. 74; 23 All. 346: 15 Mad. 226. But 22 Mad. 131. 23 Mad 361 Contra 17 Bom. 49 Fol.) **Vithal Mukund v Ganeshmal.** **15 C P L R 106.**

(5) Auction-purchaser at sale in execution.

230.—C P C s. 47 of (1908)=s.244 of (1882)—Auction purchaser's separate suit to recover purchase money on the reversal of the decree.

G brought a suit against H C and P. The suit was dismissed with costs. During the pendency of the appeal C applied for execution and in the execution H bought the house of G, paid the purchase money and got possession of the house. The decree was reversed and defendants were ordered to pay costs. G applied for the restitution of her house, and obtained an un-

C P C (1908) S.47=(1882 S.244)-*Contd.*

(2) Parties—*Contd.*

conditional order. H then brought a suit against G to recover the purchase money. *Held*—in spite of the provisions of s. 244 C. P. Code, H was entitled in this suit to recover the purchase money,as money received to his use, the consideration to it having failed. H was not in his character as an auction purchaser a party to the execution proceedings and for the purpose of the suit was to be treated as a third person.

Hira Lal Chatterjee v Gourmoney Debi. 13 Cal 326.

Notes.—Dist: 18 Mad 13. Ref: 16 Cal 33; 13 Bom 34; 15 Bom 290; 24 All 519.

(6) Prohibits suit by party or his representative against auction purchaser.

231.—C P C s. 47 (1908)=S. 244 of 1882.

Held that the section prohibits a suit not only between the parties and their representatives but also a suit by a party or his representatives against an auction purchaser in execution of the decree, when the object of such suit is to determine a question which properly arose between the parties or their representatives relating to the execution, discharge or satisfaction of the decree. (8 All 146 and 19 Cal 683 ref. to). **Dhani Ram v Chaturbhuj. 22 All 86, 19 W N 184**

See Durga Kunwar v Balwant Singh. 23 All 478, 21 W N 175. See also 22 All 108.

Notes.—Ref: 24 All 239; (1904) W N 61; 26 All 447 F B; 11 Bom L R 699.

232.—C P C s. 47 of 1908=S. 244—Representative of party to suit–Auction-purchaser who was also assignee of the decree.

The assignee of a decree for sale upon a mortgage brought the property, decreed to be sold, to sale and purchased it himself and obtained possession. A usufructuary mortgagee of the property who had been a party to the suit and in whose favour the decree was, in so far as it declared his right to continue in possession, applied to be restored to possession and obtained an order in his favour. Thereupon, the assignee auction purchaser applied in revision to have the order restoring the usufructuary mortgagee to possession set aside. *Held* that the auction purchaser though he happened also to be the assignee

C P C (1908) S.47=(1882 S.244)-*Contd.*

(2) Parties—*Con d.*

of the decree was not a representative of a party to the suit within the meaning of s.244.

Sabhajit v Sri Gopal, 17 All 222, 15 W N 64.

Notes.—Fol: 22 All 450. Ref: 18 All 36; 31 All 82 F B; 6 A L J 71 F B. Diss: (1904) W N 61. Over: 26 All 447 F B.

233.—C P C s. 47 of 1908=S. 244—Representative of judgment-debtor.

Held that proceedings in execution of a decree taken against the plaintiff's father and elder brother on previous occasions did not bind the plaintiffs under s.244 of the Civil Procedure Code of 1882, the plaintiffs not having been parties to them within the meaning of that section.

Krishnaji v Vithalrav. 12 Bom 80.

Notes—Dist: 14 Bom 82. Ref: 22 Bom 422.

(7) Party to suit—Representative.

234.—C P C S. 47; O. 21 r. 89=(1882 Ss. 244, 310 A)—Order—Appeal.

To attract the applicability of S. 244 (c) of the Civil Procedure Code, the question at issue must not only be "relating to the execution, discharge, or satisfaction of the decree or the stay of execution thereof" but must also be "arising between the parties to the suit in which the decree was passed or their representatives".The section,therefore, does not apply where the question lies between a judgment-debtor and the purchaser of his interest in land. **Maganlal v Mulji. 3 Bom L R 255=25 Bom 631.**

Notes—Ref: 5 C L J 204; 17 M L J 291; 30 All 379=(1908) W N 157=5 A L J 557; 31 All 82. F B; 6 A L J 71 F B.

(8) Legal representative of a deceased, whether a Party.

235.—C P C s. 47 of [1908]=S. 244 of [1882] —On the death of the decree-holder while his application for execution of his decree against the appellants and the respondents was pending, a dispute arose between the respondent A and the other parties to the suit in which the decree was passed as to whether she was the legal representative of the deceased. The Court executing the decree stayed execution thereof while that question was determined by a regular suit. A then instituted a suit against the other parties to the

C P C (1908) S.47=(1882 S.244)-*Contd.*

(2) Parties—*Contd.*

suit in which the decree was passed and obtained a decree against them declaring that she was the legal representative of the deceased decree-holder. Subsequently she applied for the execution of a decree. The appellants thereupon applied to the Court executing the decree to stay the execution of the decree on the ground that an appeal had been preferred against the decree obtained by A, and that the question as to whether she was the legal representative of the decree-holder had not yet been determined by separate suit within the meaning of the last paragraph of S. 244, Civil Procedure Code. The Court rejected the application. *Held*, that the language of the last paragraph of S. 244, Civil Procedure Code, does not indicate that the determination of the question contemplated is a determination not merely by the Court of the first instance, but also where appeals are preferred,a determination by the Appellate Courts. *Held*, therefore, that the question whether A was the legal representative of the decree-holder had been determined by the separate suit. *Held* further that the Court having referred the parties to a regular suit had power to proceed with the execution as soon as the question as to who was the legal representative of the deceased decree-holder had been determined in that suit.

Mukim-un-nissa v. Aziz-un-nissa. 5 O C 133.

(9) Decree against the Karnavan, execution of—Resistence by the members of the tavazi.

236-C P C S.47; O 21, r 58=[1882 Ss.244,278] Malabar Tarwad—Procedure.

Where a decree has been given against the karnavan as representing the members of the whole tarwad, all the members of the tarwad must be taken to be parties to the suit for the purpose of execution proceedings and any of them must proceed under s.244 and not under s. 278 of the Civil Procedure Code 1882. The fact that they claim the property which has been attached, adversely to the other members of the tarwad does not make them any less constructive parties to the decree. (24 Mad 658. Fol: 28 Mad 195, 10 M L J 85 Expl: and Dist: 14 M L J 137 Ref:) **Marivitill Moolamparol Mathu Amah v Pateramkunnath Cherukot 2 M L T 31=30 Mad 215—17 M L J 377.**

C P C (1908) S.47=(1882 S.244)-*Contd.*

(2) Parties—*Contd.*

(10) Exonerated defendants.

237-C P C S.47; O 21 rr. 58, 60=[1882 Ss.244, 278,280]—Parties to the suit, meaning of—Exonerated defendant.

When an action is dismissed against one of the defendants, he should not be considered as a party to the suit within the meaning of s. 244 [c] C P C, and his objection to the attachment of any property claiming to be his own would fall under Ss.278 and 280 of the C P C, and not under s 244, and his remedy, if any adverse order is passed against him, would be by regular suit under s. 283 and not by appeal under s.244.

Ram Prosad Pandey v Jaganath Ram Marwari. 6 C W N 10=30 Cal 134.

Notes.—Fol· 29 Cal 696.

Notes:—But now see the provisions of the New Code s.47 Explanation.

See also **6 C W N 727.**
and **17 M L J 416.**

238.—C P C s.47=S. 244 of 1882—Defendant exonerated from a suit.

A defendant who had been exonerated from a suit cannot be considered as a party to the suit within the meaning of s. 244(c) of Civil Pro Code and therefore a plaintiff can bring a suit for contribution for his share of the costs of execution.

Gadicherla China Seetayya v Gadicherla Seetayya. 21 Mad 45.
See Ramasami Sastralu v Kameswaramma. 23 Mad 361.

where the above case is explained.

Notes.—Exl 23 Mad 361 F B. Ref: 23 All 346 27 Mad 16; 17 M L J 416.

(11) Parties to the suit—Subsequent suit by a defendant who had been exonerated in the former suit-Maintainibility of such suit.

239.-C P C s. 47=S. 244—Parties to a suit—Limitation Act, Art.112.

Held by the Full Bench that a defendant who was exonerated by the decree from liability to the plaintiff's claim is a party to the suit within the meaning of S. 244, C. P. C, and that his claim to property attached and sold in execution of the decree against the other defendants must be prosecuted not in a separate suit but in proceedings taken under S.244.

C P C (1908) S.47=(1882 S.244)-*Contd.*

(2) Parties—*Contd.*

Held by the Division Bench that Art. 12 of the second schedule of the Limitation Act had no application to a case where a Hindu widow who had been exonerated from liability to a decree having been dispossessed by a purchaser in execution, her daughter brought a suit after her death to recover the paoperty. (20 Mad 118 followed.) **Ramasami Sastrulu v Kameswaramma. 23 Mad 361=10 M L J 126.**

Notes.—Disap: 30 Cal 154, Diss: 6 C W N 10; 23 All 346. Fol: 14 M L J 137. Ref: 6 Bom L R 697; 17 M L J 416. Dist: 30 Mad 72.

(12) Defendant objecting that his property is not liable to attachment-Defendant setting up another interest.

240.—C P C s. 47=S. 244 of 1882.

It is open to any defendant to object under this section that his property is not liable to attachment or sale on the ground for instance that it comes within the prohibitions contained in section 266. Such an objection can only be taken in this way. *Quere* whether a defendant who besides his private interest has an interest of a different character such as being a trustee for an idol is obliged in his application of objection under S 244 to set forth his character as trustee. **Gangadhar v Gangadhar, 1891 P J 207.**

(13) Defendants.

241—C.P C S.47 (=Civ.Pro. Code, 1882, s.244).

The words of s. 244, Civ. Pro. Code, go to show that the section does not apply as a bar to the adjudication of a question raised by a party not seeking such adjudication as a plaintiff, but resisting the plaintiff's claim as a defendant. (1 C W N 396, 26 Cal 946 Relied.)

Durga Charan Agradani v. Karamat Khan. 7 C W N 607.

Notes.—Fol. 9 C L J 464. Ref 9 O C 332.

242—C P C s. 47 (1908)=s.244 (1882)—Between co-defendants.

Held that s. 244 of the Code of Civil Procedure was not applicable to cases where the question was between two judgment debtors *inter se* and not between the parties arrayed against each other as decree-holders on the one part and judgment-debtors or their representatives on the other. **Raynor v. The Mussoorie Bank, Limited. 7 All 681, 5 W N 204.**

Ram Gopal v. Khiali Ram. 6 All 448=4 W N 159.

Notes.—Ref: 10 All 97: 30 All 379=(1908) W N 157=5 A L J 557; 31 All 82 F B; 6 A L J 71 F B.

(14) Party to suit—Surety.

243—C P C s.47=s. 244 of 1882.

Held, that a person who becomes surety for the performance of an original decree, after the decree has been made, is not a party to the suit within the meaning of Section 244 Civil Procedure Code. (104 P R 1886 and 109 P R 1886, distinguished.) **Sri Ram (Infant son of) v. Kanwar Hari Singh. 99 P R 1887.**

244—C P C S, 47 (=s. 244 C. P. Code, 1882) —Execution against surety—"Party to the suit."

An order refusing execution of a decree against a surety for execution is an order made against a 'party to the suit' under s. 244 and is covered by the definition of a decree under s. 2 of the Code. **Muhammad Sadik v. Hajiata Muhammad 104 P R 1886.**

Notes—Dist: 99 P R 1887.

(15) Person originally party but exempted afterwards.

245—C P C S. 47 (1908)=S. 244 of 1882.

Held that persons who had originally been made parties to a suit, but had been expressly exempted from the operation of the decree, were not "parties to the suit" within the meaning of s.244 of the Code of Civ. Pro. with regard to objections taken by them in respect of the attachment of their property by the decree-holder; but that such objections must be considered to be objections under s. 278 of the Code. (11 All 74 referred to).

Mukarrab Husain v. Hurmut-un-nissa. 18 All 52=15 W N 153.

Masihullah v. Kifayati. 18 W N 67.

Notes.—Ap: 23 All 346 Ref: 14 M L J 396 6 C W N 10; 21 Mad 45; 30 Cal 134; 138.

C P C (1908) S.47=(1882 S.244)-*Contd.*

(2) Parties -*Contd*

(16) Claim by third party to ownership of such property—Suit by decree-holder to establish mortgagor's right to property.

246-C P C S.47 of 1908=S. 244 of 1882—Decree against mortgagor for mortgage money, and directing sale of mortgaged property as against him and a third party—Attachment of other property in possession of third party as that of the mortgagor.

In a suit upon a hypothecation bond a third party was made defendant, as she claimed the hypothecated property. The mortgagee obtained a decree for recovery of the amount of the bond, and for enforcement of the mortgage In execution of the decree, the debt not being satisfied by sale of the mortgaged property, the decree holder caused certain other immoveable property in the possession of the third party to be attached She objected to the attachment on the ground that this property was her own, and was not liable to sale in execution of the decree. The objection was allowed, and the decree-holder then sued for a declaration that the property belonged to the mortgagor, judgment-debtor and was liable to attachment and sale in execution of the decree. *Held* that, as no claim in the former suit was made against the objector personally or in a representative character, but as regards her, the only claim was virtually for a declaration that she was not entitled to the hypothecated property, the decree affected her only so far as it negatived her alleged interest in that property and, so far as it was sought to be enforced against other property, she was a stranger to that suit and her objection must be taken to have been decided under ss. 278 and 280 of the Civil Procedure Code,and the present suit was rightly brought under s. 283 and was not barred by s 244. (12 Cal 458, referred to. 9 All 605,and 9 Bom 458, distinguished). **Jangi Nath v. Phundo 11 All 74**

Notes—Ap: 23 All 346. Fol: 18 All 52. Ref: 6 C W N 10; 30 Cal 134

(17) Decree-holder also judgment-debtor-Right to appeal.

247-C P C Ss.47,63 (=ss. 244, 285 Civ. Pro Code 1882)—Court of District Judge superior to that

C P C (1908) S.47=(1882 S.244)-*Contd.*

(2) Parties—*Contd.*

of Subordinate Judge—Power to realise property attached by two Courts of different grades.

Where the same property is simultaneously attached in execution of one decree of the District Judge, and another of the Subordinate Judge, the District Judge alone has the power to realise the property. The Court of a Disrict Judge is of a higher grade than that of a Subordinate Judge. The fact that the judgment-debtor was also a rival decree-holder did not take away her right to raise the objection that the property could not be sold by the Subordinate Judge. A judgment debtor-objector is entitled to prefer an appeal to the High Court, being a party to the suit within the meaning of s. 244. **Mussammat Najmunnissa Bibi v. Lal Jamna Das. 1 Ind Cas 78.**

(18) Judgment-debtor in possession as trustee-Personal decree against Judgment-debtor—Parties to suit.

248—C P C S. 47, O 21 r 58, Ss. 244, 278—If A, in execution of a decree for money against B personally, attaches and proceeds to sell properties of which B alleges that he is in possession, not in his own right, but as shebait of a deity to whom the properties have been dedicated, an order passed on a claim preferred by B falls within S. 278 of the Code,as he claims in his capacity of shebait of a deity who is no party to the suit.

Under S, 244 of the Code, the question must arise between parties to the suit in which the decree was passed, (7 Mad 255 Diss, from; 17 Cal 711 Expld), **Kartick Chandra Ghose v Ashutosh Dhara, 14 C L J 425 (F B)=16 C W N 26**

(19) Transferee of judgment—debtor

249—C P C S, 47 of 1908=S 244-Suit brought by decree-holder to question an alienation by judgment-debtor.

Held that s,11 of Act XXIII of 1861, dose not apply to suits brought by a decree-holder to question an alienation made by the judgment-debtor inasmuch as the transferee was not a party to the former suit, and only questions between the parties to the suit must of necessity be determined in the execution department. **Surubsookh v Usgur Ally Khan. 2 Agra Pt II, 180**

C P C (1908) S.47=(1882 S.244)-*Contd.*

(2) Parties—*Contd.*

(20) Purchaser of decree.

250—S. 47 of 1908=S 244 of 1882—Rights of purchaser

The words 'party to a suit" in s. 11, Act XXIII of 1861, include the heirs, assignees, and representatives of such party, and consequently give the purchaser of a decree all the rights of appeal, etc., which his vendor had. **Huro Lall Dass v Soojawut Ali. 8 W R 197.**

Tara Chand Hajrah v Doorga Churn Hajrah. 10 W R 205.

Notes.—Diss 15 W R 283. Fol· 10 W R 205. Ex: 3 Cal 371.

(21) Minor not a party to the decree under s. 47.

251—Where a jurisdiction is usurped by a Court in passing an order against which an appeal would lie, appeal against the order cannot be defeated by showing that the order was without jurisdiction. So, where, a court purporting to act under S 47 Civ Pro Code directed execution to proceed against a minor and an appeal was preferred on the ground that the decree sought to be executed did not bind the minor, *held*—that the fact that, on the applicant's own showing, the minor would not be a party to the decree within the meaning of s 47 and thus the order would not be an order under s. 47, would not make the appeal incompetent An execution Court must proceed on the assumption that there is a valid decree capable of execution, and it is not open to it to investigat the validity of the decree or its binding character. **Moharaj Kumar Bindeswari Charan Singh v Thakur Lakpat Nath Singh. 15 C W N 725.**

(22) Party to suit—Question in execution of decree-Minor defendant objecting to sale in mortgage suit, but withdrawing his defence.

252.—C P C S 47 of 1908=S 244 of (1882) A widow of a last full owner of property had mortgaged certain properties. After her death a suit was brought upon the mortgage bond in which the defence of the minor heir represented by a manager of a Court of wards, was that the widow had no right to mortgage the property But subsequently he withdrew his defence and a decree was made. Without any notice to the present plaintiff a part of the mortgaged property was sold in execution. The plaintiff sued for the recovery of the property. The defence was that no separate suit can lie. *Held*—inasmuch as the plaintiff was a party to a suit in which the decree was made his remedy, if he could object to the sale, was by an application under section 244 and not by a separate suit.

Ram Chandra Mukerjee v Ranjit Singh. 27 Cal 242=4 C W N 405.

Notes:—Ref: 30 Cal 142 ; 990 ; 26 Mad 291; 8 C W N 843. Fol: 9 C W N 222. Dist: 32 Cal 265.

(23) Meaning of—Proper representation necessary—Minor not properly represented, no party.

253.—C P C S 47=(S. 244)—Parties.

Sec. 244, C P C (Act XIV of 1882) applies to questions arising between parties to the suit in which the decree was passed, *i e* between parties who have properly made parties in accordance with the provisions of the Code. A minor who was represented in the suit either by a married woman or a person having an interest adverse to her cannot be said to have been a party to the suit and S 244 is no bar to a suit by her for a declaration that the decrees in the prior suits and the sales in execution thereof are not legally binding on her. **Musammat Rashid-un-nissa v Muhammad Ismail Khan. 10 C L J 318=6 A L J 822=13 C W N 1182=19 M L J 631=31 All 572=36 I A 168 (P C)=11 Bom L R 1225=6 M L T 279.**

See also 1905 W N 122.

(24) Execution against party to suit, not party to compromise—Resistence to execution-Procedure.

254.—C P C S 47 of 1908=S 244.

In a partition suit a compromise was effected between all the parties to the suit except S, and a decree embodying compomise was passed. In execution S resisted and petitioned the Court to declare that the decree is not binding on her. Petition rejected. *Held*,—that the Court ought to have investigated the petition by S under S

C P C (1908) S.47=(1882 S.244)-*Contd.*

(2) Parties—*Contd.*

244 of Civil Procedure Code and that order of rejection of the petition is apppealable.

Sankaravadivammal v Kumarasamya. 8 Mad 473.

Notes:—Fol : 15 Mad 366. Over : 25 Mad 300 F B. Ref : 19 Mad 40 F B ; 21 Mad 18 ; 13 Bom 567 : 16 Bom 243 ; 21 All 251 ; 24 All 44 F B.

(25) Claim for rateable distribution by creditor rejected.

255.—C P C S 47 of 1908=S. 244 of (1882). Sum detained in Court, pending application of High Court—Application rejected—Interest on sum detained claimed in execution—Procedure.

In execution of a decree by R S, another creditor claimed a rateable share of the proceeds realized. His claim was rejected. Pending an application to the High Court under s 622 of the Code of Civil Procedure to set aside this order, the share claimed by S was detained in Court at his request. The High Court rejected the application of S, and R took out execution for the costs incurred therein and for interest on the sum detained in Court at the request of S. *Held* that the interest could not be awarded to R in execution of the decree for costs, S and R being rival creditors and as not being a party to the suit. **Sanjivi v Ramasami. 8 Mad 494.**

Notes:—Ref: 11 Mad 220 F B.

(26-27) Petitioner, position of, when petition struck off

256—257.— C P C S 47=S 244—Stranger.

In a suit brought by M against K and others, certain lands belonging to G were included, and G was made a defendant ; these lands, however, were released from the claim and K excluded from the decree obtained by plaintiff agaist the other defendants. In execution, however, M had them measured as a part of the decreed lands ; and G's petition of objection under s 330 of Act VIII of 1859 having been struck off the file, G brought a suit to have his title established. *Held* that, though as a "party to the suit" brought by M, G would have been bound by s. 11, Act XXIII of 1861, to seek his remedy in the execution department, yet as he was released from the operation of the decree, he must be considered a stranger, and permitted to bring his present auction. **Gour Kishore Chowdhry v Mahommed Hassim Chowdhry 10 W R 191.**

C P C (1908) S.47=(1882 S 244)-*Contd*

(2) Parties—*Concld.*

(28) Party unnecessarily added to suit.

258—C P C S 47 of (1908)=S 244 of (1882). S 244 refers to parties or their representatives. But a plaintiff cannot evade the application of the section by adding an unnecessary party,

Kristo Mohinee Dossee v Kaliprosonno Ghose. 8 Cal 402.

Notes:—Appl: 14 Cal 809 F B. Con : 11 Bom 313. Ref : 13 All 195 ; 26 Bom 437 ; 26 Mad 686 F B.

259.—C P C S 47 of (1908)=S 244 of (1882) Parties to a suit–Alteration of a decree by a court executing it.

Plaintiff purchased a share of an estate No. 831 and obtained a decree for possession. During the pendency of his suit, the defendant's share in the estate No. 831 was converted into a smaller estate No. 248 for his share in the whole estate. Plaintiff brought the present separate suit for a declaration that the defendant's interest in estate No 831 had passed to estate No. 2218, *Held* that S 244 C P Code does not bar such a suit

The necessary transfer of the defendant's interest could not be effected without altering the decree given in the former suit. The question that arose in the suit, although it was one between the same parties as those in the former suit, could not be regarded as a question relating to the execution of the former suit, and therefore the court, in execution proceedings, had no authority to make the necessary alteration in the decree. **Krishna Roy v Jawahir Singh. 20 Cal 260.**

C P C (1908) S. 47=S. 244—Mortgage decree against father—Execution against succeeding survivor– Mitakshara Law. **See** C P C (1908) S. 50, (Case No. 932.) **33 Cal 676.**

3 REPRESENTATIVE.

(1) General.

260.—C P C S 47=(S 244)-Hindu father and sons :—

The term "representative" has not a limited signification and means a representative in interest

C P C (1908) S.47=(1882 S 244)-*Contd.*

(3) Representative *Contd.*

(24 Cal 62; 9 C W N 134 ref to). The sons of a Hindu father succeeding to his property by survivorship are the father's representatives. The test is:—Can the decree be executed against the person sought to be made representative and will he be affected by the sale? **Peari Lal Singh v Chandi Charun Singh, (1905) 5 C L J 80 = 11 C W N 163.**

261—C P C S. 47—'Representatives' who are —Decree binding endowed property—Judgment-debtor, no interest in property—Shebait if can object to execution. **14 C L J 337.**

262—C P C S. 47 of 1908=S. 244—"Parties to suit," Meaning of.

The words in s. 11, Act XXIII of 1861, "questions arising between the parties to the suit," cannot be limited to questions arising between those who were parties to the suit at the date of the decree, but after decree the representative of a decree-holder or the representative of a defendant against whom an execution is sought under ss. 210 and 216 of the Code, become parties to the suit for the purpose of execution, and questions arising between the parties to the suit within the meaning of s. 11 of the Amending Act. **Buddu Ramaiya v Venkaiya. 3 Mad H C R 263**

Notes:—Ap: 16 Cal 1. Ref: 4 M H C R 89; 8 All 626.

263—C P C S. 47 of 1908=S. 244 of 1882—Execution, representative of the judgment-debtor.

The word representative in cl. [c] s. 244 C P Code means any person succeeding to the right of any of the parties to the decree. A Hindu widow mortgaged certain properties and then assigned them to the next reversioner on condition that he was to pay the mortgage-debtor. The mortgagee brought a suit against the widow and the assignee. The suit resulted in a money decree against the widow personally. While an appeal to the privy Council was pending, the widow died and *B* was brought on the record as her representative. The decree of the High Court was confirmed. In execution *B* was sought to be made liable to satisfy the amount out of the mortgaged property. *Held*—with regards to this property he was not a legal representative of the widow as he inherited it from her husband. *Held* that *B*'s liability under the ikranamah did not fall within the scope of cl (c) of s 244 C P Code because although *B* was a party to the suit, the only claim against him was that property in his hands was liable as having been previously hypothecated; and as the suit was dismissed, so far as that claim was concerned, it was not a question relating to the execution of the decree. **Kameshwar Pershad v Run Bahadur Singh 12 Cal 458.**

Notes—Ap: 6 C W N 10; 127; 23 All 346. Fol: 11 All 74; 6 C W N 127; 29 Cal 696 Dist: 16 Cal 603; 23 Cal 454. Ex: 16 Cal 1.

264.—C P C S.47=(1882 S.244) Last Clause—May either stay, etc.

It is not obligatory on the executing court either to stay execution until the question has been determined by a separate suit or itself to determine the question as to who is the representative. A court has a discretion to stay or to dismiss the application. **Vakulabharana v Rangaiyan Chetty. 28 Mad 357.**

Notes:—But see new Code S. 47, which says the execution Court shall determine the question.

265—C P C S.47 of 1908=1882 s. 244-Decree on bond against representatives of the obligor.

Where certain property was attached in execution of a decree passed upon a bond against the legal representatives of the obligor, and the judgment-debtors objected to the attachment on the ground that the property was not part of the obligor's estate and liable to be taken in execution of the decree, but was property which they could claim in their own right,—*Held* that the matter in dispute was one between the parties to the suit in which the decree was passed and relating to the execution, discharge or satisfaction of the decree within the meaning of s. 244 of the Civil Pro. Code, and was therefore to be determined in the execution department, and not by regular suit. (11 B. L. R., 149, 2 All 752 and 7 All 36, referred to). *Per Mahmood, J.*—That the turning point upon which the application of the rule contained in s. 244 of the Civil Procedure Code barring adjudication in a regular suit depends is whether the judgment-debter, in raising objections to execution of decree against any property,

C P C (1908) S.47=(1882 S.244)-*Contd.*

(3) Representative-*Contd.*

pleads what may analogically be called a *jus tertii*, or a right which, although he represents it, belongs to a title totally separate from that which he personally holds in such property. (6 Calc. 777, dissented from). **Ram Ghulam v Hazaru Koer 7 All 547.**

Notes:—Ap. 16 Cal 1; 603. Fol: 12 All 73; 23 Mad 195 F B; 7 All 733; 9 All 605. Dist: 12 All 313 F B. Ref: 15 Cal 437; 8 All 626.

266—C P C S. 47 of 1908=S. 244-Party to suit—Representative.

Where, certain property having been attached in execution of a decree, the representative of the judgment debtor objected that the property had been acquired by himself and not inherited from the judgment-debtor, and was therefore not liable in execution,—*Held* that the question was one which must be decided in the execution department, under s. 244 of the Civil Procedure Code. (7 All 547, referred to.) **Sita Ram v Bhagwan Das 7 All 733.**

Notes:—Ap: 16 Cal 1. Fol: 9 All 605. Ref: 8 All 626.

267—C P C S.47(1908)-Decree-Representative.

Held, following the decision of the Privy Council in 11 Bengal Law Reports, 149, that where a decree against a person in a representative capacity has been properly passed and proceedings taken under it to obtain execution against the party in his representative character, he should be considered a party to the suit with respect to any question which may arise between him and other parties relating to the execution of the decree, within the meaning of Section 244 of the Civil Procedure Code. **Munshi Aziz-uddin v Mussammat Dulhan Begam P R. 88 of 1886.**

268—C P C S.47=1882, s.244 Representative-Person claiming title from judgment-debtor after institution of suit.

As regards possession of property bound by a decree, a person claiming title from the judgment-debtor after the institution of the suit and not brought upon the record under Section 372, Civil Procedure Code, is identified with the judgment-debtor and does not represent him within the meaning of Section 244 of the Code.

(16 Calc. 355, dissented from.) **Bhaini Ram v Gokal Mal 151 P R 1890.**

269—C P C S. 47, O 21, r. 90=1882 Ss. 244 311-Representative—'Person whose immoveable property is sold'—Bengal Tenancy Act, S. 173.

Where the landlord of an occupancy holding obtains a decree for rent against his registered tenant, an unregistered transferree of the tenant into whose hands a portion of the holding has previously passed is bound by the decree and is, therefore, a representative of the judgment-debtor within the meaning of S. 244 of the Civil Procedure Code. Principle of F. B. case in (24 Cal. 62 applied, 6 C W N 127 not foll). Such a transferee can apply to set aside a sale held in execution of the decree as a person whose immoveable property has been sold within the meaning of S. 311, Civil Procedure Code. He can also apply under S. 173 of the Bengal Tenancy Act to set aside the sale on the ground that the holding has been purchased by the judgment-debtor in the name of the auction-purchaser.

Azgar Ali v Asaboddin Kazi 9 C W N 134.

Notes:—Fol: 32 Cal 1031=9 C W N 824; 10 C W N 240. 11 C W N 312; 8 C L J 161. Ref: 11 C W N 163; 5 C L J 80; 13 C W N 98=8 C L J 327; 7 C L J 282; 33 Cal 1219; 2 C L J 369.

270—C P C S.47=1882 s.244-Representative-Infant member of joint Hindu family born after mortgage decree, if a proper party—Mitakshara School—Infant born three years before application for execution—Mortgage decree, if binding on the infant.

The term 'representative' as used in section 244 of the Code of Civil Procednre Act XIV of 1882 means not merely the legal representative in the sense of the heirs, executors or administrators, but includes any representative in interest that is, any transferee of the interest of the decree-holder or judgment-debtor, who so for as such interest is concerned, is bound by the decree.

C P C (1908) S.47=(1882 S.244)-*Contd.*

(3) Representative—*Contd.*

To determine whether a particular person is a representative of a party to the suit, the two tests to be applied are, *first*, whether any portion of the interest of the decree-holder or of the judgment-debtor, which was originally vested in one of the parties to the suit, has, by act of parties or by operation of law, vested in the person who is sought to be treated as representative, and *secondly*, if there has been a devolution of interest, whether so far as such interest is concerned, that person is bound by the decree.

Where the entire interest in the properties mortgaged is vested in the original judgment-debtors who are parties to the mortgage suit and a son of one of the judgment-debtors, a member of the joint Mitakshara family, is born after the mortgage decree, the immediate effect of his birth is that the aggregate of rights then vested in his grandfather, his father and his two uncles, becomes vested in him conjointly with them. By reason of the birth of his son there is a transference of interest in the eye of the law. To the extent of this interest, the son is a representative of one of the parties to the suit, namely his father. It is, on principle, strictly analogous to that of the transfer of the equity of redemption of the judgment-debtor, in whole or in part after the mortgage decree has been made.

The purchaser of a fragment of the equity of redemption after the decree, is a representative of the judgment-debtor, whether he acquires his interest under a private alienation or by a judicial sale.

The son is also, to the extent of the interest acquired by him by birth bound by the mortgage decree made before his birth. A son cannot object to alienations validly made by his father before he was born or begotten because he could only by birth obtain an interest in property which was then existing in his ancestors.

As in the case of a mortgage suit, the *lis* continues after the decree *nisi* and the doctrine of *lis pendens* is applicable to proceedings to realise the mortgage after the decree for sale, the son, who, by reason of his birth subsequent to the mortgage decree acquired an interest in the mort-

C P C (1908) S.47=(1882 S.244)-*Contd.*

(3) Representative—*Contd.*

gage properties would be bound by the proceedings in execution though not brought before the Court.

But even though he may be so bound, the mortgagee decree-holder is entitled to treat him as a representative of one of the parties to the suit and to bring him before the Court with a view to avoid possible disputes and complications in future. **Ajodhya Roy v Hardwar Roy. 9 C L J 485.**

Auction purchaser.

271—C P C S. 47=(1882 sec. 244)—Purchaser at Court sale—Whether representative of decree holder.

Where a purchaser at Court auction did not purchase from the decree-holder and did not derive title from him.

Held, that where the question is the right of a purchaser at Court auction to possession as against the judgment-debtor, the purchaser is not the representative of the judgment-creditor within the meaning of sec. 244. Civil Procedure Code. (14 Cal 644, Fol: 28 Mad 87, Dist ; 30 Mad 507 diss.) **Krishna Satapasti v Saraswantula Samobsiva Row Pantulu, 3 M L T 306=31 Mad 177.**

272—C P C S. 47—O. 2, rr. 6, 7, O. 21 r. 95 (=ss. 244, 318, Civil Pro. Code, 1882) —Auction-purchase—No confirmation and no sale certificate for a long time—Failure of auction-purchaser to ask for possession—Subsequent suit for possession and for correction of clerical error.

Where the plaintiff obtained a decree on a hypothecation and in execution thereof purchased the property, the Court did not confirm the auction sale and did not issue a sale certificate for a long time after the decree. The plaintiff did not seek for possession of the property by moving the Court or otherwise. When, however he did secure a sale-certificate, he brought a suit for possession of the hypothecated land and for the correction of a clerical error in his certificate. But the suit was held to be barred under s.244, Civ Pro Code 1882. (12 & 47 P R 1887 Ref).

Bhaga Shah v Bura Shah. 58 P R 1888.

Notes.—Not Fol 14 P R 1893.

C P C (1908) S.47=(1882 S.244)-*Contd.*

(3) Representative—*Contd.*

273—C P C S. 47; O. 21 rr. 95, 96=(1882 Ss. 244, 318 and 319)—Sale in execution of a decree upon mortgage—Purchase by the decree holder—Grant of sale certificate—Whether separate suit for possession maintainable—Limitation Act (XV of 1877) Sch II, Art. 138.

Where a mortgagee, in execution of his own decree, purchase the mortgaged property at an auction sale which is confirmed, and he obtains the sale certificate, there is no bar to his subsequently maintaining a suit to recover possession thereof if the judgment-debtor does not deliver up the property. S. 244 (c) does not apply to such a case.

Per Stanley, C. J., dissentiente (*Knox* J., concurring with him); The recognition of a dual personality in a decree-holder-purchaser would be to introduce a strange and novel legal fiction. An executor who is sued as such only cannot in his personal capacity be prejudiced by any decree which may be passed in the suit. On the contrary in the case of a decree-holder, he sues on his own behalf and for his own benefit. If he gets leave to bid and buys the mortgaged property, he does so on his own account and in his own interest alone. By becoming a purchaser he does not cease to be a party to the suit and as such be bound by any order which may be passed therein. The intention of the legislature in passing the enactment in question was to prevent any question which could be disposed of in execution becoming the cause of fresh litigation.

The word, 'representative' in S. 244 of the Code includes a party who by assignment or gift succeeds to the rights of the decree-holder after decree.

Art 138, Limitation Act, 1877, might be applicable to the case of a purchaser who was a stranger to the suit in which a decree for sale was passed and, not being a party to the suit, was entitled to take proceedings under S. 244. When a Court has passed a decree for sale in a a mortgage suit, the proceedings are not at an end when the sale to the decree-holder who has obtained leave to bid has been confirmed and a certificate of sale granted. Delivery of possession is necessary and until such possession is given, the decree cannot be said to have been executed or satisfied.

C P C (1908) S.47=(1882 S.244)-*Contd.*

(3) Representative—*Contd.*

Per Banerji J (*Aikman and Griffin, JJ., concurring*): In order that cl (c), of S. 244 may apply, two conditions are essential; first, that the question arises between the parties to the suit, in which the decree was passed or their representatives, and second, that it is a question relating to the execution, discharge or satisfaction of the decree. As regards the first condition it is manifest that the party must be arrayed as decree-holder or his representative on the one side and judgment-debtor or his representative on the other. Any question arising between the decree-holder and his representative or between the judgment-debtor and his representative is clearly not a question within the purview of S. 244.

The decree-holder as such is not entitled to possession if the decree does not award possession. It is only in his capacity as auction purchaser that he can apply for and obtain possession. In this respect his position is no better and should be no worse than that of any other purchaser. The fact that the decree holder purchased the property is a pure accident though the same person may be the decree-holder and the auction-purchaser he fills two different capacities and it is in the latter capacity that he can obtain possession.

The question which arises under S. 318 or 319, C P C is not a question between the parties to the suit or their representative and cannot be determined under S. 244. A question between the auction-purchaser or his representative and the judgment-debtor or his representative relating to the delivery of possession is not a question relating to the execution, discharge or satisfaction of the decree. Under the meaning of S. 244, cl (c), upon the judgment-debtor's property being sold and the amount due under the decree being realized, the decree is fully executed, discharged and satisfied, and no question relating to the execution, discharge or satisfaction of the decree remains to be determined.

Whether or not the auction-purchaser obtains possession of the property sold, is wholly im-

C P C (1908) S.47=(1882 S.244)-*Contd.*

(3) Representative—*Contd.*

matèrial for purposes of the decree and does not in any way affect it. The validity of the sale or the completion of it does not depend on the decree-holder's obtaining possession. So far as the purchaser is concerned, he does not obtain possession by virtue of the decree and the question of delivery of possession to him is not one relating to the execution, discharge or satisfaction of the decree. That the legislature intended that a purchaser at an auction sale may obtain possession by means of suit is manifest from Act 138, Limitation Act. A decree-holder auction-purchser, like any other auction purchaser, is entitled to claim possession not only by an application under S. 318 or s 319 but also by suit . he has alternative remedies, one of the remedies a summary application being for possession,and S.244 is not a bar to such a suit and does not apply to such an application.

No appeal lies from an order under S. 318 C. P. C.

An application under s. 318 is not an application for execution, and so also an application for delivery of possession is not an application to take a step-in-aid of execution. The opinion of *Konx, J.*, in the undermentioned cases (*f*) doubted.

Per Aikman J.—The observation of the Privy Council in (19 Cal 683) must be read with reference to the facts of the case, which was before their Lordships, and could never have been intended to have the effect of taking away a right of suit which has never been intended to have Intended to the effect of taking away a right of suit which has never been doubted. (3 A L J 234; (1906) A W N 87, overruled. 5 Mad 217 ; 13 Mad 504 ; Ref : 7 All 681 ; 25 Bom 631, Fol ; 16 Cal 681 (P C) Ref: A W N (1886, 45; (1899) A W N 122; (1866) 1 Agra H C Rep 5; 1 C W N 658 . 6 C L J 749, Fol: 26 All 365 and 19 All 477 doubted).

Mussammat Bhagwati v Banwari Lal, 6 A L J 71 (F B)=5 M L T 185=31 All 82 =1 Ind Cas 416.

275—C P C S. 47=(1882 S.244),—Representative—Auction-purchaser at sale in execution of decree against transferee of occupancy holding—Decree against recorded tenant.

The purchaser at an auction held in execution of a decre against the unregistered transferee of an occupancy holding is a representative of the recorded tenant within the meaning of s. 244, Civ Pro Code, and is entitled to apply for the setting aside of a sale in execution of a rent decree against the recorded tenant, on the ground of fraud. (24 Cal 62, Fol). **Haradhan Rakshit v Grish Chandra Mukherji, 8 C L J 327= 13 C W N 98=4 Ind Cas 326,**

276—C P C S. 47=(1882) s. 244—Auction-purchaser whether, "representative" of judgment debtor.

The auction purchaser of property sold in execution of a simple money decree is not a "representative" of the judgment-debtor within the meaning of S, 244 (c) of the Code of Civil Procedure 1882, (38 Cal 73 ; 26 All 447 ; 29 All 275 expl· 21 Bom 709, not appl I9 Cal 683 P C cons).

Mahomed Hassim v Ma Sein Bwin, 5 L B R 85=3 Ind Cas 713.

277—C P C S. 47=(1882) s.244 (c)—Execution of decree—"Representative"-Judgment debtor—Auction purchaser at sale in execution of simple money decree against judgment-debtor.

An auction purchaser at a sale held in execution of a simple money decree against the judgment-debtor whose property has been ordered to be sold at the suit of mortgagees in a mortgage suit is a "representative" of the judgment-debtor within the meaning of s. 244 (c) C P C. There is no difference in this respect between a purchaser in a private sale, and a purchaser in court sale in execution of a simple money decree against the judgment-debtor (8 All 146 ; 16 All 286, 19 All 332 ; 21 All 20 ; 22 All 86 ; 22 All 108 24 All 239 ; 9 Bom 468 : 19 Cal 683 ; 26 Cal 324; 26 Cal 326; referred to. 17 All 222 not followed). The term "representative" as used in s. 244 C P C when taken with reference to the judgment-debtor does not mean only his legal representative, that is, his heir, executor or administrator but it means his representative in interest and includes a purchaser of his interest who so far as such interest is concerned, is bound by the decree (24 Cal 62 approved). Per Bannerji J. Every purchaser of the judgment-debtor's interest who is bound by the decree is a representative of the judgment-debtor, within the meaning of s. 244 C

C P C (1908) S.47=(1882 S.244)-*Contd.*

(3) Representative—*Contd.*

P C whether he is a purchaser under a private sale from the judgment-debtor or a purchaser at a compulsory sale held in execution of a decree obtained against the judgment-debtor. (16 All 286; 23 All 116; 5 All 452; 15 Cal 756; 24 Cal 62 Ref to). **Gulzari Lal v Madho Ram 1904 A W N 61= 1 A L J 65=26 All 447 F B.**

Notes:—Fol: 27 All 155; 28 All 337=3 A L J 110=(1906) W N 43: 3 A L J 234=(1906) W N 87. Rel 6 A L J 71 F B; 31 All 82 F B; 9 C L J 485, 29 All 275, W N (1907) 64; 4 A L J 135, 5 A L J 235; 30 All 379=(1908) W N 157=5 A L J 557. Dist: 1908 W N 93, 30 All 231=5 A L J 547.

278-C P C S 47, O 21 r 69=(1882 C P C Act XIV Ss. 244 and 291)-Mortgage-decree-Sale—Suit—Right of auction-purchaser before confirmation of sale to deposit decretal amount and costs—Representative of judgment-debtor—Inchoat title—Right to redeem-Transfer of Property Act (IV of 1882) S. 91,

A first mortgagee obtained a decree on his mortgage in the presence of the second mortgagee. When he proceeded to sell the mortgaged properties, an auction-purchaser of the properties, at a sale held in execution of a decree obtained on the second mortgage-which sale however, had not yet been confirmed by Court—deposited the decretal amount under S, 291 C P C and prayed that the sale might be stopped.

Held,—that the auction-purchaser was a representative of the judgment debtor. second mortgagee, within the meaning of S. 244 C P C and he was entitled to make the deposit (24 Cal 62 Fol, 4 C W N 317=27 Cal 966 Refd to). Before confirmation of sale an auction purchaser has such a title in the property as entitles him to ask for redemption under Sec 91 Transer of Property Act. **Radha Kishun Marwari v Ham Chandra Bose. 11 C W N 495=5 C L J 45**

Notes:—Ref 9 C L J 485.

279.—C P C S. 47 (1882 S 244)—Auction purchaser-Purchaser at execution sale—Whether representative of judgment-debtor.

Auction purchaser at a sale held in execution of his decree on a second mortgage is liable under

C P C (1908) S.47=(1882 S.244)-*Contd.*

(3) Representative—*Contd.*

S. 244 C P C to be joined as a representative of the judgment-debtor by the first mortgagee decree-holder in execution of his decree. **Gokalsing Suratsing v Awatmal Sobhanmal 1 Sind L R 158.**

280.—C P C S. 47 (=Civ Pro Code 1882, s 244)—Execution of decree—Representative of judgment-debtor—Purchaser at auction-sale of property of judgment debtor.

A purchaser at an auction-sale of the property of a judgment debtor is not that judgment debtor's representative within the meaning of s. 244 of the Code of Civil Procedure. (16 Cal 355; 15 Bom 290 Fol). **Badri Prasad v Sarju Prasad, A W N 1894. 59.**

281.—C P C s. 47, O 40 r 15=(1882 Ss. 244, 610)—Restoration of property—Decree of High Court reversed by Privy Council—Purchaser pending appeal—Representative.

A purchaser in auction of property pending an appeal to the Privy Council is a representative of the judgment-debtor within the meaning of S. 244 C P C and therefore if the decree is reversed by the Privy Council which decrees restoration of property, an enforcement of that order might be sought under S. 610 against the auction purchaser although he was not a party to the appeal (26 All 117 Ref to; 19 All 136, 20 All 139 distinguished) **Garduhuj Prasad Singh v Meju Mal. 3 A L J 110. 1906 W N 43=28 All 337.**

282.—C P C S.47=(1882 s. 244)-Purchaser in a rent sale—No representative.

R obtained an assignment of a mortgage-decree and after two unsuccessful attempts to get the assignment recognized, obtained an order in his favour and proceeded to execute the decree. K the purchaser from the auction purchaser in a rent sale of these properties and whose claim petition in the execution application was rejected now applied under section 244 and got R's application for execution dismissed on the ground of limitation.

Held that K had no locus standi to come in under section 244 Civil Procedure Code, he being neither a party to the suit nor his representative **Kandaswami Gurukkal v C G Krishna Row, 6 M L J 290.**

C P C (1908) S 47=(1882 S.244)-*Contd.*

(3) Representative—*Contd.*

283.—C P C S. 47 O 21 r 58=(1882—Ss. 244, 278)-No appeal-Parties or representatives-Transfer of Property Act ss. 88, 89—Execution of decree —Appeal—Revision-Auction purchaser.

Certain property comprised in a decree under S. 88 was proclaimed for sale. As to a portion of this property an application was made by a person who alleged himself to be the owner thereof praying for its exemption from sale. This application purported to be, and was dealt with by the Court as an application under S.278 C P C and was allowed. The decree—holder appealed and her appeal was entertained as an appeal under S 244 and was allowed. *Held* on appeal by the objector to the High Court, neither S. 278 nor S. 244 of the Code was applicable, the former, because the property in question had not been attached the latter because the objector was not the representative of the judgment-debtors but claimed adversely to them. No appeal lay to the High Court, but the memorandum of appeal was treated as a petition in revision. **Muhammad Yahya v Lalta Dei. 1906 A W N 62.**

Notes—Ref 11 C W N 433 Fol; 6 A L J 437.

284.—C P C S. 47=(1882 S. 244)—Representative—Auction-purchaser.

The auction-purchaser in Court sale is representative of the decree-holder within the meaning of S.244 C P C. **Manikka Odayan v Raja Gopala Pillai. 17 M L J 291=30 Mad 507= 2 M L T 347.**

Notes:—Diss: 30 All 379=5 A L J 557=A W N 1908, 157. Not Fol: 12 O C 45, Doubted; 31 Mad 177=3 M L T 306, Ref: 8 Ind Cas 429.

285—C P C S.47 O.21 r.90=(1882 Ss.244,311) —Representative of judgment-debtor—Rent-decree—Sale—Occupancy holding—Transferee of holding if may apply to set aside sale, when holding not transferable.

When an occupancy holding is sold in execution of a decree, for arrears of rent obtained against the raiyat, a person who claims to have purchased the holding from the latter cannot apply as the representative of the judgment-debtor to have the sale set aside under S.244 or

C P C (1908) S.47=(1882 S.244)-*Contd.*

(3) Representative—*Contd.*

311 of the Code, if the holding be not transferable by custom or usage. (11 C W N 312 Fol).

Prosunno Kumar Middar v Bama Churn Mondal. 13 C W N 652= 3 Ind Cas 461.

286—C P C S. 47, O. 21 r. 89=(1882 S. 244, 310A)—Dispute between judgment-debtor and auction purchaser—Appeal—Auction purchaser, a representative of judgment-debtor.

A auction purchaser is a representative of the judgment-debtor and not that of the decree-holder whose interest in the case closes as soon as he gets his money. Any dispute between a judgment-debtor and the auction purchaser is not a dispute between parties to the suit or their representatives and does not fall within the purview of section 244 of the Civil Procedure Code. No appeal lies against an order passed under section 310A of the Code of Civil Procedure, but the order is capable of being revised. A dispute between the judgment-debtor and his representative does not fall within section 244. (30 Mad 507; 29 All 275 dissented from. 19 All 140, Fol: 27 All 263; 26 All 447; 25 Bom 631; 7 All 681 Ref:).

Anand Kunwari v. Ajudhia Nath, 5 A L J 557=1908 A W N 157=30 All 379.

287—C P C S. 47 of 1908=S. 244 of 1882—Appeal—Restitution—Order against.

The auction-purchaser is a representative of the decree-holder.

An appeal, therefore, lies against the order for restitution, passed under S. 583 of the Civ. Pro. Code. (30 Mad 507, Ref: 8 M L J 276; 10 All 166; 23 Mad 306, 311, Fol:)

Arthanari Chettiar v. Nagoji Rao and Hanumantha Rao, (1912) M W N 513.

288—C P C S. 47=(1882 s. 244)—Parties—Representative—Auction sale—Purchaser.

The purchaser, pending execution of the judgment-debtor's interest in properties involved in the execution proceedings is the debtor's representative in such proceedings. (24 Cal 62 fol.)

Akhoy Kumar v. Bejoy Chand, 29 Cal 813.

289—C P C S.47=(S.244)—Bar-Proceedings for delivery of possession — Decree-holder auction-purchaser—Proceedings in execution;—

C P C (1908) S.47=(1882 S.244)-*Contd.*

(3) Representative—*Contd.*

Under S. 244, C P C, the Court is competent to afford final relief to contending litigants cheaply and speedily,and without the necessity of a fresh suit on the same matter. (19 Cal 683 s c 19 I A 166 ref. to.) Proceedings for the delivery of possession to an auction-purchaser,who is himself the decree-holder, are proceedings in execution of the decree, and a question raised between him and a defendant in the suit is a question which ought to be decided under S. 244, C P C (27 Cal 34 ref. to.) **Ram Narain Sahoo v. Bandi Pershad, (1904) 31 Cal 737 at 742.**

290—C P C S.47=S.244—Limitation Act (IX of 1908), Art 138-Transfer of Property Act (IV of 1882), s. 90—Purchase by decree-holder -- Suit to recover possession by decree-holder's representatives.—

At a sale in execution of redemption decree, the decree-holder (mortgagee) himself purchased the property in 1899. The sale was confirmed in 1900. In 1909, the representative of the decree-holder (auction-purchaser) brought a suit to recover possession of the property so purchased. The defendants (representatives of the judgment-debtors, mortgagors) contended that, as the question involved in the suit related to the execution of the decree, the suit was not maintainable under s. 47 of the Civ. Pro. Code, 1908, and that the plaintiff's remedy lay under O. XXI, r. 5. The first Court decreed the claim. On appeal: *Held*, reversing the decree, that the suit was barred by s. 47 of the Civ. Pro Code, 1908. A decree-holder, by becoming a purchaser at a Court-sale held in execution of his decree, does not cease to be a party to the suit within the meaning of s. 47 of the Civ. Pro. Code. (27 Cal 34, 31 Cal 737, 25 Mad 529, Fol: 31 All 82, Diss:). Proceedings for delivery of possession of property purchased by the decree-holder are proceedings in execution of the decree and fall within the scope of s. 47 of the Civ. Pro. Code. (27 Cal 34, 31 Cal 742, 26 Mad 740, 25 Mad 529, 13 Mad 504, Fol:). Art. 138 of the Limitation Act (IX of 1908) does not override the provisions of s. 47 of the Civ. Pro. Code. The two should be read together. Where the auction-purchaser is also a party to the suit in which the decree was passed, his claim for delivery of possession of the property purchased must be determined by the Court in the execution department. But where the auction-purchaser is a third party, it is open to him to bring a suit for possession of the property purchased by him,and such a suit will be governed by Art. 138 of the Limitation Act. Under s. 90 of the Transfer of Property Act, 1882, the execution proceedings do not terminate with the sale. Where the execution of the decree is barred at the date of the suit, it cannot be allowed to be treated as a proceeding in execution.

Sadashiv Mahad Dhole v. Narayan Vithal Naval, 13 Bom L R 661.

291—C P C S. 47 of (1908)=S. 244 of (1882) -Clause (c)-Questions for Court executing decree —"Parties to suit"-Representative—Right to sue.

The decision of the Privy Council in (11 B L R 149), to the effect that " where a decree has been properly passed and proceedings taken under it to obtain execution against a party in a representative character, there seems to be no good reason for saying he should not be considered a party to the suit with respect to any question which may arise between him and the other parties relating to the execution of the decree " within the meaning of Act XXIII of 1861, Section 11 (Act XIV of 1882, Section 244 [c]) cited and followed.

Held, *semble*, that the above decision does not go to the length of affirming that a person who is a party to a suit in *any* character is a party in *every* other character he may happen to fill: and therefore an objection by a judgment-debtor that, while the decree was against his private property, the thing attached was property which he was holding as a mere trustee or executor or in his capacity of an office-bearer would not fall within Section 244 of the Code of 1882, so as to bar a separate suit.

Held, further, that where the subsequent suit is no longer between the judgment-debtor claiming in a different capacity against his decree-holder only, but he is suing to eject a stranger to the previous suit, who has bought the attached property at the auction, the latter cannot be said to be either a party to the prior suit of the representative of a party, so as to bring the case within the scope of Section 244 (*c*) of the Code. Moreover,if the auction-purchaser could be deemed a representative of either party, it would be

C P C (1908) S.47=(1882 S.244)-*Contd.*

(3) Representative—*Contd.*

of the judgment-debtor whose right and interest he had bought. and the question would therefore be not between the parties to the suit, but between a party and his own alleged representative. (88 P R 1886), referred to.—

Sodhi Hukam Singh v Sardar Arjan Singh, 12 P R 1887.

292—C P C S. 47 of (1908)=S. 244—Purchaser's application to set aside the sale, or for compensation for the deficiency in the area of land—Purchaser's interest adverse to the judgment-debtor.

The purchaser of an immoveable property in the execution of a decree applied to set aside the sale or to get compensation on the ground that the land sold was deficient in area. *Held*, as the interest of the judgment-debtor was adverse to that of the purchaser, the latter was not a representative in interest of the former and hence S. 244 of the C P Code cannot apply. (24 Cal 62 applied,) **Ram Narain v. Dwarka Nath Khettry, 27 Cal 264=4 C W N 13.**

Notes:—Ref: 10 C L J 492.

293—C P C S 47 and O. XXI, r. 58-(1908)-Claim-Previous purchaser in execution of mortgage decree, if competent to object to sale in execution of money decree.—

A property was sold in execution of a mortgage decree and purchased by A. M was about to have the same property sold in execution of his money-decree against the same judgment-debtors. A then made an application asking that the Court would exempt the property from sale. The Court granted the application. *Held*, that, as no provision has been made in the Civ. Pro. Code for such an application, the order of the Court below was made without jurisdiction *Held*, further, that the matter could not be regarded as a claim, inasmuch as the purchase by which the applicant claimed to have acquired his title to the property was made long after the attachment of the property by the second decree-holder. *Held*, also, that the matter did not fall within the purview of s. 47 of the Civ. Pro. Code, as the applicant could not be said to be the representative of judgment-debtor for the purposes of that section. **Mahadeo Lal v. Dinkar Prasad, 9 Ind Cas 194=15 C W N 542**

C P C (1908) S.47=(1882 S.244)-*Contd.*

(3) Representative—*Contd.*

294—C P C Ss 47, 104, O 21 rr 55, 89, 90, 92=Ss. 244, 275, 310-A, 311, 312, 588—Whether an auction purchaser is a party to the suit or is the representative of a party to the suit.

Before the sale of property, attached in execution of a decree, A, the judgment-debtor, deposited the amount due, but the receipt given by the bailiff was not filed in the execution record but in the regular record and on that account was overlooked by the Judge, in consequence of which the Township Judge ordered the land to be sold and confirmed the sale.

When, however, the fact of A's payment before the sale was brought to the notice of the Judge, he, after hearing all the parties concerned, cancelled the sale and ordered A to refund to the auction-purchaser Rs.530 *plus* 5 per cent. On appeal to the District Court, this order of refund was set aside:

Held, that an order of the above kind, to be appealable under S. 244 of the old Code (S. 47 of the new), must be an order determining a question arising between the parties or their representatives, to the suit, in which the decree was passed, and relating to the execution, discharge or satisfaction of the decree.

Held, further, that the auction-purchaser at a Court sale. who is a stranger to the suit, does not, by his purchase, become a party or a representative of either party, within the meaning of S. 244, and that the order of the District Court must. therefore, be reversed.

Held, also, that the purchaser under a sale in execution is not bound to inquire into the correctness of an order for execution. **Maung Po Thet v P R Y Anamalay Chetty, 9 Ind Cas 472.**

295—C P C S 47=S.244 of 1882—Assignee of auction-purchaser.

The expression "representative of a party" in the last paragraph of s. 244, Civil Procedure Code, does not mean the representative of a party to the execution proceedings, but it means the representative of a party to the suit. An application by the assignee of an auction-purchaser to be placed on the record cannot be dealt with under s. 244, Civil Procedure Code, and no

C P C (1908) S.47=(1882 S.244)-*Contd.*

(3) Representative—*Contd.*

appeal or second appeal lies from an order refusing such application. **Sreenath Ghose v Roma Nath Santra** 3 C W N 276.

296—C P C S. 47 of 1908=s. 244—Where a decree-holder, who had obtained a decree and order under ss.88,89 of the Transfer of Property Act over certain property, proceeded to attach it in execution of his decree,—*Held* that a third party who had bought the rights and interests of the judgment-debtors at an auction-sale held in consequence of a money-decree was not a legal representative of the judgment-debtors so as to entitle him to be heard under s. 244 of the Code of Civil Procedure at the execution proceedings. (17 All., 222, followed. 19 Calc., 683 distinguished) **Mahabir Prasad v. Partab Chand** 22 All 450

296A—A purchaser in execution of a money decree is not a representative of the judgment-debtor. (17 All., 222) followed. **Mahabir Prasada v. Partab Chand.** 20 W N 171; 22 All 450.

297—S. 47 of 1908=s. 244—Sale of property in execution of decree obtained by second mortgagee for sale of property—Holder of prior decree enforcing first mortgage—Execution of decree—Fresh suit—Meaning of "representative" of judgment-debtor-

A decree enforcing a first mortgage of certain property not being satisfied the property was sold in execution of a decree of a later date enforcing a second mortgage of the property. *Per* Stuart *C.J.*, that the decree enforcing the first mortgage could not be executed against the property, but the holder of such decree was bound to bring a fresh suit against the purchaser of the property to enforce his decree. *Per* Straight, Brodhurs, and Tyrrell, *J J*, that a fresh suit was the most convenient and expeditious remedy. *Per* Oldfield, *J.*, that the purchaser not being the "representative" of the judgment-debtor, within the meaning of s. 244 (*c*) of the Civil Procedure Code, the holder of such decree must bring a fresh suit to enforce it. **Jagat Narain v. Jagrup** 5 All 452

Notes:—Dist: 18 Mad 13, Ref: 24 Cal 62 F B, 20 Mad 378; 7 M L J 89; 13 Bom 34; 15 Bom 290; (1901) W N 61; 26 All 447 F B,

C P C (1908) S 47=(1882 S.244)-*Contd.*

(3) Representative—*Contd.*

298—S. 47 of (1908)=s. 244 of (1882)-Judgment-debtor's representative-Execution-purchaser—Private purchase-Purchase pendente lite-Defendants Nos. 2, 3 and 4 with M were owners of certain immoveable property viz Olipore and Ekdhala. The mortgagee of this property had obtained the mortgage decree in 1875. While this suit was pending one K P executed his money decree against defendant No 3 and it was purchased by the father of the plaintiff who got possession. Plaintiff B purchased Ekdhala from the mortgagors after the mortgage decree. During the execution of the mortgage decree B died and Administrator General, into whose hands his estate came, sold the decree to C in 1878. After several applications G's name was substituted as decree holder and execution was taken out against the mortgaged property in 1885. Each plaintiff's claim to the mehal purchased by him was disallowed. In suits for declaration their title to hold the property free from mortgage, G was found out to be only a benamidar. *Held*, the plaintiff A being a purchaser at an auction sale was not the representative of the mortgagors under s. 244, but B a private purchaser is a representative. (8 I A 65; 7 Cal 107; 14 Moore's I A 101; 8 B L R 122 and 14 Cal 401 referred to.) **Gour Sundar Lahiri v Hem Chunder Chowdhry. Gour Sundar Lahiri v Hafiz Mohamed Ali Khan.** 16 Cal 355

Notes:—Over: 24 Cal 62 F B Ap: 16 All 284. Fol: 7 M L J 89. Dist 20 Cal 388. Ref: 20 Mad 378; 16, All 483. Expl: 10 C L J 150.

299—S. 47 of [1908]=S. 244 of [1882]—Representative of the judgment-debtor—Purchaser at auction sale—Right to be heard in support of objections to the sale.

Representative of the judgment-debtor in s. 244 does not mean his legal representative only, but his representative in interest, and includes a purchaser of his interest who is bound by the decree. The auction purchaser of the judgment-debtor's interest is not excluded. *Held* that (16 Cal 355 and 8 W R 304) were not rightly decided. **Ishan Chunder Sirkar v Beni Madhub Sirkar** 24 Cal 62; I C W N 36.

C P C (1908) S.47=(1882 S 244)-*Contd.*

(3) Representative—*Contd.*

Notes:—Appl: 27 Cal 264; [1904] W N 61, Con: 27 Cal 44; 25 All 351: 31 Cal 561. Ref: 9 C W N 309; 27 All 364; 26 Mad 410; I A L J 709. [1904] W N 278; 4 A L J 68: 35 Cal 896 P C=12 C W N 729 =10 Bom L R 604=8 C L J 48; 10 Bom L R 59=30 All 84 P C=5 A L J 67=12 C W N 231=7 C L J 221; 131; 7 C L J 291; 31 Mad 283; 18 M L J 331, 8 C L J 369. Expl: 18 M L J 7.

(3) Private purchaser.

300—S.47, O. 21 r 83=[1882 Ss. 244, 305]—Buyer under private sale sanctioned under S. 305 is representative of the judgment-debtor within S. 244 [c]. **Gobardhan Rai v Bishan Prasad 23 All 116=[1900] W N 215.**

Notes:—Ref. [1904] W N 61; 26 All 447 F B

301—C P C S. 47 of [1908] and Ss. 68, 70, 71, (=Civ. Pro. Code, 1882, ss. 244,320)—Sale of property of judgment-debtor even after satisfaction of decree-Remedy available.

After a decree had been transferred to the Collector for sale of immoveable property, and during the pendency of proceedings before him, the judgment-debtor sold the property privately and the purchaser, having satisfied the decree, put in a satisfaction petition in the Civil Court, but the Collector sold the property subsequently. *Held* that the remedy of the private purchaser was to apply to set aside the sale under s 244 of the Civ. Pro. Code, and not to institute a separate suit, and that the application was to be made to the Civil Court and not to the Collector (24 All 239, Ref:) **Sadho Chaudhri v Abhenandan Prasad, 26 All 101=A W N 1903, 203.**

Notes—Ref. 5 N L R 121.

302—C P C S. 47=(1882 S. 244)—Purchaser from judgment-debtor during attachment subsequently set aside is not a representative of the judgment-debtor and, therefore, a suit against such purchaser by the decree-holder is not barred by S. 244. **Hafiz Ghafoor-ud—din v Hafiz Hamid Husain. 4 Ind Cas 406**

C P C (1908) S.47=(1882 S.244)-*Contd.*

(3) Representative—*Contd.*

303—S. 47=(1882 s. 244)—"Representative."

The respondent obtained against the appellant's father a decree for sale on a mortgage of certain villages which became absolute in 1897. The respondent applied for execution of his decree and on the 16th January 1904 a compromise was made between him and the mother of the appellant as his guardian. The respondent applied for possession of the mortgaged property and got it on the 11th September 1904. On the 14th September the appellant, claiming the property under an alleged deed of gift from his father and as an assignee of a subsequent mortgage, filed objections on the ground that he was not bound by the compromise of the 16th January 1904. His application was dismissed. He appealed to the Court of the Judicial Commissioners. *Held*, (per Scott J C.), that the appellant was not a representative of the judgment-debtor within the meaning of S. 244 that the order dismissing his objections was not one under that section, and that therefore no appeal lay. *Held*, (per Ryves, O A J C) that in s. 244 the word 'representative' means 'the legal representative' and does not include a transferee; and in clause (c) of that section 'or their representatives' does not mean 'and their representatives.' (15 B L R 383 24 Cal 62, A W N [1904] 61, 9 Q B D 643 19 I A 166 ; 25 Bom 631; referred to). **Lalji Minor v Munno Lal. 8 O C 370**

304—C P C S. 47 (1892 s. 244)—Representative—Rent sale of occupancy-holding—Application to set aside sale by mortgage—Transferable holding—Representative of judgment-debtor.

A person to whom a transferable occupancy holding was mortgaged before its sale in execution of a rent-decree is a representative of the judgment-debtor within the meaning of S. 244, C. P. C., and may apply to set aside the sale under that section. (24 Cal 62 F B and 9 C W N 134 Fol). **Srimati Nissa Bibi v Radha Kishor Manikya. 11 C W N 312.**

Notes:—Fol: 13 C W N 652.

305-C P C—S.47, O.21 rr.97; 99, 103=(1882) Ss. 244, 335—Representative—Mortgage from judgment-debtor.

C P C (1908) S. 47=(1882 S.244)-*Contd.*

(3) Representative—*Contd.*

A mortgage from the judgment-debtor after attachment is the representative of the judgment debtor within the meaning of S. 244, C. P. C. (30 Mad 378; 28 Mad 119; 28 Cal 492; 31 Cal 737, 25 W R 187 Ref.) **Narayanasawmi Naick v Seshappier. 17 M L J 321.**

Notes:—Fol 18 M L J 28=4 M L T 85.

306.—C P C S 47=(1882 s. 244)-Representative-Rent decree—Transfer of portion of occupancy holding before decree.

Where the landlord of an occupancy holding obtains a decree for rent against his record tenant, an unregistered transferee of the tenant, into whose hands a portion of the holding had previously passed, is bound by the decree and is therefore, a representative of the judgment-debtor within the meaning of S. 244 of the Civil Procedure Code. (Principle of 24 Cal 62, Ap: 9 C W N 134 Fol.) **Gopi Nath Chattopadhya v Sajani Kanta Singh. 10 C W N 240.**

Notes:—Ref: 13 C W N 98=8 C L J 327.

307.—C P C—S 47· O 21 r 63=(1882 Ss. 244 283)—Property purchased while under attachment.

Where property is purchased during the continuance of an attachment, but the decree in pursuance of which that attachment was made is subsequently set aside. *Held* that everything done in pursuance of that decree comes to an end and the purchaser cannot be said to be a purchaser pending a subsisting attachment so as to be the representative of the original judgment-debtor within the meaning of S. 244 of the Code of Civil Procedure, 1882. **Ghafoor Uddin v Hamid Husain. 7 A L J 26= 4 Ind Cas 406=32 All 129.**

308.—C P C S 47=Civil Procedure Code (Act XIV of 1882), s 244—Purchaser of the interest of a tenure from the judgment-debtor, whether a legal representative—Purchase prior to decree—Rent decree.

When a person purchases a tenure from the judgment-debtor who was the recorded tenant, prior to a decree obtained for arrears of rent, he

C P C (1908) S.47=(1882 S.244)-*Contd.*

(3) Representative—*Contd*

is not the representative of the judgment-debtor within the meaning of Sec. 244 (cl c), C P C and has therefore no *locus Standi* to apply in the course of execution proceedings to have the sale set aside. (12 Cal 458; I C W N 36; S C 24 Cal 62 F B) relied upon. **Kalu Saha v Bhagabati Debya. 6 C W N 127.**

309.—C P C—S 47=(1882—S 244 cl (c))—Representatives—Purchase from judgment-debtor pending attachment—Appeal.

A purchaser of property while it is under an attachment is representative of the judgment-debtor and is entitled to appeal against an order passed for sale of property puchased by him (19 All 332 ref to.) **Kamal Narain v. Sat Narain 2 A L J 265.**

310.—C P C S.47=(1882 S.244)-Representative-Purchaser of a putni *tenure* bound by rent-decree against recorded tenant—Landlord and tenant.

A person, who acquired a *putni* tenure at a sale in execution of a decree for money against the *putnidar*, but who did not get his name registered in the landlord's office, is bound by the decree for rent against the recorded tenant and is, therefore, a representative of the judgment-debtor within the meaning of S 244. (24 Cal 62 and 9 C W N 134, Fol. 6 C W N 128; 12 Cal 458 not Fol.) **Surendra Narayan Singh v Gopi Sundari Dasi. 9 C W N 824= 32 Cal 1031.**

Notes.—Ref, 11 C W N 163; 5 C L J 80. 2 C L J 369.

311.—C P C S 47=(1882 s. 244)-Execution of decree—Mortgagee under the judgment-debtor—Whether representative.

A mortgagee under the judgment-debtor is a representative of the judgment debtor within the meaning of section 244 of the Civil Procedure Code. (17 M L J 321 Fol.) **Kukkil Kurunagaram Nair v Panoikkat Narayana Nambi 4 M L T 85.**

312.—C P C S 47; O 21 r 90=(1882 Ss 244 and 311)-Representative of judgment-debtor-Recognition by landlord.

C P C (1908) S 47=(1882 S 244-*Contd.*

(3) Representative—*Contd.*

When the landlord of an occupancy holding obtains a decree against the registered tenant, an unregistered transferee of the tenant, is a representative of the judgment-debtor within the meaning of S 244 and is entitled to apply for setting aside a sale held under the decree.

The appellant purchased an occupancy holding at a rent-sale on February 20, 1906. The respondent applied, on November 13, to have it set aside, and alleged that he purchased it at a mortgage sale on November 19, 1903. He alleged that the landlod had recognised him after the purchase by the appellant.

Held, that the landlord could not at that stage recognise the purchase of the respondent, so as to prejudice the appellant, and that, if the holding was not transferable, the application by the respondent should be dismissed, and, if it was transferable, the sale should be set aside, as it was found that it was vitiated by fraud. (9 C W N 134 and 11 C W N 312 Fol). **Bhupendra Nath Chatterji v. Upendra Nath Gangopadhya 3 Ind Cas 39.**

313.—C P C S 47 = Civ Pro Code, 1882, s 244—Purchaser at private sale of interests of mortgagor, if entitled to apply.—

The purchasers at a private sale of the interests of a moatgagor who has obtained a decree to set aside the mortgage decree and the sale in execution thereof already obtained by the mortgagee are to be regarded as representatives of certain of the parties to the suit within the meaning of s. 244, Civ Pro Code. [24 Cal 62 Foll]. **Basudeb Giri v. Brojo Mohan Jana 7 C W N 54.**

314—C P C S. 47 of 1908=s. 244 of 1882—Person acquiring an interest in property sold before the liability under decree application to set aside sale-S. 310.—

A person had acquired an interest in the property sold before the judgment-debtor became liable under the decree. He made an application under s 310A to set aside the sale. He cannot apply because he is not a representative within the meaning of s 244 C P Code. **Bungshi Dhar Haldar v Kedarnath Mondal 1 C W N 114.**

C P C (1908) S. 47=(1882 S.244)-*Contd.*

(3) Representative—*Contd.*

Notes.—Fol: 5 C W N 63., 6 C W N 57. Ref: 5 C W N 821 F B 29 Cal I F B; 9 C W N 134; 13 C W N 591.

315—C P C S 47 of 1908 O 21, r 90=1882 Ss 244, 311—Benami purchase—Sale, setting aside of—Beneficiary not a necessary party. In a proceeding arising out of an application made by a judgment-debtor to have a sale set aside it is necessary only to bring before the Court as the auction purchaser. the person who is the nominal purchaser, and even if the latter is the benamidar of another person; it is competent to set aside the sale finally and conclusively as against the beneficiary, although the benamidar only is a party to the proceeding, and notwithstanding that the applicant to set aside the sale is aware of the benami purchase. **Baroda Kanta Bose v. Chandra Kanta Ghose. 6 C W N 706=29 Cal 682.**

316—C P C S.47 of (1908)—S 232 [O XXI r 16]—Decree for possession of immoveable property—Sale of property decreed—Right to execute decree:—

If a decree-holder holding a decree for possession of immoveable property sells a portion of such property, the sale does not, without express provision to that effect, give the pucbaser any right to execute the decree himself. [7 All 107 ref to] **Hansraj Pal v. Nukhraji Kunwar. 1907 A W N 280; 4 A L J 759; 30 All 28.**

317—C P C S. 47 of (1908)=S. 244 of (1882)—Question as to transfer of a decree—purchaser of the decree from the decree-holder—Application by the transferee of the decree.

The word 'representative' with reference to a decree-holder in s. 244 includes the purchaser of a decree from the decree-holder by an assignment in writing (24 Cal 62; 16 All 483 referred to). The executing court to which the decree is transferred can go into the question of the transfer of the decree under the provisions of s. 244 as amended by Act VII of 1888. **Dwar Baksh Sircar v Fatik Jali. 26 Cal 250. 3 C W N 222. Ganga Das Seal v Yakub Ali Dobashi, 27 Cal 670.**

Notes:-Fol 27 Cal 670; 25 Mad 529, 28 Mad 87=14 M L J 474. Ref; 6 A L J 71 F B; 31 All 82 F B.

C P C (1908) S.47(=1882 S.244)-*Contd*

(3) Representative—*Contd.*

318—C P C—S. 47 (=Civ. Pro. Code, 1882, s. 244)—Purchaser of plaintiff's interest in suit property, a representative of plaintiff.

Where a plaintiff sold his interest in certain suit property, the purchaser was his representative to the extent of such interest, within the meaning of s. 244, Civ. Pro. Code. **Minakshi Achi v Chinnappa Udayan. 24 Mad 689.**

319—C P C (1908)—S. 47=S.244—Representative of judgment-debtor—Money-decree—Sale of property before attachment by judgment-debtor.

The judgment-debtor in a money decree sold certain property belonging to him. On the same day, the decree-holder applied for execution and some time afterwards attached the property and purchased it himself in execution.

Held, that the first private purchaser was in sense a representative of the judgment-debtor, inasmuch as the decree which was being executed had no relation to the property, and that his title was superior to that of the subsequent execution purchaser. (16 Cal. 355; 24 Cal. 62; 1 C W N 36; 29 Cal 813, Dist). **Kali Kumar Bidyaratna v Misiri Jan. 9 Ind Cas 307=15 C W N 711.**

320—C P C S 47 of (1908)=S.244 of (1882)—Purchaser from some of the judgment-debtors of property not affected by decree-Representative of judgment debtor.

Certain persons, claiming by right of inheritance to C, sued B, N, A, K, and others for possession of certain immoveable porperty, and obtained a decree dated in August 1876 for possession of the same. In the course of the litigation which ended in that decree, Z purchased certain immoveable property from B, N, A, and K. Z was subsequently dispossessed of such property in execution of the decree of August 1876. He thereupon sued the holders of that decree for possession of the same, alleging that his vendors had inherited the same from D, that it was not affected by that decree, and that he had been improperly dispossessed of it in execution of that decree. *Held* by the Court that the plaintiff not being the representative of any of the parties to the suit in which that decree was passed in the sense of s. 244 of the Civil Procedure Code, but being, if his allegations were true, a purchaser from certain of the judgment-debtors of property not affected by that decree, the suit was not barred by the provisions of that section. 2 All., 61, distinguished. Observations by Stuart, C. J., on his judgment in, All, 388, and on the judgment of the full Bench in referring to that judgment. **Zanki Lall v Jawahir Singh 5 All., 94.**

C P C (1908) S.47=(1882.S.244)-*Contd*

(3) Representative—*Contd.*

Notes—Dist: 18 Mad 13. Ref: 24 Cal 62 F B; 15 Bom 290

321—C P C—S. 47 of (1908)=S.244 of(1882) For the purposes of s. 244 of the Code of Civil Procedure the vendee by process of law of the rights of a mortgagor must be regarded as the representative of such mortgagor. **Janki Prasad v Ul-Fat Ali. 16 All 284, 14 W N 38.**

Notes—Fol 7 M L J 89. Ref: 20 Mad 378.

322—C P C S. 47 of (1908)=S 244 of (1882).

A purchaser of immoveable property from a judgment-debtor is not a representative of the judgment-debtor within the meaning of s. 244 of the Code of Civil Procedure, where the decree against the judgment-debtor is a simple money decree and creates no charge upon specific property. **Madho Das v. Ramji Patak. 16 All 286, 14 W N 84.**

Notes—Ap: 22 All 243. Ex: 21 All 20. Ref: 11 C W N 1133 F B; 9 C L J 485; 34 Cal 954 F B. Diss: 6 C L J 255 F B. Ref: 28 Cal 493, 17 All 69: 34 All 954 F B; 19 All 332; 28 All 545 F B=3 A L J 266=(1906) W N 99; (1904) W N 61, 26 All 447 F B. Appl: 3 A L J 511. Fol: 3 A L J 511=(1906) W N 195.

323—C P C S 47 of (1908)=S.244 of (1882).

The purchaser by private sale of the rights of a judgment-debtor is a representative of such judgment-debtor within the meaning of s. 244 of the Code of Civil Procedure. (W. N. 1894, p 38) followed.

Mohan Lal v Jwala Dei. (1894) 14 W N 145.

324—C P C S. 47 of (1908)=S.244 of (1882).

The purchaser of property which is under attachment in execution of a decree is a representative of the judgment-debtor under that decree within the meaning of s. 244 of the Code of Civil Procedure. A person to whom s. 244 of the Code of Civil

C P C (1908) S.47=(1882 S.244)-*Contd*

(3) Representative-*Contd*

Procedure applies cannot avoid the application of that section by filing his objection under s. 278 of the Code of Civil Procedure. (17 All 245 and 7 All 478 referred to.) **Lalji Mal v Nand Kishore 19 All 332 17 W N 73.**

See also Ram Chaibur v Bechu Bhagat. 7 All 641. 5 W N 90.
Behari Lal v Ganpat Rai. 10 All 1, 7 W N 238.
Ghulam Thabir v Dwarka Prasad. 18 All 36, 15 W N 149.
Bastiram v Fattu. 8 All 156. 6 W N 37.

Notes:—Ap: 28 Cal 492. Fol, 21 All 20. Appl 2 C L J 265 Ref; 2 A L J 65; 11 C W N 163; 26 All 447 F B, 407 F B 1904 W N 61, 74; 5 C L J 80.

325—C P C S. 47=(1882 S 244)—Application in execution—Rightful representative of party to the decree and of estate — Purchaser from the Judgment-debtor.

Plaintiffs obtained, in a suit based on a mortgage, a decree against the property of one S, deceased. That suit was brought against an alleged adopted son of S, and two widows of S's father. One of the widows died after suit. The widows would have represented the estate if the alleged adoption had failed. In execution plaintiffs purchased a portion of the lands and applied for delivery of possession. They were resisted by a third person, who alleged himself to be the nearest reversioner to the estate and to be in possession in his own right, because S himself was said to have been adopted by his father in conjunction only with the deceased widow and because the surviving widow had under such circumstances, no interest in the estate at all. He also relied on a release deed, alleged to have been executed in his favour by the survivor of the two widows, who were defendants in the suit. The lower Court dismissed the application for delivery of possession. Hence the present appeal. There was a preliminary objection to the effect that no appeal lay. *Held*, (1) that, if the objector had inherited the estate on the death of the deceased widow, he would be the person entitled to represent the estate; (2) if, on the other hand, the surviving widow were in possession as the adoptive mother of S, even then the objector must be a person claiming from the surviving widow, who was one of the parties to the suit. In either view, the objector was a 'representative' within the meaning of S. 244 and the matter must be dealt with and decided in execution-proceedings only. The appeal therefore, did lie. (25 Mad 529, Dist:) **Sivarama Sastrial v. Somasundara Mudali, 28 Mad 119.**

326—C P C S. 47 (1908)=S. 244 (1882).

Held, that the purchaser of property which is at the time of the purchase under attachment in execution of a decree is a representative of the judgment-debtor. (19 All 332 followed. 16 All 286 explained). **Gur Prasada v. Ram Lal, 18 W N 160=21 All 20.**

Notes—Ap: 28 Cal 492. Ref: 11 C W N 163; (1904) W N 61, 26 All 447 F B; 5 C L J 80.

(4) Reversioners.

327—C P C S. 47=(Act XIV of 1882 S. 244)—Reversioners of a Hindu—Decree against the widow—Whether representatives of judgment-debtor.

A decree for sale upon a mortgage of the husband's property was passed against a Hindu widow. She died before execution, and the decree-holders applied to bring the reversioners of the husband on the record.

The reversioners objected on the ground that they were not the representatives of the widow. *Held*, that it is the duty of the Court to stay execution until the question so raised is decided by a separate suit or to itself determine the question. If it decides that they are not the representatives of the judgment-debtor, it should reject the application. **Khuman Singh v Makhan Singh, 5 A L J 550=1908 A W N 93.**

328—C P C S. 47=(1882 S. 244)—Reversioners—Competency to object in execution.

A decree was passed against a Hindu widow. On her death the reversioners to her husband were made parties to the decree. They objected to the execution on the ground that the debt was contracted without legal necessity. Their objections were overruled and they filed the present suit *Held*, that the suit was not barred by the provisions of S. 244 Civil Procedure Code, inasmuch as they could not contend in execution

(3) Representative—*Contd.*

proceedings that the mortgagor was not competent to make the mortgage. (21 All 277, Fol:)
Jagarnath Singh v. Shiv Ghulam Singh, 5 A L J 745=31 All 45=A W N 1908, 288=1 Ind Cas 704.

Notes:—But see the provisions of S. 47 of the new Code.

(5) Heir.

329—C P C S. 47 (1908), O. XXI, rr. 58, 63 (=Civ. Pro. Code, 1882, ss. 244, 278, 283)—Execution of decree—Execution against representative of deceased judgment-debtor — Objections—Appeal—Appeal heard without jurisdiction—Revision.—

In execution of a decree against the plaintiffs as representatives of the deceased judgment-debtor, certain property was attached as belonging to the judgment-debtor. The plaintiffs' objection to the effect that the property belonged to them having been disallowed and their appeal against the order rejecting their claim dismissed, they brought a fresh suit for damages for wrongful attachment in the Court of a Munsiff having Small Cause Court powers. The suit was also dismissed The District Judge, being of opinion that, since no suit lay, he was competent to hear an appeal against the order of dismissal, entertained an appeal made to him by the plaintiffs and affirmed the order of dismissal. On revision, it was contended that the District Judge was not competent to hear the appeal and that the suit was improperly dismissed. *Held*, that under the provisions of s. 244 of the Civ. Pro Code, the plaintiffs being representatives of the judgment-debtor and not third parties, were precluded from bringing a separate suit to establish their title to the property attached by the decree-holder. *Held*, also, that the order of the District Judge being right on the merits, no interference in revision was necessary, although he had no jurisdiction to entertain the appeal. (36 P R 1902, F B, S C 22 P L R 1902. F B, Fol:)
Mihan Singh v. Sri Ram, 73 P L R 1904.

330—C P C S. 47 (1908)=S. 244 (1882)—Decree against Mitakshara father—Execution against property in son's hands on father's death.

Per Curiam (Harington and Geidt, JJ., dissenting),—When on the death of a member of a joint Mitakshara family against whom a decree for money has been passed his son is brought on the record as his legal representative, the question of the liability of the ancestral property, which the son acquires by survivorship, for the debt covered by the decree. may be determined in the execution proceedings, and a separate suit is not necessary. Meaning of the expression "legal representative" discussed. **Amar Chandra Kundu v. Sebak Chand Chowdhry (F B), 11 C W N 593=5 C L J 491.**

Notes—But now defined in S. 2 cl. 11.

331—C P C S. 47 of (1908)=S. 244 of (1882)—Civil Procedure Code, ss. 278-283 — Question of Court executing decree—Separate suit—" Representative" of judgment-debtor.—

The decree-holder under a decree for enforcement of lien against the zamindari rights and interests of K applied for execution by attachment and sale of certain shares, one of which was recorded in the khewat in the name of K, and two others in the name of B, his brother's widow. The shares having been attached, the judgment-debtor died, and J, his brother, and L, his son, were substituted as his representatives. In execution of the decree, only the share which had stood recorded in the name of the deceased judgment-debtor, and which was in possession of J and L as his representatives, was sold; and the decree-holder then applied for sale of the other shares which had been attached. To this B objected under s. 281 of the Civil Procedure Code, claiming to be the owner of the shares in question. Before the hearing of her objection she died, and L applied to have his name brought upon the record in her place for the purpose of supporting the objections. An order having been passed disallowing the objections which had been filed by B, L applied to the High Court. A preliminary objection was taken on behalf of the decree-holder to the hearing of the appeal on the ground that, as the first Court's order related to L's claim as the heir of B to have the shares entered in her name released from attachment, it must be regarded as passed under s. 281 of the Civil Procedure Code, and as conclusive, subject to L's bringing a suit to establish his right. On the other side it was contended that, L being the representative of the deceased judgment-debtor K, the first Court's order must be regarded as

C P C 1908) S 47=(1882 S.244)-*Contd.*

(3) Representative—*Contd.*

passed under s. 244 of the Code, and the appeal would therefore lie. *Held*, that the preliminary objection must prevail,and the first Court's order must be regarded as passed under s. 281, and not under s. 244 of the Code, inasmuch as L's claim which was rejected by it, was nothing more than to come in as B's representative for the purpose of supporting her objections; and it was in right of a third person, whose interest he asserted to have passed to him, that he prayed admission to the proceedings, and his character was wholly distinct from that he filled as the legal representative of his deceased father. Because L happened, for the purpose of the execution proceeding, to be his father's legal representative. and to be liable to satisfy the decree to the extent of any assets which might have come to his hands, it did not follow that any rights claimed by him through a third person must be dealt with, and could only be dealt with, between him and the decree-holder in the execution-proceedings (11 B L R 149, 7 All 547, 7 All 733, 2 All 752, 7 All 36, and 6 Cal 777, referred to).

Bahori Lal v. Gauri Sahai, **8 All 626.**

Notes:—Fol: 23 Mad 195 F B. Diss: 16 Cal 603; 12 All 73; 315 F B Ref: 15 Cal 437; 16 Cal 1; 23 Bom 237.

332—C P C S. 47 of (1908)=S. 244 of (1882) —Decree against a party who represented the deceased.—

In 1875 a decree was passed against N who represented L who died while the suit was pending, holding N liable to the extent of the assets of L in the hands of N. In 1879 the decree-holder applied for execution of decree who got an order and attached the lands of N without proving that the property attached belonged to L. N objected but the Munsif dismissed his claim asking him to bring a regular suit.The property attached was brought by A B. N applied to the successor of the Munsif for the review of the judgment failing which he filed a suit in 1880 against A B & the decree-holder. *Held*, that as N was a party to suit in 1875, S. 244 bars a separate suit. **Arundadhi v. Natesha, 5 Mad 391.**

Notes:—Fol: 16 Cal 1; 9 Bom 458. Dist: 9 Mad 80. Ref: 15 Cal 437; 7 Mad 255, 12 Mad 387; 8 All 626.

C P C (1908) S.47=(1882 S.244)-*Contd.*

(3) Representative—*Contd.*

333—C P C S. 47 of (1908)=S. 244 of (1882) —Deceased judgment-debtor—Execution against a person not the legal representative.—

The defendants, along with one N and C, had brought a suit against one A in the Civil Court at Peshawar in the Punjab,and obtained a decree, on the 23rd July 1878 for Rs 3,05,545-12-0. In 1881 application for transfer of the decree to the Court at Moradabad for execution was made, and it was granted, but no steps were taken thereupon. On the 12th June 1883, A died. On the 30th April 1884, the defendants again applied to the Court at Peshawar, treating their judgment-debtor as being then alive, for a fresh certificate to execute their decree in the Moradabad district, and obtained it. On the 20th August 1885, they made an application to the District Judge of Moradabad for execution of their decree, and in it, it was stated that the application was "for execution against Adjudhia Prasad and after his death against Angan Lal, his own brother, and Durga Kuar, widow, and Lachman Prasad and others, sons of Ajudhia Prasad, residents of Kundarki, and the said Angan Lal, at present residing at Umballa and employed in the Commissariat-Transport Department, judgment-debtors". It was further stated that "the judgment-debtor was dead, and his heirs are living and in possession of his estate, and Angan Lal himself has realized Rs. 9,637-4-9 due to the deceased judgment-debtor from the Commissariat Department of Calcutta and appropriated the same; therefore to that extent the person of the said Angan Lal was liable." Notification of this application was issued to Angan Lal as also to the other persons named therein. Angan Lal objected to the application as against him, stating that, although he was the brother of A, deceased, yet he always lived separate and carried on business separately; and that there was no connection or partnership between him and the deceased judgment-debtor, and that he had no property of the deceased in his possession. Further, that as A left issue, it was wrong to call him an heir to A, and take out execution process against him. In reply to these objections, the judgment-creditors (defendants) did not contend that Angan Lal was the legal representative of the deceased judgment-debtor, but treated him as a person in possession of a sum of money belonging to the deceased,and, therefore, liable to the extent of the sum so re-

C P C (1908) S.47=(1882 S.244)-*Contd*

(3) Representative—*Contd.*

ceived by him. The Subordinate Judge, holding that Angan Lal was the brother of the deceased and had realized the amount of the Commissariat Office, which he failed to prove that he paid to the deceased, ordered execution to proceed against him. Angan Lal then instituted this suit to set aside the order of the Subordinate Judge. It was contended that the proceedings of the Subordinate Judge were held under s. 244 of the Code, and, therefore, no separate suit would lie. *Held*, that the contention must fail, as the Subordinate Judge never treated the proceedings in execution against Angan Lal upon the footing that he was the legal representative of the deceased judgment-debtor. 3 I A 241, and 3 C L R 437, were referred to. **Angan Lal v. Gudar Mal, 10 All 479.**

334—C. P. C. S. 47 of (1908)=S. 244 of (1882) —Legal representative of a deceased decree-holder—Representatives—Revision

The Code of Civil Procedure contains no provision under which a representative of a deceased decree-holder can have his name entered on the record when nothing remains to be done under the decree beyond its execution.

An order refusing to such a representative his claim to continue the execution proceedings, cannot be interfered with by way of revision, but is open to appeal under S. 244 of the Code of Civil Procedure. **Jeshankar v Pandaya Fulia. 2 Bom L R 887.**

335—C P C S. 47 of (1908)=S. 244 of (1882) —Parties to suit—Representatives.

Held, that a person claiming to be the representative of a deceased decree-holder for purposes of executing the decree in favour of the heirs and who has been recognized by the Court as a petitioner, but has not been recognized as the representative of the deceased decree-holder, the Court having refused to permit him to execute the decree, unless and until he has established his representative title in a regular suit, is not a "representative" within the meaning of clause (c), of S. 244 of the Civil Procedure Code.

The only legitimate construction of the expression in the above clause "questions arising between the parties to the suit in which the decree was passed or their representatives" is one which restricts it to *de facto* representatives

C P C (1908) S 47=(1882 S.244)-*Contd*

(3) Representative—*Contd.*

admitted as such on the record, and neither "parties" nor "representatives" includes persons who claim to be but are not admitted in the record to be parties or representatives, as the case may be. **Nihal Singh v Chait Singh. 97 P R 1887.**

336—C P C S.47 of (1908)=S.244 of (1882)— Execution of Decree, questions to be determined in—Separate suit relating to property sold in execution—Legal representative.

A Hindu widow, having only a life interest in her husband's property, mortgaged a portion of it to the appellant for a certain sum of money. The appellant brought a suit against her to recover the mortgage money by sale of the mortgaged property. To this suit, on her death during the proceedings, the respondents were made defendants, as her legal representatives. A decree was passed against these defendants to be satisfied out of the deceased widow's personal estate in their hands. In execution of this decree a portion of the mortgaged property was sold by auction and purchased by the appellant. The respondent brought a suit against the appellant for possession of the property purchased by him at the auction sale, on the allegation that it did not form part of the widow's estate but belonged to the estate of her husband. *Held*, that the appellant was entitled to retain the property purchased by him. Whether the property formed part of the widow's estate or belonged to the estate of of her husband was a question which ought to have been decided in execution, and could not be made the subject of a separate suit by the respondents. The provisions of s. 244, Civil Procedure Code, make no distinction in this respect between representatives brought on the record before and representatives brought on the record after decree. **Gajadhar Parshad v Ambika Sahai. Supp. 1 O C 60 Followed in 8 O C 405.**

(6) Manager

337—C P C S. 47 of (1908)=S. 244 of (1882). The manager of a Sansthan can dispute the validity of the decree (made in the time of the previous manager) in execution proceedings without being obliged to bring a separate suit. **Venubai v Dhondo. 1892 P J 250.**

(7) Karnavan.

338—C P C. S.47; O. 21, r. 58=(1882 Ss. 244,

C P C (1908) S.47=(1882 S.244)-*Contd.*

(3) Representative—*Contd.*

278)—Parties—Decree against Karnavan—Objection to execution by members of tarwad.

A decree against a karnavan in his representative capacity binds all the members of his tarwad; and consequently those other members are all constructively parties to the suit,-notwithstanding that some of the members claim the attachment of property adversely to others. An objection by them to the attachment of property falls under S. 244 and not under S. 278.
Mathu Amma v Kunnat Cherukot.
17 M L J 377=30 Mad 215.

(8) Co-sharer.

339—C P C S. 47—"Representative"—Unrecorded co-sharer, if representative of recorded co-sharer—Bengal Tenancy Act (VIII of 1885), s. 173, order under, when appealable.

An unrecorded co-sharer in a tenancy sold in execution of a rent decree against the recorded co-share is not a representative of the recorded co-sharer within s. 47 of the Code (9 C W N 184, Ref.). It cannot be laid down generally that an order under s. 173 of the Bengal Tenancy Act is in no case appealable. Whether an appeal will lie or not will depend upon whether the question relates to the execution of the decree and whether it is between the parties to the original suit or their representatives so as to bring the order under s. 47, Civ. Pro. Code.
Sreematty Joy Tara v Pran Kristo Seal.
15 C W N 512.

(9) Ijardar.

340—C P C S.47=(1882) S.244 cl (c)-Representative—Parties etc—Ijardar of judgment-debtor is legal representative—Right of suit.

(1) An Ijardar of a property of the judgment-debtor is his representative within the meaning of S. 244, C P C. (2) A suit by a decree-holder against the judgment-debtor and his Ijardar for a declaration that the ijara was null and void is not maintainable as that is a question which should be decided by the Court executing the decree. (19 All 332, 16 All 286; 21 All 20; 24 Cal 62 ref. to.). **Mathewson v Gobardhan Tribedi.**
5 C W N 654=28 Cal 492.

Notes.—Ref: 17 M L J 321.

C P C (1908) S.47=(1882 S 244)*Contd*

(3) Representative—*Contd.*

(10) Benamidar.

341—C P C S. 47=(1882) Civil Procedure Code S. 244—'Representative,' who is—Beneficial owner.

A person for whom the predecessor of the judgment-debtors was the *benamidar* and who is therefore really interested in protecting the property, is a 'representative' of the judgment-debtors within the meaning of section 244 of the Civil Procedure Code. **Shibkumar Lal Panday v Maidhur Gazi.** **7 C L J 299.**

(11) Attaching creditors.

342—C P C S. 47 of (1908)=S. 244 of (1882)—Decree-holder's representative—Attachment of adecree-Ss. 232, 273.

A person attaching a decree is a representative of the decree-holder and is entitled to enforce execution of the decree which he has attached. When the court which passed the decree and the court which executes it is the same it has jurisdiction to execute the attached decree on the attaching crecitor's application. **Peary Mohun Chowdhry v Romesh Chunder Nundy.**
15 Cal 371.

Notes:—Ap: 24 Cal 778 ; 17 Mad 58 ; 17 All 425. Fol: 16 Mad 20 ; 3 M L J 211; 6 C L J 141. Ref: 11 C W N 433; 6 C L J 437.

343—C P C S 47=(1882 s. 244)-Representative—Person attaching decree.

A person attaching a decree is a representative of the decree-holder. (15 Cal 371 foll.)
Brojo Nath Saha v Gaya Sundari Dassya.
6 C L J 141.

344—C P C S. 47; O. 21 r. 18=(1882 s.244)—An attaching creditor, representative of the decree-holder.

An attaching creditor becomes the representative of the decree-holder for the purposes of s. 244 of the Code and any order passed in execution as between him and the judgment-debtor, is therefore open to appeal. (28 Mad 473 over; 24 Mad 412 Fol: 16 Mad 20 Fol.) **Krishnan v Venkatapathi Chetti.** **29 Mad 318.**

(12) Official assignee.

345—C P C S 47 of (1908)=S. 244 of (1882)—A suit for pre-emption was decreed conditionally

C P C (1908) S. 47=(1882 S.244)-*Contd.*

(3) Representative—*Contd.*

on the plaintiff paying Rs. 1,595. He paid the amount, and it was certified under s. 258 of the Code of Civil Procedure. Subsequently the decree was modified on appeal by increasing the amount which the plaintiff was required to pay as the condition of pre-emption. He failed to pay the additional amount, and the suit consequenty stood dismissed. His assignee brought a suit to recover the Rs. 1,595 paid by him under the original decree. *Held* that the suit was barred by s. 244 of the Code of Civil Procedure

Ishur Das v Koji Ram. **10 All 354, 8 W N 57.**

Notes.—Ref. W N (1907) 183.

346—C P C—S. 47 of 1908=S. 244, 1882—Statute 11 and 12 Vic—Insolvency proceedings.

A decree-holder having attached the property of his judgment-debtor in execution of the decree obtained an order for sale of the attached property. Prior to sale the judgment-debtors made an application to be declared insolvents, and obtained an order under Statute 11 and 12, Vic. Ch 21, S. 7, by which their property was vested in the Official Assignee. An application was then made by the Official Assignee to the Court in which the execution of the decree was pending for the release of the property from attachment, and that the property might be made over to him. The Court dismissed the application. On appeal the District Judge reversed the first Court's order. *Held* that the matter did not come before the Court of first instance under s. 49 of Statute 11 and 12, Vic Ch 21 inasmuch as that section refers to cases where the insolvent's schedule had been filed and to debts or demands admitted therein and in the present case no schedule had been filed at the time of the Official Assignee's application, and the Court could therefore only entertain the application under the provisions of Civil Procedure Code relating to the execution of decrees. *Held*, that the Official Assignee could not be held to be a representative of the judgment debtors within the meaning of s. 244 of the Code of Civil Procedure, and his application was not one relating to the execution, discharge or satisfaction of the decree. *Held* that the Court of first instance had only jurisdiction in the matter under s. 278 of the Code, and disposed of it under that section and that the

C P C (1908) S.47=(1882 S.244)-*Contd.*

(3) Representative—*Contd.*

District Judge had no jurisdiction to entertain the appeal. **Kashi Prasad v Miller. 7 All 752, 5 C W N 166.**

Notes:—Diss: 28 Cal 419. Ap. 16 Cal 603. Ref: 22 Cal 259 ; 21 Bom 205 ; 30 All 486=(1908) W N 203=5 A L J 553.

347—C P C S. 47, O. 21 r. 16, =(Act XIV of 1882—Ss 232, 244)—Assignee—Representative—Decree-holder.

Where an application made by the assignee of a decree under s. 232 of the Code of Civil Procedure, 1882, is objected by a Court, the assignee's remedy lies in an appeal from the order of rejection under s 244 of the Code of Civil Procedure, and not in a suit for a declaration that he is the assignee of the decree, and as such competent to execute the same. The transferee of a decree, is a representative of the decree-holder within the meaning of that s. *qua* the decree. (16 All 483 Ref.) **Budhan Singh v Salig Ram. 1 A L J 61.**

348.—C P C S 47, O XXI r. 58=(Civ Pro. Code 1882, ss. 244, 278)—Assignment of decree—Subsequent attachment of decree so assigned - Frame of petition objecting to attachment.

After the assignment of a decree for value, the decree was attached in execution of a decree obtained against the assignor. The assignee applied for release of the property under s. 278 of the Code. *Held*, that as the assignee was neither a party nor a representative of a party, the claim by him to the attachment was rightly framed under s 278. He could not invoke s. 244 of the Code in support of his claim. **Venkatasubba Naidu v. W D Smith, 10 M L J 116.**

349.—C P C S. 47—(1882 S. 244)—Insolvency Act (11 & 12 Vic C 21),—Insolvency Proceedings-Vesting order-Prior attachment—Priority of claim-Attaching creditor and official assignee—Civil Procedure Code Act (XIV of 1882), S. 244- Official assignee, whether representative of Judgment-debtor—Appeal.

Where the objection of the Official Assignee was that the property attached, though belonging to the judgment-debtor, was not liable to be

C P C (1908) S. 47=(1882 S.244)-*Contd.*

(3) Representative—*Contd.*

sold in execution of the decree by reason of a vesting order passed in the insolvency proceedings. *Semble:* That the Official Assignee was a representative of the judgment-debtor within the meaning of S. 244 C P C (7 All 752, 21 Bom 205 ref to.)—**Mitter v Lakimoni Debi.**

5 C W N 761=28 Cal 419.

350.—C P C S. 47=(1882 S. 244)—Representative—Official Assignee-Disallowance of claim of Official Assignee to have proceeds of sale in execution of decree against insolvent judgment-debtor paid to him-Appeal:

Held, that the Official Assignee not being the representative of an insolvent judgment-debtor no appeal would lie against this dis-allowance of his claim to have the proceeds of a sale in execution of a decree against insolvent judgment-debtor paid over to him. (7 All 752: 21 Bom 205 and 22 Cal 259 ref.to.) **The Official Assignee v Hazari Lal.**

1908 A W N 203=30 All 486.

351.—C P C S. 47=(1882 S 244)—Application for payment of sale proceeds to official assignee-Not an application in execution—Appeal

An official assignee is not a representative of the judgment-debtor within the meaning of section 244, Civ. Pro. Code. An application for payment of money to him of the proceeds of sale is not an application for execution, discharge or satisfaction of the decree and no appeal lies against an order rejecting that application. (7 All 752 Foll; 21 Bom 205; 22 Cal 259 Ref) **Grey v. Hazari lal. 5 A L J 553=1908 A W N 203.**

(13) Transferee

352.—C P C S. 47=S. 244.—Transfer of decree by operation of law—Representative of original decree-holder-Right to appeal against order refusing execution.

R died in May 1859, leaving his property to his executors in trust for the appellant *P*, and he directed that the property should be assigned by them to the appellant as soon as he came of age. In August 1868, the executors filed this suit against *L* as manager of certain landed property belonging to the Hallai Bhattia caste, and known as Mahajan Wadi to recover certain loans made by them as executors to him as manager of the said Wadi. On the 11th May 1870, while this suit was pending, the executors assigned all the property of their testator to the appellant P. By the deed of assignment they assigned to him *inter alia*, "all moveable property, debts, claims, and things in action whatsoever vested in them as such executors." No steps were taken, subsequently to this assignment, to make the assignee *P* a party to the suit, which proceeded without amendment. On the 23rd January 1873, a decree was passed for the plaintiffs on the record for Rs 31,272-13-5, and it was declared that the said sum should be a first charge on the rents and income of the said Wadi. Subsequently to this decree, *L* opened an account in the name of the appellant *P*, and from time to time made payments to him on account of the decree. The last of these payments was made on the 19th November 1884. None of these payments were certified to the Court. In 1885 the respondent *V* was appointed to the office of manager of the Hallai Bhattia caste in the place of *L*, the original defendant in the suit. On the 4th January 1886, his attorneys wrote to the appellant's attorneys offering to pay the appellant the balance due to him under the decree. Subsequently, however, he refused to make any payment to the appellant, whereupon the appellant applied for execution of the decree against him as manager of the said Wadi. He claimed to be a transferee of the decree under s. 232 of the Civil Procedure Code (Act XIV of 1882). His application was refused by the Judge in Chambers. *Held* that the appellant was a transferee of the decree within the meaning of s 232 of the Civil Procedure Code. The decree had been transferred to him "by operation of law." As such, he was entitled to sue out execution and was to be regarded as the representative of the original decree-holder within the meaning of cl *(c)* of s. 244 of the Civil Procedure Code, and had a right of appeal against the order of the Judge in Chambers refusing execution. **Purmanandas Jiwandas v Vallabdas Walji,**

11 Bom; 506.

Notes:—Fol 21 Bom 122; 16 All 483. Ref 2 Bom L R 887; 1 All 42.

C P C (1908) S.47=(1882 S.244)-*Contd*

(3) Representative—*Contd.*

353—C P C S. 47 of (1908)=S.244 of (1882)—Amendment Act VII of 1888—Application by transferee from legal representative—Transferee and legal representative—Administrator of estate.

A transferee under s 232 is a representative of the decree-holder under s. 244 cl. (c) and the term includes subsequent transferees as well as the purchasers directly from the decree-holder. (26 Cal 250 and 16 All 483 followed.) **Ganga Das Seal v Yakub Ali Dobashi. 27 Cal 670.**

354.—C P C (1908)—S. 47—"Representative"—Simple money decree—Attachment—Transferee from judgment-debtor—Separate suit—Fraudulent transfer—Husband gifting all his property to wife—Decree under execution.

Held that a transferee of a judgment-debtor's property is not a representative of the judgment debtor for the purpose of executing a simple money decree; consequently, an objection by such a person to the attachment of prperty does not fall under *S.*47 of the C P Code, and a separate suit is maintainable by the decree-holder if the objection of the transferee is allowed. (16 All 286 Fol. 24 Cal 62=1 C W N 36; 26 Cal 250; 3 C W N 222; 29 Cal 813; 32 Cal 1031; 9 C W N 824 Dist). **Mussammat Bhamaphul Devi v Rai Sahib Harbaksh Singh. 113 P W R 1912.**

355.—C P C—S, 47 (1908)=Ss. 244, 311—Transfer of pending execution case—Sale held irregularly—No application by judgment-debtor to set aside sale—Transferee of judgment-debtor whether competent to question sale. **13 Ind Cas 542.**

356.—C P C S. 47—O 21 r 16=(1882, Ss. 244, 232)—Transferee of decree—Transferee of portion of decree, no transferee:—A person who acquires a partial interest in the rights created by the decree is not entitled to be recognized as the transferee of the decree under s. 232. The assignee's right is only by separate suit and not by execution. **Pasupathy Ayyar v Kothandarama Ayyar. 28 Mad 64.**

357.—C P P C S 47 (244)—Representative. A transferee of a decree is the representative of the decree-holder soon after assignment even before recognition of the transfer by Court.

Sadagopa Chari v Raghunatha Chariar. (1909) 33 Mad 62.

C P C (1908) S.47=(1882 S.244)-*Contd*

(3) Representative—*Contd.*

358—C P C S. 47=S. 244—Representatives of transferor of decree—Application for substitution of names by transferees—Non-registration of transfer.

The holders of a decree for the sale of mortgaged property transferred the same to *M* by instruments which were registered at a place where a small portion only of the property was situate. Subsequently, *M* transferred the decree to other persons, and the co-transferors applied under s. 232 of the Civil Procedure Code to have their names substituted for those of the original decree holders. The judgment-debtor opposed the application on the grounds that his name had not been substituted for those of the original decree-holders, who had transferred to him, and that the transfers to *M* were inoperative, as the instruments of transfer had not been registered at the place where the substantial portion of the mortgaged property was situate, in accordance with s. 20 of the Registration Act of 1877. It appeared that no notice had been issued to *M* under s. 232 of the Civil Procedure Code. that he was dead, and that his legal representatives had not been cited as required by law. The application was allowed by the Courts below. *Held* that the matter involved questions arising beween the parties to the decree, or their representatives, within the meaning of s. 244 (c) of the Code, and that the order allowing the application was therefore a decree within the definition of s. 2, and was appealable as such. **Gulzari Lal v Daya Ram 9 All 46.**

Notes.—Ref: 16 All 483.

359—C P C S. 47; (1908)—(=Civ Pro Code, 1882, s. 244)—Execution of decree—Representative of a party to the suit—Transfer of property before attachment.

The transferee of property, which at the time is not attached, does not, on the subsequent passing of a money-decree against the transferor, become a representative of such transferor, within the meaning of s. 244 of the Code of Civil Procedure. (16 All 286 Fol: 19 All 333, 21 All 20 Dist.)

Sheo Kunwar v Elahi Baksh A W N (1900), 107.

C P C (1908) S.47=(1882 S.244)-*Contd.*

(3) Representative—*Contd.*

360—C P C S. 47 (=Civ Pro Code, 1882, s. 244)—Execution of decree—Representative of party to the suit.

Held that a mortgagee, who has purchased the mortgaged property at a sale in execution of the decree on the mortgage, is not the representative of the mortgagor so as to entitle him to come in under s. 244 of the Code of Civil Procedure, and object to the execution of the decree of another mortgagee against the same mortgaged property. (17 All 222 Ref.) **Baldeo Prasad v Madan Mohan Lal.** **A W N 1900,42.**

(14) Mortgagee.

361—C P C S. 47 of 1908=S. 244—Representative of a party to the suit—Second mortgagee taking a mortgage during the pendency of a suit on the first mortgage.

Held that a second mortgagee who takes his mortgage during the pendency of a suit on the first mortgage is a representative of the mortgagor within the meaning of s. 244 of the Code of Civil Procedure. (16 All 286, referred to.) **Sheo Narain v Chunni Lal.** **22 All 243**

362—C P C S. 47 (1908)—S. 244—Mortgage—Money-decree by mortgage—Execution—Sale of mortgaged property—Purchase by mortgagee at the sale-Mortgagor's remedy. **14 Bom L R 254**

363—C P C—S. 47—'Representatives,' who are—Decree binding endowed property—Judgment-debtor, no interest in property—*Shebait* if can object to execution. **14 C L J 337.**

364—C P C S. 47=S. 244-Person acquiring interest before the liabily of the judgment-debtor arises is not a representative.

A person who had acquired an interest in property sold in execution of a decree, before the judgment-debtor became liable under the decree, is not a representative of the judgment-debtor within the meaning of s. 244 of the Civ Pro Code, 1882. Where an order under s. 310-A, Civ Pro Code, 18 82, does not decide a question between the parties to the decree or their representatives, although it is an order relating to the execution of a decree, it does not come within the provisions of s, 244, Civ Pro Code, 1882, and, therefore, no appeal lies from such order. **Bungshidhar Haldar v Kedar Nath Mondal.** **1 C W N 114.**

Notes.—Fol 6 C W N 57; Ref. 5 C C 377; 5 C W N 63. Dist 13 C W N 591.

C P C (1908) S. 47=S. 244 of 1882.

See C P C (1908) S. 2 cl. 2, Case No (26).
27 All 380.

C P C S. 47—Questions in execution of decree.

See (1) C P C S. 144 (1) Case No (1378).
24 All 228.

(2) Execution of decree–Execution by or against representatives.
28 All 466 F B

(3) C P C Sch III. **16 W N 69.**

(4) C P C S. 144 (1) Case No (1373).
13 C C 180.

(5) C P C S. 144 (1) Case No (1371)
6 Ind Cas 125.

(6) C P C S. 144 (1) Case No (1359).
34 Cal 860.

4. QUESTIONS RELATING TO EXECUTION.

(1) Carrying away some of materials purchased—Suit for damages.

365—C P C S. 47=(1882 Sec 244).

The plaintiff purchased a paramba in court auction and the sale was confirmed; but before he obtained possession the decree-holder and judgment-debtor joined with some others and carried away some of the materials of a building standing upon the land. The plaintiff sued them all together for damages.

Held that this was not a question relating to the execution of the decree within the meaning of Section 244 of the Civil Procedure Code, and that the purchaser was entitled to implead in one suit all the joint wrong-doers including the parties to the suit in execution of which the property was sold. **Kolintavita Antathodam Mama Amina v Kolintavita Muyyarukandi Bavachi Haji.** **3 M L T 97=17 M L J 543=31 Mad 37.**

C P C (1908) S. 47=(1882 S. 244)-*Contd.*

(4) Questions relating to execution—*Contd.*

(2) Damages resulting from acts done under cover of execution proceedings, suit for, maintainability of—Execution Court-Jurisdiction.

366—S. 47 (1882 s. 244)—Execution discharge or satisfaction, relating to—Small Causes Court, reasons for finding.

Under s. 244 of C P C the Court executing the decree could only restore to the rightful owner land of which he had been deprived in the execution proceedings in excess of that decreed, and that where damages had resulted from acts done under cover of the execution proceedings, either by the decree-holder, or at his instigation or suggestion, a separate suit for the recovery of such damages lies against the decree-holder.

The question of an assessment of damages for injury arising from the fact that execution was taken out in excess of the relief granted under the decree, is not one relating to the "execution, discharge or satisfaction of the decree" itself but is one outside the decree. (11 W R 516, 12 W R 85 and 12 B L R 201, Fol; 7 W R 45, Ref; 23 Bom 334, 13 All 533, Dist.) **Deno Nath Banskya v Ram Kumar Chakrabutty. 6 C L J 527.**

(3) Pre-emption suit—Execution Order allowing mesne profits to pre-emptor.

367—C P C S. 47=(1882 S 244)

When a decree for possession of land is passed in a suit for pre-emption, a question, whether mesne profits should be allowed to the plaintiff for the period between the institution of his suit and the final decree on appeal is not "relating to the execution, discharge or satisfaction of the decree" as used in *S.* 47; nor does the case come under *S* 144. The question could be carried only by a separate suit. **Chaudhri Hoa Rama v Rama Paliya. 44 P L R 1910.**

(4) Question as to amount received under mortgage

368—C P C S. 47=S.244-Attempt to obtain redemption of a usufructuary mortgage by means of an application in execution

Certain mortgagees held a simple mortgage which was to become usufructuary for non-payment of the mortgage-debt by a certain date. The debt was not paid as stipulated and the mortgagees obtained a decree for possession until the usufruct satisfied the debt. Sometime after this, the mortgagors applied under s. 244 of the Code of Civil Procedure for recovery of posseesion of the property, and for payment of a large sum of money alleged to have been realised by the mortgagees in excess of their due. *Held* the proper remedy was a suit for redemption and not an application under s. 244. (12 B H C 183, 12 B H C 160; 14 Bom 327 referred to.) **Har Prasad v Sheo Ram 20 All 506, 18 W N 139.**

369—C P C S. 47=S. 244—Usufructuary mortgage.

In a suit for possession under an usufructuary mortgage, plaintiff obtained a decree which was afterwards authoritatively interpreted to mean that he was to get possession of the property in order to repay himself out of the profits, keeping the usual accounts, and, after satisfaction of his claim, restore the property. *Held* that, under the terms of the decree, he was in effect required to certify, for the information both of the Court and of the judgment-debtors, the amounts received and outstanding; and that the Court executing the decree was bound to require from him, from time to time, a statement of the amount received and could deal with the matter under Act XXIII of 1861, s. 11. **Golam Russool Khan v Kishen Mohun Shaha. 23 W R 156.**

(5) Mode of redeeming mortgaged lands in execution of former decree.

370—C P C—S. 47=S. 244 of 1882.

A mortgagee was put into possession of the mortgaged property, under a decree obtained by him against the mortgagor, to the effect that the mortgagee should remain in possession until the mortgage debt was paid. The mortgagor subsequently paid into Court the money due under the mortgage decree, and applied to be restored to the possession of the mortgaged property. Both the lower Courts granted the mortgagor's application. On special appeal——*Held* (following the decision of the Full Bench in 12 Bom 161) that such an application was not the proper mode for the mortgagor to redeem the property and to recover possession from the mortgagee, the previous decree for possession having

C P C (1908) S.47=(1882 S.244)-*Contd.*

(4) Questions relating to execution—*Contd.*

been fully executed when the mortgagee was put into possession.

Ramchandra Ballal v Baba Esgonda. 12 Bom H C R 163.

(6) Payment of money after date fixed in decree—Execution proceedings-Possession—Rate of interest.

371—C P C—S. 47, O 21 r. 89=(1882 ss. 244, 2, 310, A)—Transfer of Property Act (IV of 1882) secs. 88, 93—Usufructuary mortgage.

On a decree for sale in default of payment before a given date the mortgagor paid it after the date but the mortgagee did not apply for an order for sale. On the mortgagor's application for possession in the form of an execution petition possession was delivered to the mortgagor

Held that the decree for sale was final and subsequent proceedings were execution proceedings. Unless there is something in the decree to debar him from so doing, the judgment-debtor is entitled to stop execution by payment of the debt at any time after decree and before the execution sale is complete; the execution sale is not finally complete, until he had an opportunity of obtaining its decision under s. 310 A of Civil Procedure Code. The only penalty affixed to the default is the liability to have the property sold.

Even if that mortgagor be regarded as a decree-holder under sec. 2 Civil Procedure Code his default affects only his rights as such decree-holder but his rights as judgment-debtor are not affected. The mortgagor can get possession of property in execution proceedings. *Held* that the mortgagee after the decree for sale was entitled only to the Court rate of interest and not to the melvarm of the property as under the mortgage. **Audipuranam Pillay v Gopalasawmy Mudally. 3 M L T 281=18 M L J 259=31 Mad 354.**

(7) Contest between the holder of a decree for an undivided share of joint property and an auctin purchaser-Pendente lite.

372—C P C—S. 47=(1882 Civil Procedure Code, s. 244)—Question relating to the execution, discharge or satisfaction of the decree.—

C P C (1908) S.47=(1882 S.244)-*Contd.*

(4) Questions relating to execution—*Contd.*

One Wilayati Begam obtained a decree for possession of a share in certain joint and undivided Zamindari property, and this decree was executed so far as might be by delivery of formal possession. While the suit in which this decree was passed was pending, one Raghunath Das obtained a simple money decree against another co-sharer in Zamindari and in execution thereof brought the property to sale and it was purchased by Nand Kishore. Nand Kishore got possession. Wilayati applied for partition of her share but was resisted by Nand Kishore, and accordingly instituted a suit against Nand Kishore praying for a declaration of her title as against him. *Held* that such a suit was not obnoxious to the prohibition contained in section 244 of the Code of Civil Procedure. (26 All 447 Dist ; 28 All 722; 6 Ch. D. 160 Ref). **Wilayati Begam v Nand. Kishore. (1908) A W N 93=30 All 231=5 A L J 547.**

(8) Question between decree-holder & judgment-debtor as to saleability or otherwise of an occupancy holding.

373—C P C—S. 47 of 1908=s. 244 of 1882—Questions for Court executing decree—Dispute between the decree-holder and judgment-debtor as to the saleability of an occupancy holding.

S. 244 allows the question between the decree-holder and the judgment-debtor as to the saleability or otherwise of an occupancy holding to be determined in execution proceedings. (26 Cal 727 and 24 Cal 355 referred to.) **Gahar Khalipa Bipari v Kashi Muddi Jamadar. 27 Cal 415=4 C W N 557.**

Notes:—Ref: 9 C W N 972.

374-C P C-S. 47 of 1908=s. 244 of 1882-Liability of an occupancy holding to be sold in execution-Transferability of such holding to custom.

An application was made for the attachment and sale of an occupancy-holding in the execution of a money-decree. According to s. 244 C P Code, the judgment-debtor can raise a question as to whether the holding is saleable according to custom, and get it determined in the execution proceedings. **Majed Hossen v Raghubur Chowdhry. 27 Cal 187.**

Notes.—Fol: 4 C W N 571; 11 C W N 83.
Dist: 4 C W N 679.

C P C (1908) S.47=(1882 S.244)-*Contd.*

(4) Questions relating to execution—*Contd.*

375—C P C—S. 47=s. 244—Question of validity of sale of an occupancy—holding not transferable by custom for arrears of rent by a co-sharer landlord—Bengal Tenancy Act VIII of 1885.

An occupancy holding not transferable by custom, as well as the judgment-debtor's interest in it, are not saleable in execution of a decree for rent obtained of some only of several cosharer landlords. (24 Cal 355 referred) An occupancy holding not transferable by custom was sold and the sale confirmed in execution of a decree for the arrears of rent obtained by some only of the several cosharer landlords. The application of the purchaser for possession was objected to by the judgment-debtor on the ground of the illegality of the sale. *Held*, that the confirmation of the sale is no bar to an application by the judgment-debtor for a declaration that such a holding could not be sold in execution, the question being one relating to the execution, discharge or satisfaction, of the decree. (8 All 146 referred.)

Durga Charam Mandal v Kali Prasanna Sarkar. 26 Cal 727=3 C W N 506.

Notes:—Appl; 27 Cal 187. Dist: 13 C W N 630. Fol: 27 Cal 115; 810; 4 C W N 571; 27 All 702=2 A L J 469=(1905) W N 162: 9 C W N 972; 10 C W N 176=4 C L J 68, W N (1907) 193; 29 All 612. Appr: 6 C L J 320 F B. Ref: 5 C W N 763, 10 M L J 110; 8 C W N 472, 9 C W N 34, 11 C W N 83; 29 Cal 54; 7 C W N 572, 5 C L J 235 F B; 294, 11 C W N 1011 F B; 34 Cal 199, 11 C W N 513; 4 A L J 519; 5 A L J 121=30 All 146 =(1908) W N 49; 10 Bom L R 66= 35 Cal 331 P C=7 C L J 139=12 C W N 249: 35 Cal 61 F B.

376—C P C S. 47, O 21 r 90=(Ss 244, 311) Question relating to execution—Setting aside sale in execution proceedings.—

Where the holder of a money decree executes it after the death of the judgment-debtor against his sons and legal representatives and brings their ancestral property to sale and purchases it himself, it is open to the representative of the judgment-debtor to apply to the Court executing the decree to set aside the sale even after confirmation on the ground that

C P C (1908) S.47=(1882 S.244)-*Contd.*

(4) Questions relating to execution—*Contd.*

property sold was not acquired by them as representatives and, therefore, not liable to be proceeded against in execution. Questions relating to the validity of execution sales and arising between the decree-holder, purchaser and the judgment-debtor must be determined by the Court executing the decree. As between the parties to a suit, a sale in execution may be set aside upon the ground other than specified in S. 311, of the Civil Procedure Code. **Krishnan Chetti v Arunachellam Pillai.**

(1892) 16 Mad 447=3 M L J 216.

(9) Question as to amount of security on stay of execution pending appeal.

377—C P C S 47 of 1908=S 244 of 1882.

The question as to the amount of security to be given by a defendant against whom a decree has been passed, when a stay of execution is granted pending appeal, is a question relating to the execution of the decree as contemplated by s. 244 of the Civil Procedure Code. **Ishwagar v Chudasama Manabhai 12 Bom 30.**

(10) Order for stay of sale of property in execution of mortgage decree-Appeal.

378—Ss. 2 S 47 O 21 R 69=(1882 Ss 2, 244, 291)

An order for stay of sale of mortgaged properties in execution of a mortgage decree is an order under Cl c of S. 244, C P C though the order is in terms one under S 291. **Shyam Kishen v Sunder Koer. 31 Cal 373.**

(11) Question as to order absolute for sale.

379—C P C S. 47=(1882) S. 244.

Any question that arises as to an order absolute for sale is not a question relating to the execution of a decree. (25 Cal 703; 22 Cal 924; 25 Cal 133; 21 Cal 818.) **Hatem Ali Khundkar v Abdul Gaffurdhan 8 C W N 102.**

Notes.—Ref 12 C W N 282=7 C L J 581; Diss 30 All 248=(1908) W N 103=5 A L J 272 Dist: 9 C L J 358.

C P C (1908) S.47=(1882 S.244)-*Contd.*

(4) Questions relating to execution—*Contd.*

(12) Power of Court to correct its own mistake—Amendment of sale certificate including a property not sold

380.—C P C S. 47—(1882 S 244)—Inherent power.—

A Court committing a blunder has power to rectify it of its own motion.

Where two properties were advertised for sale and one property was sold but the sale certificate included both the properties and the purchases got possession of both:

Held that the Court had inherent power to rectify the mistake by amending the sale certificate and to direct that the delivery of possession of the second property be cancelled:

That the matter would also come under s. 244, C P C., the question being one between the decree-holder and the judgment-debtor and relating to the satisfaction or discharge of the decree.

Gobinda Chandra Chanda v Abhoy Charan Bagchi. 12 C W N 1027.

(13) Application to recover proceeds of sale from decree-holder after sale has been set aside.

381-C P C S 47,=(1882 s 244-cl (c))-Relating to the execution, discharge or satisfaction of the decree.—

Held, that an application to recover from a decree-holder the proceeds of a sale in execution, such sale having been set aside, is an application which falls within S 244 of the Code of Civil Procedure S.244 of the C P C applies as well to a dispute arising between the parties after the decree has been executed as it does to a dispute arising between them previous to execution. (17 All 478; 22 All 79; and 2 All 61 ref to. 7 All 641 distinguished).

Collector of Jaunpur v Bital Das, 1902 A W N 67=24 All 291.

(14) Application by a subsequent purchaser in execution of another decree to set aside the sale on the ground that the exparte decree had been set aside.

382.—C P C s 47 (1908)=s 244 (1882)—Sale in execution of an exparte decree—Purchase by the decree-holder—Confirmation of the sale subsequent setting aside of the decree—Application by a purchaser in execution of another decree to set aside the sale on the ground of the setting aside of the exparte decree.

The decree holder of an exparte decree purchased certain immoveable property in its execution. After the confirmation of the sale, the exparte decree was set aside. The prior purchasers of the same property in execution of another decree made an application under s 244 to set aside the sale on the ground that the exparte decree was set aside. The defence was that they could not apply under s 244 and that a sale once confirmed could not be set aside. Held that the case was one under s. 244 and that the sale could not stand as the exparte decree was set aside inasmuch as the decree-holder himself was the purchaser. (25 Cal 175; 3 C W N 6; 26 Cal 727; L R 15 I A 12; 10 All 166; 10 Cal 220 referred to).

Set Umedmal v. Srinath Roy 27 Cal 810=4 C W N 692.

Notes.—Ref: 13 C W N 710; 27 Mad 98; 31 Cal 499; 9 C L J 134; 6 C L J 102; 320 F B; 5 C L J 328; 11 C W N 1011 F B; 35 Cal 61 F B. Dist 6 C L J 92.

(15) Foreclosure application to re-open execution.

383.—C P C S 2, s 47=(1882 Ss 2, 244)—Any question arising after an order absolute for foreclosure is not one relating to execution and no second appeal will lie against the appellate order on such application. **Tara Pado Ghose v Kamini Dassi. 29 Cal 644.**

Notes:—Ref 6 O C 114.

(16) Power of Court—Appeal.

384.—Ss 47. 144 (1) (=Civ Pro Code, 1882 ss 244 583)

An appeal lies against an order passed under s 583 Civ Pro Code, as against any order passed in execution. S. 583, Civ Pro Code, gives no rights which a successful party did not otherwise possess. It only regulates the exercise of his right to claim the restoration of the state of things as it stood before the erroneous decree was passed. The Court must determine all questions between the parties necessary to restore the parties to the

C P C (1908) S.47=(1882 S.244)-*Contd*

(4) Questions relating to execution—*Contd.*

original state of things. **Vellanki Venkatarama Rao v Venkatasubbamma Rao. 8 M L J 276.**

(17) Question regarding satisfaction—No application for execution pending.

385.—C P C S 47=1882 s. 244 (c)

Where a court deals with a question relating to the discharge or satisfaction of a decree, it may be said to be executing the decree within the meaning of S. 244 C P C., although no formal application for execution may have been made to it; and an order passed by the court is a decree and is appealable. **Ram Kamlessuri Pershad v Sukhan Singh. 7 C W N 172.**

Notes.—Ref: 12 C W N 282=7 C L J 581; 10 C L J 91.

(18) Order under appeal.

386.—Ss. 47, 55, (=old Ss. 244, 336)—Civ Pro Code, 1882.—

An order passed by the executing Court for the imprisonment of a judgment-debtor though not liable to be appealed against as an order, is appealable as a decree, for such an order decides a question relating to the execution of a decree within the meaning of s 244 (new s 47), Civ Pro Code. **Seva Singh v Dhaunkal. 69 P R 1895.**

(19) Mortgage-decree—Purchase-Suit on a subsequent mortgage—Matter relating to execution—Sale—Obstruction—Claim allowed—Appeal.

387.—C P C S. 47, O 21, rr 95, 97, 99, 103 (1882 ss 244, 318 and 335)—Sale subject to prior charge—Purchase to possession—Mortgagor after decree for sale—Obstruction—No appeal.

An order determining the right to possession of properties as between the mortgagee-decree-holder--purchaser and a party to the suit, is an order passed in execution between the parties to the suit within the meaning of S.244 C P C and hence an appeal will lie against such an order.

A similar order as between the decree-holder purchser and one who had purchased the property from the mortgagor judgment-debtor after the decree for sale is not an order between parties to

C P C (1908) S.47=(1882 S.244)-*Contd.*

(4) Questions relating to execution--*Contd.*

the suit or their representatives within the meaning of s 244, C P C., and hence no appeal lies against such an order.

Where in a decree for sale the rights of purchasers in execution of a decree for sale upon a prior mortgage were reserved and properties were sold subject to a charge in their favour:—

Held that upon the proper construction of the decree the prior purchasers were entitled to remain in possession until redeemed and that subsequent purchaser was not entitled to recover the properties from them without paying the amount of the charge in their favour.

Kasinatha Ayyar v. Uthumansa Rowthen 12 M L J 1=25 Mad 529.

Notes.—Fol: 26 Mad 740; 13 M L J 237; 14 M L J 474; 28 Mad 87. Con: 28 Mad 119. Ref 30 Mad 507; 16 M L J 27; 17 M L J 291; 5 A L J 285; 6 A L J 71 F B; 31 All 82 F B.

(20) Suit barred—Restitution.

388—Ss. 47; 144 (1)=(1882 Ss. 244 583)—

Where a decree-holder obtains possession of the property without intervention of Court and the decree is reversed on appeal, no suit lies for possession of the property so taken possession of after the decree of the lower Court. Ss. 244 and 583 bar such a suit, the language of these sections being imperative.(22 All 79,25 All 441 ref.to.) Where instead of an application for restitution the plaintiff brought a suit for possession but prayed that his suit may be treated as an application for execution:—*Held*, that his prayer should be granted. **Sheodihal v Bhawani. 1907 A W N 90=4 A L J 188=29 All 348.**

Notes:—Now under the new Code a separate suit for restitution is barred. The matter could be dealt with only in execution proceedings. See the Notes on the section given in the beginning.

(21) No bar—Restitution proceedings—Bar by S. 244—Not strictly applicable to.

389—S. 47 S. 144 (1)=(1882 Ss. 244, 583)—

The provisions in S. 244 that the questions referred to therein must be determined by the order

C P C (1908) S.47=(1882 S.244)-*Contd.*

(4) Questions relating to execution—*Contd.*

of the Court executing the decree and not by separate suit is not made applicable to proceedings for restitution by the terms of S. 583. Proceedings in restitution can be had either by summary process or by a new suit. (10 M I A 293 foll. 9 W R 402 ref. to; 4 Cal 625, 33 Cal 857 expl.)

Matiram Marwari.v Ramkumar Marwari. 35 Cal 265.

(22) Application for refund of money.

390—S. 47; S. 144 (1)=(1882 Ss. 244 583)—An application in restitution for refund of money may be made in execution or by means of a separate suit. (38 All 665; 29 All. 143 ref to.) **Bithal Das v Jamna Prasad, 30 All 476= 5 A L J 527=1908 W N 206.**

(23) Execution of decree—Restitution.

391—C P C S 47 (1908)=S. 244 of (1882), In execution of a decree obtained exparte the decree-holders realized from their judgment-debtor some Rs. 1,300. The judgment—debtor applied under section 108 of the Code of Civil Procedure to have the decree set aside. His application was at first dismissed, but on appeal the *exparte* decree was set aside. The suit was re-heard, and was ultimately dismissed. Thereupon the successful defendant applied to the Court which had executed the decree against him for restitution of the money realized in execution of that decree.

Held, that the defendant's proper remedy was that which he had sought, namely, by application in execution and not by separate suit. (32 All 79) followed.

Saran v Bhagwan 25 All 441=23 W N 100.

Notes.—Fol: 28 All 665=3 A L J 556=(1906) W N 171 Ref: 4 A L J 188; W N (1907) 90; 29 All 348.

(24) Recovery of mesne profits for period between decree of High Court in appeal and decree in review-Separate suit -Application in execution.

392—Ss. 47,144 (1)=(1882 Ss. 244,583)—Review.

Where M D defendant in a partition suit, was deprived by the High Court of a house allotted to

C P C (1908) S.47=(1882 S.244)-*Contd*

(4) Questions relating to execution—*Contd.*

him by the first Court and subsequently the High Court, acting under Ch. XLVII set aside its decree, and M D having recovered possession of the house, applied under S. 583, C P C for mesne profits. *Held* that S. 583. had no application, the order entitling M D to restitution having been passed under Ch. XLVII, not in appeal under ch XLI. *Held*, further, that, it, was not necessary for M D to bring a separate suit: one of his remedies was by summary process, *i e* by an application under S. 244 and the application might be deemed to be one under that section. 1 All 203 ref to; 9 W R 402; 25 All 441; 27 All 485 approved. *Semble*: Also that the lower Court would have an inherent right to order restitution of what had been declared to have been improperly taken. 14 Cal 484,22 Cal 989 ref. to. It was further urged that in any case M D could not recover more than three years' mesne profits. *Held*, that the applicant having been guilty of gross laches in not applying for review for many years should get mesne profits only from the date of the High Court's decree in review.

Collector of Meerut v Kalka Pershad. 1906 A W N 171.

(25) Question as to whether debt was properly contracted.

393—C P C S, 47=S. 244—Execution against endowed property.

B obtained a decree against *V* a trustee of a muth. Subsequently *V*'s title as a trustee was negatived and that of *S* declared by a decree. *B* applied for the execution of the decree against the muth-property and to have *S* substituted instead of *B* V. *Held* that *S* shonld be made a party and that the question whether the debt was contracted for the benefit of the muth could not be raised in execution proceedings. **Sudindra v Budan. 9 Mad 80.**

Notes:—Ap: 23 Cal 639 Fol: 22 Bom 475; 29 Mad 553=16 M L J 415. Ref· 12 Mad 503; 18 Mad 131; 23 Bom 237; 17 M L J 388; 484; 19 M L J 651.

(26) Legal representatives of debtor-Decree-holder—Sons of deceased Hindu debtor can raise questions of illegality or immorality of their father's debt.

394—C P C—S. 47=(1882 S. 244)—Question

C P C (1908) S.47=(1882 S.244)-*Contd.*

(4) Questions relating to execution—*Contd.*

arising in execution-Execution proceedings—Separate suit, not permissible.

There is no substantial distinction in regard to questions arising in execution between the position of legal representatives added as parties to the suit before decree and legal representatives brought in after decree under S. 234 of the Civil Procedure Code (Act XIV of 1882). All questions between them and the decree-holder relating to to execution must alike be disposed of under S. 244 of the Code.

Where the sons of deceased Hindu debtor are added as legal representatives in the course of a suit and before the decree is pronounced, it is open to them to dispute in execution proceedings the liability of the ancestral properties for the debt of their father on the ground that the debt was tainted with immorality or illegality. They cannot insist on the decree-holder resorting to a fresh suit to enforce their pious obligation as Hindu sons to satisfy the debt out of the ancestral properties, because the question having arisen in execution proceedings between the decree-holder and themselves as parties to the suit, separate suit is rendered inadmissible by the provisions of S. 244 of the Civil Procedure Code, 1882.

Shivram v Sakharam. 10 Bom L R 939=33 Bom 39=I Ind Cas 459.

395—C P C—S. 47=*S.* 244—Hindu Law—Joint family—Money-decree against father—Execution against son after the death of the father—Ancestral property in the hands of the son liable—Civil Procedure Code *Act* XIV of 1882, Secs. 234, 244 and 278.

A money-decree obtained against the father of an undivided Hindu family can be executed after his death against his sons to the extent of the ancestral property that has come into their hands even if the debt has been incurred for the sole purposes of the father, provided that it is not tainted with immorality or illegality. If the son against whom the decree is sought to be executed as representative of his father takes the objection that debts are tainted with immorality he can do so undes Sec.244 of the Civil Procedure Code Act XIV of 1882. (11 *Mad.* 413; and 16 All 449, not followed. **Umed Hathsing v Goman Bhaiji. P J 1895, P 152; 20 Bom 385.**

C P C (1908) S.47=(1882 S.244-*Contd.*

(4) Questions relating to execution—*Contd.*

Notes:—Diss: 6 C W N 223. Dist: 3 Bom L R 97. Ref: 3 Bom L R 322; 6 Bom L R 344; 8 C W N 843; 28 Bom 383; 5 C L J 80, 491 F B, 34 Cal 642 F B; 11 C W N 593 F B; 32 Bom 348=10 Bom L R 297; 939. Appl: 11 Bom L R 699; 10 Bom L R 939; 11 C W N 163. Fol: 33 Cal 676=3 C L J 131, 33 Bom 39.

(27) Powers of Court executing decree-Hindu family—Objection by his son that his interest in the property mortgaged is not saleable in execution of decree obtained against his father.

396—C P C—S. 47=S. 244—Decree for sale on a mortgage.

Held that it is not open to a son in a joint Hindu family, who has been made a party as the legal representative of his father to proceedings in execution of a mortgage decree against his father, to raise an objection in those execution proceedings that the decree against the father is not binding on him in his personal capacity by reason of his not having been made a party to the suit in which the decree was passed. (17 All., 537, referred to. 19 All 480, and 21 All., 277, approved. 1899 A W N 24 not followed.) **Hira Lal Sahu v Parameshar Rai. 21 All 356.**

Notes:—Fol 32 Cal 265.

(28) Money decree—Death of judgment-debtor—Ancestral property-Objection by judgment—debtors' heir on the ground of want of necessity.

397—C P C—S. 47—Execution proceedings—Objection decided in execution proceedings and not by separate suit.

The heir of a deceased judgment-debtor is entitled to object in execution proceedings that the ancestral property in his hands is not liable for a money-decree against the deceased, on the ground that the debt was not incurred for necessity.

The dispute on such an objection is one for decision in execution proceedings and is not a matter for a separate suit. (11 Mad 413, 17 Mad. 122 Dist. 16 All 449, not Fol; 47 P R 1887; 87 P R. 1887, 147 P.R 1907 34 Cal 642; 1 C W N 593;

C P C (1908)-S.47=(1882, S.244)-*Contd.*

(4) Questions relating to execution—*Contd.*

5 C L J. 491, 2 M. L. T. 207, 18 W. R. 185; 11 B. L. R. 149, relied upon). **Tota Singh v Partap Singh.** **13 Ind Cas 670.**

(29) Legal representatives of the judgment-debtor-Plea that the property survived to them by survivorship-Plea raised in execution proceedings.

398.—C P C S 47: S.52: O 21 r 41=(1882 Ss 244 252, 267.) Decree-Execution proceedings.

The plea should be raised in execution proceedings—Sale-Purchaser cannot be met with the plea in a separate suit.—

C sued M on a money bond. During the pendency of the suit, M having died, his widow R and his brother N were brought on the record as his legal representatives. The suit proceeded to a decree, which awarded the claim out of the property of M. Before, however, the decree was executed, both R and N died. C thereupon brought on the record the defendants as the legal representatives of M, and applied for execution of the decree by attachment and sale of the property in dispute. The defendants denied that they were legal representatives of M, and that they had any property of M which could be liable for the decree. The Court negatived the objections and sold the property which was purchased by the plaintiff. The plaintiff sued to recover possession from the defendants. The defendants contended that the property was joint family property of M and defendants and that at his death it survived to the defendants. The plaintiff contended that the defendants were debarred by S 244 of the Code of 1882 from asserting their title. The lower applellate Court disallowed the contention. On second appeal :—

Held, that, so far as the sale of the property by the Court at the decree-holder's instance as that of the deceased was concerned, the question was one relating to the execution of the decree arising between the decree-holder and the defendants as judgment-debtors under S 252 of the Code. It was, therefore, a question in relation to them falling within S 244 of the Code by reason of the explanation to S 647. The defendants, were, therefore, bound to object to the attachment and sale under that section, so far as the decree-holder's action was concerned.

C P C (1908) S.47=(1882, S.244)-*Contd.*

(4) Queations relating to execution—*Contd.*

On further contention that, whatever might have been the result if the decree-holder had been a party to the suit, the dispute now was between the auction-purchaser, who was a stranger to the previous suit and the execution proceedings therein, and the defendant and that, therefore, S. 244 did not apply.

Held, negativing the contention, that, though an auction-purchaser at a Court-sale in execution of a decree was not a party to the suit in which the decree was passed, and though he was not representative of either the decree-holder or the judgment-debtor for the purposes of S. 244. yet if the question raised by the judgment-debtor as to the legality of the Court-sale was virtually one between the parties to the suit, that is, between the decree-holder and the judgment-debtor, and if in the decision and result of that question the auction-purchaser was interested, the judgment-debtor should not be allowed to attack the sale in a suit, because he was precluded by S. 244 from raising the question by, or relying upon it as a defence in, any proceedings other than those under S. 244.

The test in all such cases is, whether the ground upon which the Court-sale is attacked as conferring no title upon the auction-purchaser, affects the parties to the suit, and could have as between them, been raised and determined under S 244, and whether the auction-purchaser though not a party in that suit, is a party interested in the result. (L R 19 I A 166; 7 Mad 255, Fol. 25 Bom 631, 3 Bom L R 255 Expl:)

Gokulsingh Bhikharam Pardeshi v. Kisansingh Guru Laxmangir, 12 Bom L R 539=7 Ind Cas 457=34 Bom 546.

399—C. P. C.—S.47=(1882 s 244)—Property not comprised in the decree, decree-holder taking possession of, by independent action and not through Court executing decree.—

Where the decree-holder has obtained possession of the lands by his own act and not through the Court executing the decree the question as to whether the lands are covered by the decree is not one relating to the execution of the decree, and the Court executing the decree has no jurisdiction under s. 244 to determine such question.

Abdul Wahid Khan v Mirza Muhammad 7 O C 218.

(4) Questions relating to execution—*Contd.*

400—C. P. C.—S. 47=(Civ. Pro. Code, 1882, s. 244)—Execution of decree—Attachment of improvements effected in respect of land—Determination of question of ownership of improvements.—

In execution of a decree, improvements effected in respect of certain land were attached. The judgment-debtor having died, his legal representatives were brought on record. The legal representatives of the deceased judgment-debtor contended that the improvements belonged to them in their own right and were not the property of the deceased. The point for determination was whether the question of ownership of the improvements could be gone into in execution proceedings. *Held*, that with reference to s. 234 of the Code, this question could be and ought to have been decided only under s. 244 (c) and not by separate suit. **Vengapayyan v Karimpanakal Parvati. 26 Mad 501.**

(30) Preliminary objection to hearing of appeal—Right to begin—Interlocutory order in execution proceedings-Receiver—Appointment. effective.

401—C. P. C.—Ss.47, 51, O XL, r. 1—Decree preferred.—

It cannot be assumed that there is a right of appeal in every matter which comes under the consideration of a Judge; such right must be given by a statute or by some authority equivalent to a Statute; consequently, if the right of appeal is challenged, it is incumbent upon the appellant to establish the right to appeal. But unless the objection was obviously sound, the appellant could hardly be expected to answer by anticipation the grounds that might possibly be assigned by the respondent in supnort of the objection. The practice, therefore, usually followed in the Calcutta High Court, has been to require the respondent at the outset to indicate conclusively the grouud upon which his objection is based. (*8* Bom 287, Not. Fol.). The expression "an order relating to execution of a decree" is comprehensive enough to include an order relating to the stay of execution thereof. (29 Bom 71 *Expl.*). An interlocutory order which does not conclusively determine the rights of the parties in controversy in the execution-proceedings is not a decree within the meaning of s. 47 read with s. 2 of the Code of Civil Procedure. On the plaintiff

(4) Questions relating to execution—*Contd.*

applying to execute the decree, the Court ordered that he might be allowed to do so if he fulfilled certain conditions at different stages of the proceedings. The Court determined various questions as to the character of the conditions to be imposed and called upon the decree-holder to comply with them. Before the time for compliance was over, the judgment-debtor appealed; *Held*, that the orders were interlocutory and were not orders determining a question relating to execution within the meaning of s. 47, S 51 of the Code is to be read with r. II of O. XXI and r. 1 of O XL. When a Court appoints a Receiver for purposes of execution of a decree, the order is one under r. 1 of O XL read with s. 51. If a Receiver is appointed without any direction given as to security, the order takes effect at once, and he is validly in possession though no security has been given. If the appointment is conditional upon the furnishing of security, the giving of security is a condition precedent, and there is no effective appointment till security has been given. Upon an appeal preferred under cl. (s) of r. 1 of O XLIII, the Court is bound to consider not only whether a Receiver should have been appointed, but also, whether a suitable person has been selected. No appeal lies till a final order for the appointment of a Receiver has been made. **Srinivas Prosad Singh v Kesho Prosad Singh. 14 C L J 489.**

(31) Realization of the share of a sum found due-Question of execution proceedings.

402—C. P. C.—S. 47=S 244 of 1882.

In a partnership suit the Court after finding that a certain sum was due to the firm, which the parties were entitled to in equal shares, ordered the defendant to realise the amount and pay half to the plaintiffs. On the question whether the plaintiffs could realise their share from the defendant by execution of their decree or by separate suit.

Held, that as a specific sum having been found to be due to the firm, the plaintiffs could recover from the appellant in execution proceedings their share of any sum found to have been realised by the defendant or to have been realisable with due diligence under Section 244 (c) of the Civil Procedure Code.

(4) Questions relating to execution—*Contd.*

Held, Section 260 of the Civil Procedure Code, inapplicable to the case. **Tikaya Ram v Mega Ram. 48 P R 1900.**

403—C. P. C.—S. 47=S.244—Question relating to execution of decree—Parties to suit.—

Where certain decree-holders attached certain immoveable property as belonging to two of the judgment-debtors who objected that they had gifted the property to certain temple, and were only in possession of it as trustees for that temple, *held* that *quoad* the judgment-debtors, the question raised fell under Section 244, Civil Procedure Code, as one relating to the execution of the decree between the parties to the suit, and was not one to be tried by a separate suit.— **Sri Narain v Daulat Ram. 9 P R 1889.**

404—S. 47 of 1908= 1882 Section 244—Decree for pre-emption-Question whether decree-holder has paid money into Court within time.

On the 19th May 1897, Hyat obtained a decree against Saghar Mal, vendee, for pre-emption of certain land and it was ordered that on payment by him of Rs. 2,000, purchase-money by the 28th June 1897, for payment to Saghar Mal, vendee, together with Rs. 29 cost of sale-deed and registration, he should be put in possession of the land and that in default of deposit of the said sums the decree should become void. The decree-holder by mistake paid into Court only Rs. 2,000 by the 28th June, and on the 1st July the vendee submitted an application urging that the decree had become void in consequence of the failure of the decree-holder to pay in the whole amount specified in the decree. This application having been rejected, the judgment-debtor (vendee) appealed to the Divisional Judge but his appeal was dismissed on the ground that no appeal lay.

Held, that the question whether the purchase-money had been deposited in time was one arising between the parties to the suit, in which the decree was passed, and relating to the execution thereof within the meaning of Section 244 of the Civil Procedure Code.

Held, therefore, that an appeal lay to the Divisional Judge from the order rejecting the application. **Saghar Mal v Hyat. 38 P R of 1898.**

(4) Questions relating to execution—*Contd.*

405—S. 47 of 1908=1882 S. 244 — Decree incapable of execution by reason of events subsequent to decree—Decree giving an option to the parties.—

A partition suit brought by a son against his father was referred to arbitration. On the 9th January 1890, the award was published, and, on the 27th March 1890, the defendants moved for and obtained a decree in terms of the award. By this decree it was ordered that, in satisfaction of the plaintiff's claim, the defendant should pay to him Rs. 1,05,000 in the manner therein stated *viz*, Rs. 40,000 to be paid forthwith, and the balance of Rs.65,000 to be paid "upon that plaintiff delivering to the defendant certain specified property, which included two vessels or buglows, called respectively the *Nasri* and *Sambuk*". In no event was defendant to be required to pay the Rs. 65,000 before the 15th November 1890. At the date of the decree the vessel *Sambuk* was at sea on a voyage, and, on the 18th June 1890, while still on the voyage, she was lost. On the 15th November 1890, the plaintiff's attorneys demanded payment of the balance of Rs. 65,000. They offered to deliver the other properties specified in the decree, but stated that the vessel *Sambuk* had been lost. They offered to pay its value, which they estimated at Rs. 1,000. The defendants, however, demanded the delivery of the buglow, which they stated to be worth a very large sum. The defendant having, under the circumstances, refused to pay the Rs. 65.000, the plaintiff applied for execution of the decree, which was refused. He then obtained a rule calling on the defendant to show cause why the decree of the 27th March should not be amended or rectified by stating therein the amount of money to be paid to the defendant as an alternative, if delivery of the vessel *Sambuk* could not be made, such delivery having become impossible. That rule was discharged. The plaintiffs then took out a summons calling on the defendant to show cause why an order should be made, under s. 244 of the Civil Procedure Code, directing the plaintiffs to pay to the first defendant, in lieu of the delivery of the vessel *Sambuk*, such sum of money as might be fixed by the Court as the value of or compensation for the loss of the vessel *Sambuk* in the decree mentioned, and why an order should not be made that on payment of such sum and delivery of the other properties mentioned in the decree which

C.P.C.(1908)-S 47=(1882, S.244)-*Conta*

(4) Questions relating to execution—*Contd*

the plaintiffs were to deliver under the decree to the first defendant on payment by the latter to them of Rs.65,000 the first defendant should pay to the plaintiffs Rs,65000 and interest thereon from the 5th day of November 1890, mentioned in the said decree, and, in the event on its being held that the first defendant was not bound to pay the said sum of Rs,65,000, then why an order should not be made that the property mentioned in the decree which the plaintiffs were to hand over to the first defendant on payment of Rs,65,000 should not be retained, used, and appropriated, absolutely by the plaintiffs for their own use and benefit, freed and discharged of all claims on the part of the first defendant, and why the first defendant should not be directed to withdraw the claim made by him to a debt of Rs,22,000, or thereabouts, mentoined in an affidavit of one Ahmed bin Essa Khaliffa, and why such further or other order as to the Court might seem fit and the justice of the case may require should not be made in the premises and in relation to the properties mentioned in the decree which were to be delivered over by the plaintiffs to the first defendant on receiving from him Rs,65,000, and why in the alternative this suit should not be restored and placed on the board for trial. It was contended by the plaintiff that the questions raised in the summons were questions arising in execution to be dealt with by a Judge in chambers under s. 244 of the Civil Procedure Code, and that a fresh suit was not necessary. *Held*, dismissing the summons, that the application was not one in execution of a decree, nor was the question one arising in the course of execution, but that the decree having become incapable of execution, the summons asked the Judge to decide what were the rights of the parties in consequence of its non-execution. *Held*, also (as to the part of the summons asking for restoration of the suit), that the matters in issue in the suit had been fully heard and determined, and the rights of all parties had been settled by the decree, and consequently there was nothing further to be tried. The Court could not in this suit, after passing a decree, proceed to ascertain the rights of the parties under a state of facts quite different from those which appeared in the pleadings and arising subsquently to the decree. **Ahmed bin Shaik Essa Khaliffa v Essa bin Khaliffa. 18 Bom. 495.**

C P.C.(1908)S 47=(1882, S.244)-*Contd*

(4) Questions relating to execution—*Contd.*

406—C P C S. 47=S. 244 of 1882—Objection by representative of party to the suit to the jurisdiction of the Court which passed the decree.

S. 244 of the Code of Civil Procedure applies as well to a dispute arising between the parties contemplated by that section in relating to the execution of a decree after it has been executed, as it would to a dispute between such parties relating to the execution of adecree before it had been executed. It is competent to the Court charged with the execution of a decree to consider the question as to whether the Court which passed the decree had jurisdiction to pass it, unless the decree itself precludes that question. (11 All 314 and 15 Bom 219 referred to). **Imdad Ali v Jagan Lal. 17 All 478,**

Notes—Ap: 21 Bom 314. Dist: 23 All 476. Ref: 21 Bom 456; 19 All 332; 24 All 291. Fol: 3 A L J 601=(1906) W N 233.

(32) Claim to attached property,

407—C P C S. 47 of 1908=S. 244—Questions to be decided in execution—Property liable to be sold therein.

The question whether certain property is liable to be sold in execution of a decree can be decided under s. 244 of C P Code. (11 B L R 149 18 W R 185, followed in principle). **Mungeshur Kuar v Jumoona Pershad. 16 Cal 603.**

Notes—Dist: 12 All 313 F B; Ref: 19 M L J 401; 32 Mad 429.

(33) Party attached in execution after satisfaction of decree from other sources.

408—C P C S. 47=S. 244—Separate suit.

An elephant having been attached in execution, it was released on the claim of one *P*, upon *S* standing surety. It was finally declared to be the property of the judgment-debtor; but the decree having been satisfied from other sources, it was ordered that the elephant be returned to the judgment-debtors. It was then demanded from the surety; but he objecting, the claimant (*P*) was served with notice to produce it. This not having been done within the period fixed, the Munsif ordered that it should be demanded from the surety, and (on his failure to produce its stipulated price) should be realized by attachment;

C.P.C.(1908)-S.47=(1882, S.244)-*Contd.*

(4) Questions relating to execution--*Contd.*

and sale of his property. *Held* that, the decree having been executed, the Munsif's subsequent proceedings as to the elephant were illegal, and that the right to it was open to a suit. **Juggut Chunder Bhadooree v Shib Chundra Bhadooree. 16 W R 269.**

Notes—Fol: 5 C L R 33. Ref: 10 W R 99.

(34) Question as to legality of purcharse by judgment-debtors of right of some of decree-holders.

409—C P C S. 47 of 1908=S. 244 of 1882.

Held that disputes as to the legality of the purchase by judgment-debtors of the rights of some of the decree-holders in the property to which the decree relates and the extent of the share acquired under the purchase are questions falling within the purview of section 244, clause (c), and must be determined by order of the Court executing the decree. (5 All 27, 7 W R 136; and 25 W R 343 referred to). **Kudhai v Sheo Dayal 10 All 570, 8 W N 231.**

Notes—Dist: 22 Mad 209; 8 M L J 309.

410--S. 47 of 1908=S. 244 of 1882—Separate suit—Limitation.

In execution of a decree, the property of the judgment-debtor was sold, and on an account being taken, a certain sum therein appearing to be due was paid in December 1868 to the decree-holders. Subsequently, on the application of the judgment-debtor, the account was re-opened, and had been overdrawn by the decree-holders. In 1876 the judgment-debtor applied to the Court which executed the decree for an order for the repayment of the amount over-drawn. *Held* that while the application was not barred by any provisions of the Limitation Act, IX of 1871, the English doctrine of laches did not apply in this country; and, further, that the application had been presented in the proper Court, as required by s. 11 of Act XXIII of 1861 (corresponding with s. 244 of Act X of 1877). **Allij Hossein v Muzhur Hossein. 4 C L R 577.**

Notes—Ex: 10 Cal 538.

C.P.C. (1908) S.47=(1882,S.244)- *ontd*

(4) Questions relating to execution—*Contd.*

(35) Objection to claim to portion of the land.

411—C P C S. 47=S. 244—Decree altering possession of land.

Where a decree directed certain land to be taken from first defendant and put into plaintiff's possession for a term, and a claim was put in by second defendant's assignees to part of the land,—*Held* that an objection by first defendant to the claim was a matter to be determined in execution proceedings, and not by separate suit. **Rahiman Khan Samoji Sahib v Patcha Miyah 4 Mad 285**

Notes—Ref: 15 Cal 437; 7 Mad 255.

(36) Alleged fraudulent execution of decree.

412—C P C S. 47=S. 244—Separate suit.

Certain property in the 24-Pergunnahs having been seized and sold in execution of a decree of the High Court, application was successfully made to the District Judge to set aside the proceedings, on the ground that the execution was fraudulent and not warranted by the decree. *Held* that the Judge had no right to entertain such an application, or to re-open, at the instance of a third party, execution proceedings which had come to an end. The question could only be determined in a regular suit. **Luchmeeput Singh v Adoyto Churn Mullick. 24 W R 452**

See Jogenarain Singh v Bhugbano. 2 W R Mis 13.

Notes—Dist: 22 Bom 267.

413—C P C S. 47=S. 244—Suit for setting aside sale—Fraud—Sale under Act (X of 1859)—Act (XXIII of 1861) s. 11.

A landlord obtained an *ex-parte* decree for arrears of rent and in execution of that decree the tenure was sold. The tenant then brought a suit against both the landlord and the purchaser for setting aside the sale on the ground that the decree and the execution proceedings were fraudulent and that the purchaser was only a benamidar for the landlord. The defendant contended that the suit would not lie, the questions being such as could be determined and were actually determined by the Court executing the decree.—*Held*

C.P.C.(1908)-S.47=(1882, S.244)-*Contd.*

(4) Questions relating to execution—*Contd.*

that neither s. 244 of the C P Code nor s. 11 of act XXIII of 1861 applies to proceedings in execution of a decree obtained under act (X of 1859) and that the suit being one to set aside the sale on the ground of fraud was maintainable. (11 Cal 376 distinguished.) **Brojo Gopal Sarkar v Busirunnissa Bibi. 15 Cal 179.**

Notes—Ref: 17 Cal 769 F B.

414—C P C S. 47 1908=1882 S. 244—Application for further execution by taking an account.

An application to the Court passing a decree for possession in favour of the heirs of a mortgagee for further execution thereof, by taking an account is not the proper mode for the mortgagor to redeem the mortgaged lands and to recover possession thereof. The proper course for a mortgagor who seeks for an account and redemption or for redemption alone, is to bring an independent suit for that purpose.(2 Bom 371, overruled.) **Ravji Shivram Joshi v Kaluram. 12 Bom H C R 160.**

(37) Question after Court has executed decree and become functus officio—Review.

415—C P C S. 47=S. 244 of 1882.

Pending the execution proceedings a judgment-debtor was permitted to examine the accounts, but failed to do it and then after the proceedings were struck off and the decree declared to be satisfied, he made a new application for a permission to examine the accounts. *Held*—the question must be determined according to s. 647 C P Code and the only remedy of the judgment-debtor is by a review of the order which struck off the proceedings and declared the decree satisfied. The words the 'following question shall be determined by order of the Court executing the decree' of s. 244 mean the Court executing the decree at the time when the application is made and that those words do not include the Court which had executed the decree and has become *functus officio*. **Fakaruddin Mahomed Ahsan v Official Trustee of Bengal. 10 Cal 538.**

Notes—Dist: 5 C W N 627. Ref: 18 All 106.

C.P.C.(1908)-S.47=(1882 S.244)-*Contd.*

(4) Questions relating to execution—*Contd.*

(38) Decree subsequently modified, question as to execution of.

416—*S. 47* of (1908)=S. 244 of (1882).

Where it is contended that the decree that has been executed is not the decree that was passed between the parties, but a decree modified by a subsequent decretal order, s. 11. Act XXIII of 1861, does not appiy, the question not being one relating to the execution of the decree and between the parties to the suit. **Umbika Churn Chuckerbutty v Dwarkanath Ghose. 8 W R 506.**

Notes—Ap: 15 Cal 179. Ref: 17 Cal 769 F B; 2 Mad 264.

(39) Question raised for first time in execution.

417—C P C S. 47=S. 244 of 1882.

Held that a question raised for the first time between the parties to a decree at the time of its execution, although not expressly reserved in that decree for determination at the time of its execution, may be enquired into and determined by the Court executing the deree under s. 11 of Act XXIII of 1861. **Janoji Banaji v Vyankatesh Shrinivas. 2 Bom H C R 393: 2nd Ed 371.**

(40) Forfeiture, relief against—Non-payment of rent, though stipulation contained in compromise decree.

418—C P C S. 47=S. 244 of 1882.

A Court can relieve in execution proceedings against forfeiture for non-payment of rent, even though the stipulation is contained in a compromise deree. (10 Bom 435 dis. from: 10 Cal 305 ref to). **Nagappa v Venkat Rao. 24 Mad 265**

Notes—Ref: 26 Mad 31: 3, Bom 15 F B;31 Mad 474; 18 M L J 469. Fol: 8 Bom L R 813 F B=1 M L T 370.

(41) Assignee of decree.

419—C P C (1908) S. 47=S. 244 of 1882—Indirect assignment.

A, a decree-holder, applied for execution of his decree, but was opposed by *B*, the judgment-debtor, on the ground that *A* had sold his decree to a third party, from whom it had passed to *B*'s

C. P.C. (1908) S.47=(1882, S.244)-*Contd.*

(4) Questions relating to execution—*Contd.*

son. *Held* that this was a question arising between the parties to the suit in which the decree was passed and relating to the execution of the decree, and might be determined by the Court executing the decree, under s. 11, Act XXIII of 1861. **Ramdhan Rakhit v Panchanan Chuckerbutty 1 B L R S N 9: 10 W R 144.**

420—C P C S.47 of 1908=S.244—Representatives of judgment-debtors—Question of liability of property to be sold.

Held that the question whether a person alleged to be a representative of a deceased party to a suit is such representative, and also the question whether property against which execution is sought in the hands of the representative of a deceased party was in fact the property of such deceased party and not the separate property of the representative, are questions to be decided under s. 244 of the Code of Civil Procedure and not by separate suit. (16 Cal 1, 11 B L R 149, and 12 All 313, referred to). **Beni Prasad Kunwar v Lukhna Kunwar. 21 All 323.**

421—Questions relating to execution—Representative—K and M were undivided Hindu brothers.

A suit was brought against K and decree for costs was made against him. K having died after decree, K's sons were brought on the record for him in execution of the same. Certain property was attached and the sons objected that the attached property was the self-acquired property of their uncle M who died after K and that they had inherited no property from *K*. Their objections became successful. The transferee of the decree brought against the sons of K to establish his right to proceed against the property in question.

Held—the question of the liability of the property to be taken in execution in the hands of the defendant was a question arising between the parties to the suit or their representatives, and relating to the execution &c. of the decree within the meaning of s. 244 and that the suit was not maintainable. The cases as to the position of representatives added to the suit either before or after the decree referred to and discussed. **Rajrup Singh v Ramgolam Roy. 16 Cal 1.**

C P C. (1908) S.47=(1882, S.244)-*Contd.*

(4) Questions relating to execution—*Concld*

Notes.—Ap: 17 Cal 711 F B; 12 All 313 F B. Foll 21 All 323. Dist; 6 C W N 63: 23 Mad 195 F B; 23 Bom 237. Ref: 6 Bom L R 1043.

(42) Land not liable to execution under S. 9 N W P Rent Act—Land sold in execution—Recovery of.

422—S. 47 of (1908)=S. 244 of (1882)—Suit by judgment-debtor to set aside sale—Fresh suit—Civil Procedure Code, s. 244.

A judgment-debtor sued the decree-holder for recovery of possession of certain land which had been sold in execution of the decree and to set aside the sale, on the ground that the land was not liable, under s. 9 of the N W P Rent Act to sale in execution of decree. *Held* that the question at issue between the parties was clearly one relating to the execution and satisfaction of the decree, and that the suit was therefore barred by the provisions of s. 244 of the Civil Procedure Code. **Janki Singh v Ablak Singh. 6 All 393.**

Notes:—Fol: 6 All 448. Dist: 7 All 641.

(43) Defaulting purchaser—Re-sale—Deficiency in price—Recovery of deficiency from defaulting purchaser.

423—C P C S. 47—Court-sale—Suit for recovery of amount so realised—Not barred.

S. 47 (1) Civ Pro. Code, 1908, does not bar a separate suit by a person, who, as defaulting purchaser in a Court-sale, was ordered to make good the deficiency in price that resulted in consequence of a re-sale, for setting aside the order and for recovery of the sum of money realised from him on account of such deficiency. (19 All 22, Fol. 18 Mad 439 and 25 Cal 99, Dis. 26 All 447, Dist; 14 All 201 (209); 19 Cal 683 and 25 Bom 631 (635), Ref.) **Parbat v Bindraj. 7 N L R 134.**

(5) ANY OTHER QUESTION.

(1) Adjustment between parties—Jurisdiction of Court to deal with.

424—C P C S. 47; O. 31 r. 3=(1882 Secs. 244, 258)—Mortgage—decree—Order absolute for sale—Execution.

C P C (1908) S.47=(1882, S.244)-*Contd.*

(5) Any other question—*Contd*

A Court which is competent to execute a mortgage decree is not only competent but it is also its duty to determine how much is due and realisable under the decree at the time when execution is sought; and as such it can enquire into the matter of an adjustment between the parties after the order absolute for sale.

The powers of the Court which are called upon to execute a mortgage decree are not confined within the four corners of the rules framed under Sec. 104 of the Transfer of Property Act. Sec. 104 is an enabling section and the rules made by the High Court under the provisions of that section, do not limit the applicability of the provisions of the Code of Civil Procedure as regards sales held in execution of mortgage decrees. **Harish Chandra v Jagabandhu. 3 M L T 202=12 C W N 282=7 C L J 581.**

425—C P C S. 47 (1908)=Ss. 244, 258—Uncertified judgment cannot be taken notice of by Court. An adjustment of a decree out of Court, which is not certified to the Court cannot, under S. 258 of the Code of Civil Procedure be pleaded as a bar to execution. (31 Mad 409 followed. 21 Mad 356 referred to.) **Ganapathy Appar v Chenga Reddy. 29 Mad 312.**

(2) Power to stay execution—Case in which decree is being executed is before appellate Court.

426—C P C S. 47=(1882 s. 244)—Where the very case in which the decree is being executed, is before the appellate Court, that Court has the powers to stay execution.

Quære: Whether the same power exists where the appeal is only against the decree sought to be executed? **Pasupati Nath v Nanda Lal Bose 28 Cal 734=5 C W N 67.**

Notes:—Dist: 9 C W N 123. Ref: 3 C L J 29, 34 Cal 1037 F B=11 C W N 1030=6 C L J 298. Fol. 33 Cal 927=3 C L J 67. Dist: 31 Cal 1081; 36 Cal 923; 14 C W N 179.

(3) Agreement antecedent to decree not to claim benefit of the decree how far within the section.

427—C P C S. 47=(1882 s. 244 (c))-'Any other questions' relating to execution etc.

C P C (1908) S.47=(1882, S.244)-*Contd.*

(5) Any other question—*Contd*

A contract made between the parties to a suit in derogation of a decree which may be passed in future cannot form the subject of an enquiry under S. 244, C P C, in a proceeding for the execution of the decree; an agreement not to execute a decree, if effect is sought to be given to it in execution proceedings, must be a transaction between the parties, subsequent to the decree. Questions under S. 244 (c) relating to the execution of a decree and arising between the parties to a suit in which the decree was passed or their representatives must be such as have reference to matters arising subsequent to the passing of the decree and not antecedent to it. **Chhoti Narain Singh v Musstt Rameshwar Koer. 6 C W N 796.**

Notes.—Fol. 31 Cal 179.

(4) Agreement to stay or not to enforce decree—Validity and existence of-Matter to be determined in execution—Not in separate suit.

428—C P C S. 47, Civil Pro. Code (1908)=S. 244 of (1882).

The existence and validity of an agreement to stay or not to enforce a decree ought to be determined in execution under the provisions of S. 244, Civ Pro Code, and not in a separate suit. (22 Bom 463, Fol.; 29 Cal 810, Dist.) **Rukmani Ammal v Krishnamachary (minor) by his guardian Andalammal, 9 M L T 464=8 Ind Cas 1071.**

(5) Suit, maintainability, conveyance, execution of, by court-Rights of parties under the conveyance, how to be enforced.

429—C P C S. 47—Title to property, when vests-Agreement for repayment of profits collected—Suit to recover by way of mesne profits—Provincial Small Cause Court's Act (IX of 1887), Sch II Art. 31:

When the decree merely directed the defendant to execute a conveyance of certain property and further that if he failed to execute it, the court would execute it on his behalf and the conveyance was executed by the Court, nothing further remained to be done in execution proceedings, and if either of the parties wanted to enforce his

(5) Any other question—*Contd.*

rights under the conveyance, a separate suit was maintainable. The title to the property in such a case did not vest in plaintiffs till the conveyance was executed. Hence between the date of the execution of the agreement of sale and the execution of conveyance, the vendor was the proper person to collect the profits. If the vendor agreed that he would repay the plaintiff profits which he must collect either himself or by his agent or by another person on his behalf, a suit to recover from the defendant by way of mesne profits the amount payable to him is not for recovery of the profits of immoveable property wrongfully received by the defendant and is not barred by Art 31 of the Provincial Small Cause Court Act, from the cognizance of the Small Cause Court.

Kali Narain Bhoudmik v Harinath Chakravarthy. 12 C L J 599=7 Ind Cas 484

430—C P C 1908——S. 47 and O XX, r 11—Agreement to delay execution—Sanctioned by Court not to be resiled from—No fresh suit necessary.

A judgment-debtor, who had the benefit of the arrangement for delay in execution which was sanctioned by Court, is not at liberty to resile from it.

The arguments in 14 M L J 359 and 18 M L J 548 have lost their force under the new Civil Procedure Code. The old S. 257-A is dropped and S. 210 re-appears in O. XX r. 11 of the new Code. And S. 47 allows Courts to treat applications as suits and *vice versa*. (14 M L J 359; 18 M L J 548, overruled; 4 Cal 27; 25 Cal 86, Foll).

Subbaraya Aiyar v Ramasamy Pillai. (1912) 1 M W N 9=11 M L T 18=22 M L J 166=(1912) M W N 458.

431—S. 47 Civil Procedure Code=(Act. XIV of 1882) Sec. 244—Agreement before date of decree.

When a decree is once passed, it must be taken to be conclusive between the parties and an agreement entered into between the parties before the date of the decree and not embodied in it cannot be given effect to in the execution proceedings (22 Bom 463 ref:). **Benode Lal Pakrasi v. Brojendra Kumar Saha. 29 Cal 810=6 C W N 838.**

(5) Any other question—*Contd.*

(6) Agreement to give time.

432—S. 47 of (1908)=s. 244 of (1882)– Suit on agreement.

The parties to a decree presented a petition to the Court executing the decree, in which they stated that they had agreed that the principal amount of the decree was to be paid within eight years; that a sum of Rs.50 was to be paid annually as interest on the principal amount: and that upon default of payment of the interest the whole amount due should be realized by execution of the decree. On this petition being presented, the Court struck the case off its file. *Held* that upon default being made, the decree-holder's remedy was by execution of the decree, and not by suit to enforce the terms of the agreement.

Champat Rai v. Pitambar Das 6 All., 16

Notes:—Fol: 6 All 228. Ref: 12 All 571.

(7) Execution of decree passed on usufructuary mortgage-Application for order absolute—Mortgage in possession after decree-Subsequent profit—Accounts.

433—*S.* 47=(1882 s. 244 c)—Under the terms of a compromise decree in a suit on a mortgage, the defendants were to pay a certain amount within a year and in default the amount was to be recovered by sale of the mortgage, and other property under the deeds of mortgage the mortgagee was to be in possession in lieu of interest but the decree was silent as to possession and interest. The decree-holder applied for sale. The lower Court held that if he had continued in possession after the decree it would be necessary to take an account to ascertain whether the decree had satisfied and dismissed the petition. *Held*, that the Court was wrong in going behind the decree instead of executing it. *Held*, also, that the application was an application for an order absolute for sale. **Appa Rao v. Krishna Ayyangar. 25 Mad 537.**

Notes:—Ref 17 M L J 201; 30 Mad 255.

(8) Objection by Judgment—debtor to the executability of decree.

434—S. 47=(1882 s. 244 (c))—is not intended to apply to a case where the judgment-debtor against whom a decree for sale has been obtained as the representative of the mortgagor tries to set

C P C (1908)-S.47=(1882, S.244)-*Contd.*

(5) Any other question—*Contd.*

aside the effect of a decree. It refers to proceedings in execution based on the decree as if the decree was perfectly good and valid. (27 Cal 242 dist.; 19 All. 480, 21 All. 277, 21 All 356 ref to.

Khetrapal Singh Roy v. Shyama Prosad Barman. 32 Cal 265.

Notes:—Fol: 16 M L J 545. Ref: 30 Mad 26; 8 C L J 20.

(9) Setting aside sale.

435—S. 47 of (1908)=s. 244 of (1882)—An order setting aside a sale on the ground that only one of two decree-holders purchasers who were allowed to deduct the sale price from the decretal amount had put in the receipt was presented on his behalf also, comes under s. 244 of the Code of Civil Procedure. **Makka v. Sri Ram. 24 All 108=(1901) 21 W N 169.**

(10) Application to set aside sale in execution of an exparte decree subsequently set aside under s. 108, Civil Procedure Code

436—C P C S. 47=s. 244.

Where a property was sold in execution of an ex-parte decree and purchased by the decree-holder and the decree was subsequently set aside under s. 108, Civil Procedure Code.—*Held*, that it is competent to a Court under s. 244, Civil Procedure Code, to go into the question and to set aside the sale as bad. (19 Cal 683: 17 Cal 709 relied on). **Beni Pershad Koeri v. Lakhi Rai 3 C W N 6.**

Notes:—Fol: 27 Cal 810

(11) Purchase at execution sale by decree-holder-Leave to bid—Necessity for setting up fraud in pleadings—Setting aside of sale.

437—S. 47; O 21 rr 72, 95, 96, =(1882 Ss. 244 294, 318, & 319)-A suit for the recovery of certain property purchased by him at a Court sale in execution of mortgage decree obtained by himself After two infructuous attempts at sale for which A had obtained leave to bid, A purchased the property at the third sale in the name of B (without permission to bid) for a sum considerably less than the principal money due on the mortgage, the sale was confirmed and possession delivered to B.

C P C (1908)-S.47=(1882, S.244)-*Contd.*

(5) Any other question—*Contd.*

Held (*Per Miller, J.*)—The purchase being effected in contravention of the provisions of S. 294 the sale was voidable on the application of any person interested in it and confirmation of the sale does not affect the case.

It is not the duty of the Court knowingly to accept the position of an instrument of fraud and that too when the fraud has been practised upon itself or upon another Court.

Per Sankaran Nair, *J.* the provisions of Section 294 of the Code of Civil Procedure which is enacted in the interests of the judgment-debtor and other persons interested in property, precluded the plaintiff from purchasing the property in the name of another.

Per Abdur Rahim. *J.*—The sale not having been set aside under Section 294, the plaintiffs are entitled to recover possession of the property.

A party relying upon a fraud either as the basis of his action or as defence to a suit must plead it in distinct terms so that the party whose act is impeached as fraudulent may have full notice of the charge he has to meet.

The restriction imposed on a decree-holder buying the property of the judgment-debtor in execution of his decree is the creation of a statute and when that same statute has provided a penalty for the violation of such restriction, the penalty should be regarded as co-extensive with the disobedience of the restriction, the Court cannot attach, to the disregard of a rule like this, consequences other than that contemplated by the Legislature, by converting such disregard into fraud; it should, without being hasty in inferring fraud, strictly and narrowly construe all charges of fraud.

The pharse "abuse of process of the Court" is generally used in connection with actions for using some process of the Court such as a writ of attachment taken out maliciously to the injury of another person. (24 Cal 355 Appr. 23 Mad 227; 11 Mad 588; 14 Mad 498; 22 Mad 628 at 3; 11 Cal 731; 5 Bom 575 Appl: 10 Cal 757; 5 C W N 265: 24 Cal 355 Dist; 10 Cal 757: 11 App Cas 232 at page 242; 24 Cal 355 Ref:). **Thathu Naick v Kondu Reddi 5 M L T 248=32 Mad 242 =1 Ind Cas 221.**

C P C (1908) S. 47=(1882, S. 244)-*Contd.*

(5) Any other question—*Contd.*

(12) Sale setting aside for fraud—Auction-purchaser & decree-holder-Parties.

438—C P C S. 47=1882 S. 244 Cl. (C).

A judgment-debtor is entitled by an application under sec. 244 C P C to have an execution sale of his properties set aside if he alleges and proves fraud on the part of the decree-holder though no fraud is alleged or proved against the auction-purchaser who is a stranger to the suit. (19 Cal 683=2 C W N 691=3 C W N 403=4 C W N 541 foll).

When during the pendency of an application under sec. 244 C P C to set aside an execution sale, the sale is confirmed, such confirmation is no bar to the maintenance of the application even though the auction purchaser is a stranger to the suit. (19 Cal 683 must be taken to have overruled in effect the Full Bench case of 17 Cal 769=3 C W N 399 follow).

Khirode Sundari Debi v. Jnanendra Nath Pal Chaudhuri, 6 C W N 283.

Notes:—Fol: 8 C W N 330; 6 C L J 111. Dist: 32 Cal 175.

(13) Sale in execution, the judgment-debtor being ignorant of the execution proceedings through the fraud of the decree-holder—Setting aside proceedings in execution.

439—C P C S 47=S 244. of 1882.

In 1879 D obtained a decree against S. S gave security for the satisfaction of the decree, whereupon D agreed not to take proceedings in execution. In breach of this agreement, D in the same year applied for execution, and sold certain immoveable property belonging to S, of which K became the purchaser. K did not apply for possession until 1883, in which year he applied for and obtained possession of the property. S alleged that he then for the first time became aware of the sale, and that by the fraud of L and K he had been kept in ignorance of the execution proceedings taken by D in breach of the above-mentioned agreement, and within thirty days after K obtained possession, he (S) applied for a reversal of the orders which had been passed in the aforesaid fraudulent proceedings. The Subordinate Judge held that the application was barred, and referred the applicant to a separate

C P C (1908) S. 47=(1882, S. 244)-*Contd.*

(5) Any other question—*Contd.*

suit to set aside the sale. On application to the High Court.—*Held*, on the authority of 6 Bom., 148, that a separate suit would not lie, and that the relief sought by S could only be obtained, at all events as against D, by an application under s. 244 of the Civil Procedure Code, 1882. **Sakharam Govind Kale v Damodar Akharam 9 Bom 468.**

Notes:—Ap: 17 Cal 769 F B; 19 Cal 683 P C. Ref: 22 Bom 463 F B; 1 Bom L R 74; 25 Bom 631; 26 All 447 F B; (1904) W N 61; 11 Bom L R 699.

(14) Sale in execution of decree for arrears of rent-Fraud-Suit to set aside sale on the ground of fraud.

440.—C P C S. 47 of (1908)=S 244 of (1882) —Questions arising between parties to the suit —C P Code Ss 311, 312, 314, 316.

Held,—When circumstances affecting the validity of a sale in execution have been brought about by the fraud of one of the parties to the suit, & give rise to a question between the parties such as apart from fraud would be within the provisions of S 244, a suit will not lie to impeach the validity of the sale of the ground of such fraud. (11 Cal 376=5 Mad 217, 6 Bom 148, 9 Bom 468 appr: 14 Cal 679 dissented from in part).

In such a case the judgment-debtor is entitled, whether the sale is confirmed or not, to make as against the person guilty of fraud or accessory thereto, such application as he is entitled to make under S 311, his time for making it being computed from the time when the fraud became known to him. *Held*—in cases in which the decree or purchase is made benami, S 244 does not apply, and suit lies to set aside the sale.

Mohendra Narayin Chaturaj v Gopal Mundul. 17 Cal 769.

Notes:—Not Fol: 23 All 478: 6 C W N 283 Diss. 26 Cal 324. Fol: 3 C W N 6; 18 Cal 139; 19 Cal 341. Dist: 31 Cal 805. Ref: 21 Cal 457; 2 C W N 311; 21 All 140.

441.—C P C S. 47=S 244 of 1882.—Application for setting aside a sale for fraud when a third party is auction purchaser.

An application to set aside a sale on the ground of fraud would come under S. 244 even

(5) Any other question—*Contd.*

though the purchase is made by third person. (20 All 412 Dist:) **Bhubon Mohan Pal v Nunda Lal Dry. 26 Cal 324=3 C W N 399**

See Hira Lal Ghose v Chandra Kanta Ghose. 26 Cal 539=3 C W N 403.

Notes—Ap: 26 Cal 539; 26 All 447 F B Fol: 6 C W N 283; 31 Cal 385. Ref: 27 Cal 197; 28 Cal 4. 5 C W N 124; 23 All 478; 24 All 239; (1904) W N 61; 26 All 447; 5 C L J 328; 11 Bom L R 699.

442-C P C.S 47=S 244 of 1882.-Application to set aside sale for fraud-Question between decree-holder or auction purchaser—and Judgment—debtor.

A Judgment-debtor applied to get the auction sale set aside. He alleged certain facts which if true, would amount to fraud on the part of the decree-holder or the auction purchaser. His case comes within S 244. 19 Cal 683=24 Cal 707: 2 C W N 691 referred to.

Rajoni Kant Bagchi v Hossen Uddin Ahmed. 4 C W N 538.

Notes:—Ex: 5 C W N 124. 23 Cal 4.

(15) Suit to set aside sale on the ground that property was not ancestral

443—C P C—S. 47 of (1908)=S 244 of (1882)—Sale under S. 320 C P C.

The property of a judgment-debtor was sold by the Collector under s 320 of the Code of Civil Procedure as being ancestral property The judgment-debtor sued the decree-holder and the auction purchaser to set aside the sale on the ground *inter alia* that the property was not ancestral. *Held* that inasmuch as before the property could be sold by the Collector the question whether the property was ancestral or not had to be decided after notice as between the decree-holder and the judgment debtor, the question was one arising between the parties to the suit and the suit was barred unders. 244 of the Code of Civil Procedure, (8 All 146) and (19 Cal 683) referred to.

Daulat Singh v Jugal Kishore. 19 W N 205, 22 All 108.

Notes:—Ref: 24 All 239; (1904) W N 61, 26 All 417 F B.

(5) Any other question—*Contd.*

(16) Setting aside sale for irregularity.

444.—C P C S 47 (1908)=S. 244 of 1882.

Sale in execution of a decree-Possession given to purchaser who was the decree-holder—Satisfaction of decree and restoration of property to mortgagor—Remedy for recovery of mesne profits and interest—Application in execution proceedings—Separate suit—Right of purchaser to interest on purchase money.

Under mortgage decree obtained by the appellant against the respondents the mortgaged property was, in February 1901 put up for sale in default of payment and purchased by the decree-holder who had obtained leave to bid. The purchase money was not paid but was set off by the appellant against the amount due under the decree, which gave no future interest. Possession was given to the appellant in December 1901. In September 1903 the sale was set aside for irregularity and in March 1904 the respondents paid the appellant the amount due under the decree and possession of the property was restored to them. *Held*—(affirming the decisions of the Courts in India) that the respondents were entitled by Ss. 583 and 244 of Civil Procedure to recover mesne profits and interest thereon in the execution proceedings and were not obliged to have recourse to separate suit, for Lordships would not at this stage of the proceedings have been disposed to permit. *Held*, also, that the appellant was not entitled to interest on his purchase money which had not been actually paid, but was set off against what had not been actually paid, but was set off against what was due on the decree. The sale was set aside for his fault and it was out of the question that he should be allowed to make a profit at the expense of the respondents out of his own error, and so in effect recover interest not allowed him by the decree. **Prag Narain v Kamakhia Singh. 31 All 551.**

(17). Saleable interest—Auction Purchaser-Sale set aside on what ground.

445.—C P C S. 47, O 21, r 91=(1882 Secs.244 313)—An execution sale can be summarily set aside on the application of the auction purchaser under section 313 Civil Procedure Code only when the judgment debtor has no saleable interest therein. No order can be made under that section when the judgment debtor has an interest, however small, in the property sold.

C P C (1908) S 47=(1882 S.244)-*Contd*

(5) Any other question—*Contd.*

In the absence of fraud or misrepresentation an execution sale cannot be set aside under section 244 merely on the ground that the auction purchaser thought that A and B were the judgment debtors and he purchased the interests of both, whereas in fact A was the sole judgment debtor and his interest alone passed at the sale. (20 Cal 8 Ap:) **Makhamchore Sarkar v. Nishid Gonai.**

10 C L J 492=3 Ind Cas 438.

(18) Saleable property—Sale of holding without consent of landlord-T P. Act. S. 2

446.—C P C Ss. 47, 60=(1882 Secs, 244 266). —Transfer of Property Act, (IV of 1882) Secs. 2 (c) 108 (*j*).

Property which is not transferable without the landlord's consent is not saleable within the meaning of section 266. Civil Procedure Code, and cannot therefore be attached in execution of a decree.

There is no usage in Comilla, under which tenants are entitled to sell their holding without the consent of the Maharaja of Tippera.

The Transfer of Property Act does not apply in cases where the legal relationship of the parties was constituted before the Act came into force. (8 C W N 235 Ap:) **Kailash Chandra Pal v Hari Mohun Das.**

10 C L J 110=13 C W N 541= 1 Ind Cas 362.

447.—C P C S. 47 of 1908=S. 244 —Application to set aside sale—Civil Procedure Code, 1882 s. 294.

An application under s. 294 of the Civil Procedure Code to have a sale set aside on the ground that the purchaser took nothing by his purchase inasmuch as he was the holder of the decree in execution of which the property was sold is a matter in execution falling under s. 244 of the Code (5 Mad; 217, followed) **Chintamanrav Natu v. Vithabai** **11 Bom ; 588.**
Genu v. Sakharam. **29 Bom; 271,**

Notes:—Ref 21 Cal 554; 22 Bom 271; 624; 32 Mad 242. Fol 23 All 478.

C P C (1908) S.47=(1882) S.244) *Contd.*

(5) Any other question—*Contd.*

(19)—Sale brought about by fraud in execution.

448—C P C S. 47, O XXI. rr. 69. 90.—Execution sale brought about by fraud-Waiver of right to object to sale.

11 C W N 848=6 C L J. 62.

(20) Order refusing to confirm a sale in execution of exparte decree set aside.

449—C P C—S. 47 of 1908=S. 244 C P Code includes an order of refusal to confirm a sale on the ground that there is no decree subsisting on the date when the confirmation of the sale is applied for, the question raised being one relating to the execution, or satisfaction of a decree. (19 Cal 683 referred to.) **Doya Moyi Dasi v Sarat Chunder Majumdar.** **25 Cal 175= 1 C W N 656.**

Notes:—Fol 26 Cal 324; 27 Cal 810. Ref 6 C L J 226.

(21)-Questions for Court executing decree —Set aside sale confirmed in appeal-Non-payment-of price-Remady.

450.—C P C S. 47 of (1908=) S. 244 of 1884.

Auction sale set aside under s. 311 and price refunded, but sale confirmed on appeal. The purchaser did not pay the price. The proper remedy to recover it is an application under s. 244 and not a suit (24 W N 61 followed.)
Rahimuddin v. Ram Lal.

1904 W N 205=27 All 155.

(22)—Suit to recover sum paid in excess under decree.

451.—C P C S. 47 of (1908.)=S 244 o (1882) —Separate suit.

Sums paid in execution in excess of what was due under the decree can only be recovered by application to the Court which executed the decree, not by a separate suit. **Kashee Kishore Roy Chowdhry v.Kishen Chunder Sandyal.**

15 W R; 160.

(23) Application by judgment-debtors to recover surplus from decree—holders.

452.—C P C S. 47 (1908)=S. 244 of (1882.— Whereby sale in execution decree had been fully

C P C (1908) S.47=(1882) S.244)-*Contd.*

(5) Any other question—*Contd.*

satisfied, but was afterwards amended at the instance of the judgment debtors, and in consequence thereof, the decree holders were found to have realized more than they were entitled to, *held* the judgment debtors could proceed under s. 244 to recover the surplus. **Dhan Kunwar v. Mahtab Singh. 19 W N 181, 22 All 79.**

Notes:—Fol 15 All 441. Ref 24 All 291. 29 All 348 4A L J 188; W N 1907, 90.

453.—C P C S. 47= (1882) S. 244.—Execution of decree Application by judgment-debtor that more had been realised from him than was due under the decree—Appeal.—

Held, that an application by a judgment debtor for refund of money realised from him in execution proceedings in excess of the sum due under the decree is covered by Section 244 of the Civil Procedure Code and that a refund can be ordered by the Court executing the decree. (63 P R 1901; 13 Calc; 326, 20 Mad 487; 24 Mad 519, 1 C W N 708, 10 Calc, 538, referred to and distinguished.) **Kalu Khan v Abdul Latif. 45 P R 1904; 113 P L R 1904.**

(24)—Excess sum retained by decree holder after satisfying decree.

454.—C P C S. 47 of 1908=S. 244.—Separate suit.

Suit brought to recover the amount to which plaintiff was entitled under a decree passed in favour of himself and defendant as co-plaintiffs in a former suit. It appeared that defendant purchased the property sold in execution of the decree and that the price for which the sale took place was sufficient to satisfy the decree. Instead of paying the purchase money into Court, defendant with the knowledge and assent of plaintiff, retained the whole sum upon the understanding that he should give the Court a receipt for himself and on behalf of plaintiff and afterwards pay to plaintiff his portion of the amount decreed. Accordingly defendant presented a petition to that effect and obtained a certificate confirming the sale. Defendant having failed to pay plaintiff his portion the present suit was brought. Upon these facts it was held in special appeal that the decree was satisfied by sale of the judgment debtor's property and that the execution proceedings were completely at an end the defendant having been

C P C (1908) S.47=(1882.S.244)-*Contd.*

(5) Any other question—*Contd.*

by the assent of the plaintiff made his agent for the acknowledgment of the satisfotion of the decree No subsequent application under the decree could have been entertained by the Court which executed it

Therefore plaintiff's claim was not a matter determinable under s. 11 of Act XXIII of 1861. **Ramandan Chetty v Kunnappu Chetty 6 M H C R 304.**

Kristo Chunder Goopto v Ram Sunder Sein. 17 W R 14

Notes—Fol: 10 Cal 538

455—C P C—S.47 of (1908)=Civil Procedure Code (XIV of 1882) Sections 244, 206-Excess recovered by decree—holder—Decree subsequently amended—Judgment debtor's application for restitution "Right to apply"—A decree as actual ly drawn up awarded a larger sum to the decree-holder than what the judgment made payable. The decree was executed and the amount specified therein realised by the decree-holder. More-than three years after the decree was amended at the instance of the judgment debtor,

Held that under section 244, Code of Civil Procedure, the judgment-debtor was entitled to apply for restitution of the amount which had in execution of the decree been realised in excess. Art. 178 Sch 11 Limitation Act, would govern such an application, and the right to apply accrue only when the decree was amended. Before the date any application for refund would be inconsistent with the terms of the decree as it then stood. (20 All 334 Dist.) **Harnam Chandra v Muhamad Yar Khan. 2 A L J 169=1905 A W N 63= 27 All 485.**

Notes.—Fol:28 All 565=3 A L J 556=(1906) W N 171.

(25) Land taken in excess of decree.

456—C P C S. 47=S. 244 of 1882—Separate suit—Cause of action.

Where a party who has obtained a decree for land takes possession by his own act, and not by the act of the officer of Court, of more land than the decree gives him,—*Held* that a suit will lie to recover back possession of any land taken in excess of the decree. **Mudun Mohun Singh v Kanyee Doss Chuckerbutty. 12 B L R, 201. Shurut Soonduree v Puresh Narain Roy. 12 W R., 85.**

C P C (1908)-S 47=(1882,S.244)-*Contd.*

(5) Any other question—*Contd.*

Notes—Diss: 23 Mad 55. Ref: 22 Cal 488, Fol: 6 C L J 527.

(26) Compromise decree-Effect of compromise.

457—C P C—S. 47=S. 244 of 1882—Mode of enforcing agreement of compromise—Right of suit.

A decree for partition having been compromised by an agreement made by the parties, and communicated to the Court which passed the decree,—*Held* that the effect of the decree was extinguished by the agreement, which could only be enforced by a fresh suit, and not by an application for execution of the former decree. **Hari Raghunath Joshi v Krishnaji Anant Joshi. 19 Bom., 546.**

(27) Compromise as to possession after decree.

458—C P C—S 47 of 1908=S 244—Procedure.—B sued his brother C for possession of certain lands. B and C came to an amicable settlement, one of the terms of which was that C, during his life, should retain possession of certain of the lands, and that, after his death, they should pass to B. A decree was given in accordance with the terms of the compromise. On C's death, his widow refused to put B in possession of the lands. B sought to obtain possession of the lands with mesne profits by executing the decree under the compromise against C's widow. *Held* that he ought to proceed by regular suit. **Tara Mani Dasi v Radha Jiban Mustafi. 6 B L R., Ap, 142: 14 W R., 485.**

(28) Refund of proceeds of sale on ground of compromise.

459—C P C S 47—When a refund is claimed of the proceeds of an execution sale on the ground that the decree has been satisfied by compromise, the matter ought to be tried under Act XXIII of 1861. s. 11, and not by regular suit. **Velayet Hossein v Wulee Ahmed, 23 W R., 207.**

(29) Restitution of amount paid under decree.

460—C P C—S. 47 of 1908=S. 244-Reversal of decree—Interest—Fresh suit.

In a suit for redemption of a mortgage a decree was passed for possession by redemption on the plaintiff paying the sum of Rs 43,625-7-0 the amount of the mortgag-debt. Prior to the institution of the suit, the defendant had taken proceedings in the Judge's Court to foreclose the mortgage, and the plaintiff paid the above mentioned sum into that Court for the defendant, who took it. The plaintiff appealed to the High Court from the decree directing him to pay Rs 43,625-7-0 as the mortgage debt, and obtained a decree by which the decree of the first Court was modified, and the amount payable on redemption was reduced to Rs. 22,155. The plaintiff then took out execution of the decree to recover from the defendant the difference between the two sums with interest. *Held* that the effect of the Appellate Court's decree was to direct restitution of any sum paid under the first Court's decree which was disallowed by the Appellate Court's decree and that the question was clearly one for determination by the Court executing the decree, and not by separate suit, being expressly provided for by s. 583 of the Civil Procedure Code. *Held* also that the decree-holder was entitled to restitution of the amount with interest. L R 3 P C 465, referred to. 7 All., 170, distinguished. **Jaswant Singh v Dip Singh. 7 All 432.**

Notes.—Fol: 15 Mad 203. Ref: 9 Mad 506; 18 All 262; 20 All 430.

461—C P C S. 47 (1908)=Sections 244 & 311 -Sale—Fraud-Execution-Proceedings-Partition-Mortgage.

After a sale has been confirmed, an application to set it aside for fraud is maintainable under section 244 Civil Procedure Code A co-sharer, who has obtained a portion of the mortgaged properties on a partition after the execution of the mortgage bond by the other co-sharers hypothecating their undivided shares in the said properties and who has been made a party to the mortgage suit is a necessary party to the execution proceedings. The sale of his share of the property, held in execution of a decree obtained in his presence under the mortgage bond, is not a nullity, although he was not made a party to the execution proceedings; but can be set aside in a proceeding properly set on foot for that purpose. (25 Bom 337; explained 27 Cal. 243; referred to.) **Golam Ahad Chowdhry v. Judhister Chundra Shaha. 30 Cal 142=7 C W N 305.**

(5) Any other question—*Contd.*

(30) Declaratory decree—Appeal.

462—C. P. C. Ss. 47, Decision as to executability of—Appeal. **10 M L T 437.**

(31) Step in aid of execution—Order in Council if includes provisions of decree affirmed—Payments in satisfactions of a decree made out of Court, if may be proved.

463—C. P. C. S. 47, O. 21 r. 31, (244, 258)—Limitation Act (XV of 1877) Sch. II, Art 180—Decree, revivor of Limitation.

In order that any proceeding in excution may operate as a revivor there must be expressly or by implication a determination that the decree is still capable of execution and the decree-holder is entitled to enforce it. Where a decree-holder applied for execution and on the judgment-debtor's objecting to the execution on the ground of the decree being time-barred, the objection was overruled but the decree-holder did not proceed with the application any further· *Held*, that this order operated as a revivor of the decree. An order in Council affirming a decree of the High Court includes the directions in such decree ; an application to enforce any such direction is in point of law an application to execute the order to the whole of which Art 180 of Sch. II of the Limitation Act is applicable. Payments made out of Court in salisfaction of a decree and not certified to the Court under S. 258, C P. C., cannot be proved under S. 244, C. P. C.—**Srimati Kamini Debi v Aghore Nath Mukherji (1908) 14 C. W N 357=7 C L J 91=4 Ind Cas 402.**

(32) Question arising after sale.

464—S 47 of 1908=S. 244 of 1882.

An objection by a judgment-debtor to a sale in execution of a decree on the ground that the property which was the subject of sale was not legally saleable, is not a matter which can be entertained by the Court under S. 311 of the Code of Civil Procedure so as to afford a ground for setting aside the sale on account of material irregularity in publishing or conducting it. (6 All 448 and 6 All 393 distinguished).

Per Mahmood J.—The scope of s. 244 of the Code of Civil Procedure is limited to matters connected with the execution of the decree between the decree-holder and the judgment-debtor

(5) Any other question—*Contd.*

and covers all the questions which may arise between the decree-holder and the judgment-debtor relating to the execution etc., of the decree. Questions that may arise after the sale are not, strictly speaking, questions relating to the execution, discharge, or satisfaction of the decree within the meaning of clause (3), s. 244 ; but, as soon as there has been a sale, the execution of the decree so far as the decree-holder is concerned, is over and the question whether the purchaser has purchased anything by the sale is not a question as to the execution of the decree holder's decree.

Also per Mahmood, J , the expression "conducting the sale" as used in s. 311 of the Code of Civil Procedure does not include any proceedings unconnected with the actual carrying out of the sale, but refers to the action of the officer who makes the sale, and not to anything done antecedent to the order of sale (L. R., 10 I A., 25) referred to. **Ram Chhaibar Misr v Bechu Bhagat. 7 All 641; 5 W N 190.**

Notes:—Ref: 16 Cal 33; 13 Bom 34; 15 Bom 290; 4 A L J 519 Dist: 24 All 291. Fol: W N (1907) 193; 29 All 612.

(33) Confirmation of sale.

465—C P C—S. 47=S 244—Applicability of the section.

Property was sold in execution of a decree and the auction purchaser (who was the decree-holder) was put in symbolical possession. No objection was taken to the sale and the sale was confirmed The judgment-debtor subsequently objected to the delivery of lands and complained that delivery was not made after proper measurements and that more lands than were actually sold were delivered to the purchaser.

Held:—that after the confirmation of sale the decree was satisfied, that no further execution could be had under the decree and that the question raised by the judgment-debtor was not one arising in execution under S. 244 of the Civil Procedure Code. (6 M H C 304, followed.).
Kuppusami Aiyar v Ramaswami Aiyar. 5 M L J 256.

(34) Order absolute for sale-T P Act S. 88.

466—C P C S. 47=S. 244 of 1882 C P Code does not include any questions arising as to the order absolute for sale where the order absolute for sale of the mortgage property is once made

C P C (1908) S.47=(1882,S 244)-*Contd.*

(5) Any other question—*Con d.*

under s. 88 T. P. Act (21 Cal 818, 22 Cal 924 931; 16 All 23 followed); (12 All 61; 13 All 278 dissented from) **Akikun Nissa Bibee v. Roop Lal Das,** **25 Cal 133.**

(35) Mismanagement of devasthan property

467—C P C S. 47 of (1908)=S 244 of 1882.

A decree directed that respondent No 1 should have the management of certain lands for Devasthan purposes so long as he carried on the management of property. If he failed to perform this duty or if he mortgaged or sold Devasthan lands, the appellant should enjoy the Inam lands and apply the proceeds to Devasthan purposes. Respondent No. 1 failed in his duty and the appellant presented a *darkhast*, *held* that the decree was capable of execution, that it was not declaratory only and that the question of mismanagement fell under cl. (c) of S. 244.

Madhavrao v. Ramrao, **1896 P J 379= 22 Bom 267.**

(36)Suit for restoration of property where decree is reversed.

468—C P C—S. 47=S. 244 of 1882.

Where a person obtains possession of property under a decree which is subsequently reversed, a claim for the restoration of the property need not, under Act XXIII of 1861,s 11, be the subject of a separate suit, but may be enforced in a miscellaneous proceeding. **Nagindas Devchand v Natha Pitamber.** **10 Bom H C R 297**

(37) Decree wrongly executed.

469—C P C—S. 47=S. 244 of 1882-Trespass, Suit for.

Where, in execution of a decree, something is done which is not ordered by the decree as making breaches in a bund which were thought by the nazir necessary for the protection of the bund, a suit will lie for trespass committed thereby. It is not a question arising in execution of a decree under s. 11, Act XXIII of 1861. **Rash Behary Lall v Wajan.** **12 B L R., 208 note 11 W R., 516**

See also Subjan Bibi v Sariatulla- **3 B L R A.C., 413:12 W R, 329.**

(38) Lands in dispute whether covered by a decree.

470—C P C—S 47 1908—Question to be decided by Court executing decree,

II C, C, 109

C P C (1908) S.47=(1882,S 244)-*Contd.*

(5) Any other question—*Contd.*

The question whether the lands in dispute were covered by the decree was a question which arose between the parties to the suit in which the decree was passed and which related to the execution of the decree. Such question must be determined by the Court executing the decree and could not be the subject of a separate suit. (12 Bom 449, 5 M H C 185, 14 W R 39, Fol.)

Maung Kye v Ma E May, **U B R 1897 —1901, Vol. II, 249.**

Notes—Dist., U B R 1910, 4th Qr., Civ. *66.*

(39) Retention by the court of property not the subject matter of a decree in the course of its execution—Dismissal of petition for delivery of possession.

471—C P C—S. 47=S. 244 of 1882—Appeal from order of dismissal.

A decree having been passed awarding to a plaintiff in a suit a moiety of certain jewels which were stored in family boxes in the possession of the defendant, the boxes containing the jewels were taken possession of by an officer of the District Court, and a division was effected by a Commissioner appointed for that purpose by that Court. After the division, certain jewels remained, which had been set aside by the Commissioner as not forming part of the subject-matter of the decree, and these continued in the custody of the District Court. The defendant thereupon presented a petition to the District Court praying that the jewels so remaining undivided might be returned to him. Plaintiff resisted the application,but both parties agreed that the said remaining jewels were not part of the subject-matter of the suit, and were not dealt with by the decree. The petition was dismissed, whereupon the petitioner appealed. On objection being taken that no appeal lay against the order of dismissal on the ground that, since the jewels in question were not part of the subject-matter of the suit and were not dealt with in the decree, the question was not one relating to the execution of a decree and was not governed by S.244 of the Code of Civil Procedure-*Held* that the question as to what should be done with the boxes and their contents arose between the parties to the suit, and related to the execution of the decree; that the order was passed under s. 244 of the Code of Civil Procedure; and that consequently an appeal lay. Per

(5) Any other question—*Contd*

Michell, J.—The property having been interfered with in the course of the execution ot a decree, the question involved was one "relating to the execution of the decree."The general words in the section should be construed liberally. (5 Mad 185, and B L R 201 referred to). **Appa Rao v Venkataramanayamma.** **23 Mad 55.**

(40) Cause of dispossession.

472—C P C S. 47=S. 244. of 1882.

It should be distinctly found in such a case how the dispossession occurred, whether through the Court or by the act of the defendant himself. **Surot Soondery Dabee v. Onwar Narain Pershad Dey,** **12 B L R 207 note.**

S. C. Shurut Soonduree Debee v Puresh Narain Roy, **12 W R 85**

Notes:—See 12 W R 85

(41) Damage done by removal of crops for possession of which decree had been obtained.

473—C P C S. 47=S 244 of 1882.

By the terms of a decree passed by the District Munsif, the plaintiff was declared entitled to the possession of certain land, together with the crops upon it. The plaintiff asked for execution of the decree in respect of the land and the crops, which he alleged had been unlawfully taken away by the defendants, and possession of the land was given to the plaintiff, but it was referred to a separate suit for the damage sustained by him by reason of the removal of the crop. *Held*, that no separate suit could be maintained, but the plaintiff's remedy was by a proceeding in execution under s 11 of Act XXIII of 1861 (Civil Procedure Code). **Sungara Narayana Pillay v Sandira Pillay.** **6 Mad H C R 13.**

(42) Damage for inquiry to goods under attachment.

474—C P C S. 47=S. 244—Separate suit.—

A claim for damages in respect of injury sustained by goods while under attachment in execution of a decree which was afterwards set aside is not a matter to be disposed of under s. 11, Act XXIII of 1861, but must be made the subject of a separate suit. **Kashee Kishore Roy Chowdhry v. Noor Khan,** **7 W R 45**

Notes:—Dist: 10 W R 131; 22 Bom 267, Ref: 6 C L J 527,

(5) Any other question—*Contd.*

(43) Question of liability for wrongful execution.

475—C P C S. 47=S. 244—Separate suit.—

Where property attached in execution of a decree is found by the Court executing the decree to have been wrongly seized, the question of the legal liability of the plaintiff for the loss sustained can only be determined by a separate suit and an order adjudging such liability passed in execution of the decree will be set aside as illegal. **Wright v. Seeta Bam,** **2 Agra 105.**

(44) Claim for damages for enquiry of goods wrongly attached.

476—C P C S. 47=S. 244—Separate suit.—

A claim for damages for injury to certain goods belonging to plaintiff, but attached by the defendant in execution of a decree held by him against the plaintiff, pending such attachment, through the alleged negligence of the defendant, is a matter which should be determined by a separate suit, and not by the Court executing the decree under which the goods are attached. **Luchman Dass v. Heera Lal,** **3 N W 187.**

(45) Monthly allowance payable under decree.

477—C P C S. 47=S 244—Cause of action—Separate suit on failure to pay.

Where by a decree the plaintiff's right to a monthly allowance was declared. — *Held*, that any failure on the part of the person bound to pay by the terms of the decree would constitute a good cause of action; and a fresh suit brought on the assertion of payment being withheld would not be affected by the provisions of s. 11, Act XXIII of 1861. **Nawazish Ali Beg v. Vilaytee Khanum,** **2 Agra 23.**

Notes.—Ap: 22 Bom 267.

(46) Right to maintenance.

478—C P C S. 47 (1908)=S. 244—Maintenance payable by instalments under decree.—

Where the holder of a decree for maintenance is opposed in execution by the heirs of her judgment-debtors.the questions arising between them cannot be determined in execution, but must be tried in a regular suit. *Quære* -If the original judgment-debtor were alive, could the decree-

C P C (1908) S 47=(1882, S.244)-*Contd.*

(5) Any other question—*Contd.*

holder enforce her claim for maintenance by execution without a fresh suit for each instalment unpaid ? **Premoo Bibi v. Dassoo Debia, 10 W R 93.**

(47) Question as to validity of mortgage decree for sale on mortgage.

479—C P C S. 47=S. 244 of 1882.

Held, that where a decree for the sale of specific mortgaged property is being executed, a person who does not claim through the mortgagor cannot in execution contend that the mortgagor was not competent to make the mortgage, and that the decree was one which ought not to have been passed. (22 Bom 225), (19 All 480), (12 All 313) and (19 W N 24) referred to.

Leladhar v. Chaturbhuj, 19 W N 64= 21 All 277.

480—C P C S 47=S. 244—Questions as to the authority to consent to decree—Validity of a consent decree.—

In the execution of a consent decree one of the judgment-debtors opposed the application under S. 244 C. P. Code alleging that the person alleged to have consented to the decree had no authority to do it. *Held*,—this question could not be raised in execution. (9 Mad 80 App.)

Dhani Ram Mahta v. Luchmeswar Singh, 23 Cal 639.

Notes:—Fol: 6 C W N 796.

(48) Execution of pottah by decree-holder in favour of judgment-debtor.

481—C P C S. 47=S. 244—Limiting decree for possession.—

Where a decree-holder, declared to be entitled to possession of certain land, subsequently to decree executed a pottah in favour of his judgment-debtor, who was then in possession, and afterwards took out execution under his decree.—*Held*, on an objection by the judgment-debtor that, under these circumstances, he was not entitled to possession; that satisfaction of the decree not having been entered up, such objection could not be dealt with under s. 244 of the Civil Procedure Code. **Baba Mahomed v. Webb, 6 Cal 786=8 C L R 36.**

Notes:—Dist: 22 Mad 182.

C P C (1908) S.47=(1882, S.244)-*Contd*

(5) Any other question—*Concld.*

(49) Question in execution decree as to whether money paid in time.

482—C P C S. 47 of (1908)=S. 244 of (1882) —Pre-emption suit—Conditional decree — Civil Pro. Code, 1877, sections 214, 244.

The plaintiff in a suit to enforce a right of pre-emption obtained a decree to the effect mentioned in section 214. On payment by him of the purchase-money into Court, the defendants objected, in the execution department, to such payment on the ground that it had been made within time. The Court which made the decree disallowed the objection. The defendants appealed from the order disallowing the objection. They had previously appealed from the decree. The appellate Court heard both appeals together, and holding that the purchase-money had not been paid into Court within time, reversed the decree, and allowed the objection. The plaintiff preferred a second appeal to the High Court from the appellate Court's decree, which was admitted. He also preferred an appeal from the appellate order allowing the objection, but this appeal was rejected as being beyond time, and such order became final.

Held, that, inasmuch as the question whether the plaintiff had paid the purchase-money into Court within time was not one relating to the execution of the decree within the meaning of s. 214 of the Code of Civil Procedure, but was one which should be decided in the suit itself and therefore the proceedings in the execution department touching that question were ill-founded, such order was not a bar to the hearing of the second appeal preferred by the plaintiff.

Muhammad Ali v. Debi Din Rai, 1882 W N 94=4 All 420.

(50) Order in execution giving mesne profits-not given by decree-Order without jurisdiction.

483—C P C—S. 47 of (1908)=Ss. 244 & 211—Mesne profits, order in execution giving, when no direction in decree. An order passed in execution giving to the Plaintiff mesne profits not awarded by the decree is without jurisdiction. L R 22 I A 68 (1894), followed. 19 All 155 (1896) distinguished. **Ishari Pershad v Ram Narain Saha 6 C W N 672.**

C P C (1908) S.47=(1882, S.244)-*Contd*

(6) APPEAL & SECOND APPEAL.

(1) Applicability of the section.

484—C P C S. 47=(1882 S. 244)—Deposit to set aside a sale—Purchaser of a portion of an occupancy holding, right of.

The question whether the purchaser of a portion of an occupancy holding is entitled to come in under section 310A of the Civil Procedure Code to make a deposit and to have a sale held for its own arrears set aside is one that comes under clause (c) of section 244 of the Code and an appeal and a second appeal lie in the case.

Omar Ali Majhi v Moonshi Basiradeen Ahmad. 7 C L J 282.

See also cases under.

(1) Appeal—Questions in execution.
(2) Appeal—Execution of decrees.
(3) Appeal—Decrees.
(4) Appeal—General.

485—C P C S. 47, O 21 r 89=(1882 Ss. 244 310-A)—Appeal—Order under S. 310A—Applicability of:

An order under s. 310-A is appealable under s 244 C P C (1897) (1 C W N 703 foll).

Phulchand Ram v Narsing Pershad Misser. 28 Cal 73.

Notes.—Ref: 30 Mad 507=17 M L J 291=2 M L T 347 ; 25 Mad 244 F B, 29 All 275 =4 A L J 135=(1907) W N 64: 7 C L J 282 ; 13 C W N 591 ; 5 O C 377.

(2) Execution of decree—Appeal

486—C P C S. 47=S. 244 (of 1882)

The judgment-debtor applied under S. 310 A of the Civil Procedure Code to the Subordinate Judge to set aside a sale in execution of a decree against him, and an order was made accordingly. The auction purchaser appealed to the District Court against that order but his appeal was dismissed on the ground that no appeal lay against that order as S. 310-A was not included in the sections enumerated in S, 588 of the Code.—

Held, that this case did fall within the terms of S. 244 (c) of the Civil Procedure Code and an appeal therefore lay against that order to the District Court. **Pandurang v Krishnabai.** 1 Bom L R 74.

C P C (1908) S.47=(1882, S.244)-*Contd.*

(6) Appeal & second appeal—*Contd.*

(3) Right of a mortgagee to the benefit of s. 310-A—Appeal against adverse to mortgagee.

487—C P C S. 47=(1882)—Ss. 2, 244 and 310 (A)—Mortgagee, whose immoveable property has been sold.

A and B, who were joint owners of some property together, mortgaged it to C. C then sued on the mortgage and got a decree against them both. After decree A sold away his share of the property to B in consideration of the latter undertaking to pay the whole of the decree amount and executing to him a simple mortgage on the share so sold for the balance of the sale amount. Subsequent to this arrangement, C executed his decree and purchased the entire property himself in execution. B then applied to the Court to have the sale set aside under S. 310 (A), C P C.

Held: that as B's mortgage would be affected by the sale, he was a person whose immoveable property had been sold within the meaning of S. 310 (A), C P C and that consequently, he was entitled to the benefit of that section, and that as the purchaser was the decree-holder himself and the matter was done arising in execution the order passed between him and another party to the suit under S. 310 (A) was appealable. (13 Cal 346, referred to). **Srinivasa Aiyangar v Aiyathorai Pillai.** 21 Mad 416, 8 M L J 55.

Notes.—Ap: 22 Mad 286 ; 29 Cal 1 F B, Fol. 30 Mad 507 ; 25 Bom 104. Dist: 30 Cal 125 ; 5 C L J 204. Ref: 5 C W N 821 ; 25 Mad 244 F B: 17 M L J 291.

(4) Parties relating to the execution of the decree Application under s. 310 A, C P C—Auction purchaser in Court sale—Appeal.

488—C P C S. 47; O 21. r.89=(1882 Ss. 244, 310A).

An appeal lies from an order rejecting an application under S. 310-A, C P C, by the transferee of the judgment debtor's interest after the Court sale. The question of setting aside a sale under S 310-A relates to the execution of the decree. A transferee who has acquired the interest of the judgment-debtor after the Court sale is a representative of the judgment-debtor and is entitled

C P C (1908) S.47=(1882, S.244) *Con'd*

(6) **Appeal & second appeal**—*Contd.*

to apply under S. 310-A (21 Mad 416; 26 Cal 449 ; 19 Cal 683 Ref: 28 Mad 87 ; 24 Cal 62 ; 25 Mad 529 Ref:) **Manikka Odayan v Rajagopala Pillai. 17 M L J 291= 2 M L T 347=30 Mad 507.**

Notes:—Diss: 30 All 379=5 A L J 557=A W N 1903, 157 ; Not Fol: 12 O C 45, Doubted, 31 Mad 177=3 M L T 306. Ref: 8 Ind Cas 429.

(5) Appeal—Locus Standi.

489—C P C S. 47. When a person made another a party to his suit and obtained a decree against him an appeal by the latter cannot be objected to on the ground that he has no interest in maintaining the appeal. A and B were first mortgagees—A and C were puisne mortgagees. A and B obtained a foreclosure decree. C paid off the debt and brought a suit for foreclosure impleading A as a party defendant on foot of the first mortgage A objected to the suit as barred by s. 244 C P C and appealed against the decree for foreclosure in favour of C *Held* that it did not lie in the mouth of C to question the right of A to appeal when he himself made A, a party, and obtained the decree against him.

Bansidhar v Gaya Prasad, 1902 A W N 3 =24 All 179.

(6) Practice, appeal (Order in)—Execution—Application of Judgment-debtor to demolish certain building—Jurisdiction of Courts (Revision) of decree.

490—C P C S. 47=S. 244—Building after execution.

The plaintiff having obtained a decree restraining the defendant from interfering in certain work that he was executing upon his land began and completed the buildings. The judgment-debtor, thinking that the decree-holder had encroached upon his land put in an application praying for demolition of certain portions of that building. The courts below entertained the application under S. 244 C P C and ordered demolition. *Held* that the application being one which could not be entertained under S 244 no appeal lay. The matter was, however. taken up in revision. Neither precedent nor rule limits the authority of High Court to call for the record of a case and pass such orders as the Court thinks fit. (31 All 133=7 C L R 191=15 All 405 referred to).

C P C (1908) S.47=(1882, S.244)—*Contd.*

(6) **Appeal & second appeal**—*Contd.*

A Court should not ordinarily grant an extra ordinary remedy by way of revision but each case must be judged upon its own merits,

Debi Das v Aijaez Husain. 1905 A W N 191=2 A L J 749=28 All 72.

Notes: - Ref: 12 C W N 16 ; 8 C L J 245 ; 35 Cal 120.

(7) Appeal if lies—Maintainability of application—Withdrawal of application under C P C S 311.

491—C P C S.47; O 21 r.90=(1882 Secs, 244, 311)—Bengal Tenancy Act (VIII of 1885) Sec, 174 Sec. 311.

It cannot be affirmed as a general proposition of law either that an order under section 174 of the Bengal Tenancy Act or under section 310A of the Civil Procedure Code is or is not appealable.

The test is whether the question raised in the proceedings is one relating to execution, satisfaction or discharge of the decree, and if the question is of this description, whether it arises between the parties to the suit or their representatives. If it so arises the order is appealable.

Application under section 174 of the Bengal Tenancy Act is maintainable, when the leave of the Court has been applied for to withdraw a previous application under section 311 of the Civil Procedure Code.

'Applies' in section 174, means applies and prosecutes. **Sital Rai v Nanda Lal. 11 C L J 202.**

(8) Order setting aside under, sale in execution of a non-appealable rent decree.

492—C P C S. 47. O XXI r 90 - Order setting aside under, sale in execution of a non-appealable rent-decree under the Bengal Tenancy Act, appealability of. **9 C W N 721=1 C L J 476; F B=32 Cal 957.**

(9) Appeal-Rent decree, application for transfer of decree rejecting application.

493—C P C S. 47, Ss. 38, 39, 41, O 21 rr. 4, 5 =(1882—Ss. 244 223).

An application for the transfer of a decree for execution under S. 223 of the Code of Civil

C P C (1908) S.47=(1882, S.244)-*Contd.*

(6) Appeal & second appeal—*Contd*

Procedure is an application which involves a question relating to the execution of decree : and as such comes within S. 244 of the Code. An appeal therefore lies against an order rejecting such an application. (16 Cal 744 Dist: 24 Cal 244 Fol.)

Bhabani Charan Dutt v Pratap Chandra Ghosh. 8 C W N 575.

(10) Order by executing Court passed without jurisdiction—Appeal.

494—C P C S. 47=(1882 ss. 244,2).

An order passed by the executing court whether with or without jurisdiction is one made under s. 244, C P C. and an appeal lies from it. (16 All 83; 17 Cal 488 foll.) **Tameshar Prasad v Thakur Prasad. 1903 A W N 99=25 All 443.**

Notes—Ref: 1 C L J 315.

(11) Order of a District Judge refusing to execute an award under Act I of 1894—One under s.244, Consequence, appealable as a decree

495—C P C S. 47=(1882 s. 244).

The Chief Court being the sole Court for appeal under s. 54 of the said Act, the above order is appealable only to the Chief Court and to no other Court, the value of the claim involved being immaterial. **Zamindars of Dhar v Rana. 53 P R 1906=103 P L R 1906.**

(12) Decree for sale—Direction by appellate Court to take accounts—Application by decree-holder to original Court—Order declaring amount due—Appeal.

496—C P C S. 47=(1882 s. 244)—Civil Procedure Code ss. 230 and 244, Cl. (c).

A decree for sale passed under s. 88 of the Transfer of Property Act is the final decree in the suit; and all proceedings subsequent to that decree for the purpose of enforcing and working out such decree are proceedings in execution of that decree. A decree for sale under s. 88 may either declare the amount due on the mortgage at the date of such decree or direct that an account be taken of what will be due to the plaintiff for principal and interest on the mortgage on a future day which is to be fixed by the decree itself. Where a decree for sale under s. 88 directs accounts to be taken, an application which the decree-holder may make for taking the account and declaring the amount which may be found due on the taking of such account is an application to enforce the decree within the meaning of s. 233 C P C. Such an application may be made to the Court which passed the original decree, and an order passed therein is appealable, being one falling under s. 244, Cl. (c) of the Civ. Pro. Code. **Aryan Bank of Vizagapatam v Venkata Narasayyamma. 26 Mad 237=13 M L J 212.**

C P C (1908) S.47=(1882, S 244)-*Contd.*

(6) Appeal & second appeal—*Contd.*

497—C P C s. 47=C P C S. 244—T P Act s. 90.

If a party is dissatisfied with an order under s. 90 T P A., the proper cause for him is to appeal against the order under s, 244. C P C.

Kishan Prasad v Radha Madho Prasad. 1904 A W N 268.

(13) Order whether a party applying for execution is not the representative.

498—C P C s, 47=(1882 s. 244).

An order determining whether a party applying for execution is or is not the representative of the decree-holder is appealable under the last clause of s. 244. **Krishnama Chariar v Appasami Mudaliar. 25 Mad 545=12 M L J 280.**

(14) Auction purchaser—Representative—Appeal.

499—C P C S.47: O 21 r. 89=(1882 S.310A)—Decree-holder.

Where the auction-purchaser is a third person and not the decree-holder and whereupon an application being made by the judgment-debtor under s. 310-A, C P C, to set aside the sale, it is not contested by the decree-holder so that no question arises between the decree-holder and the judgment-debtor, the order made by the Court does not fall within s. 244, Civ Pro Code and is consequently not appealable. (26 Cal 449; 1 C W N 70: 3; 21 Mad 416 Dist). **Amir Rai v Basdoe Singh. 5 C L J 204.**

500—S. 47=S. 244 and s. 234—Questions for Court executing decree—Parties—Representative.

C P C (1908) S. 47=(1882, S. 244)-*Contd.*

(6) Appeal & second appeal—*Contd.*

Held (applying the principle laid down by the Privy Council in 11 B L R 149) that where execution has been properly taken against the representative of a deceased judgment-debtor under s. 234 of the Civ Pro Code, and the said representative has made an objection to the sale of the property attached on the ground that it is ancestral property the question thus raised is a question arising under s, 244 (C) of the Code, and an appeal therefore lies from the decision thereof by the executing Court. (47 P R 1887 cited).

Ramchand v Gholushah.
87 P R 1887.

(15) Decree passed against representative of debtor—Attachment of property as belonging to debtor—Objection to attachment by judgment-debtor selling independent title.

501—C P C S. 47 of 1908=S. 244 of 1882.

A decree was obtained against the representatives of the deceased judgment debtor to the extent of his property in their hands and some property was attached. The defendant objected that the property was his own and not that of the deceased but was overruled. *Held* an appeal lay. 9 All 605 Contra.

Mulmantri v Ashfak Ahmad 9 All 605.

Contra **Awadh Kuari v Raktu Tiwari.**
6 All 109.

Notes:—Ap 12 All 313 F B. Ap: 12 All 73. Dist 11 All 74; 12 All 313 F B. Ref:15 Cal 437; 17 Mad 399.

502—S. 47=S. 244—Purchaser of a decree—A representative of the decree-holder—Ss. 2, 232—Application by transferee of a decree—Second appeal.

The word representative in s. 244 includes the purchaser of a decree from the decree-holder by an assignment in writing. (24 Cal 62, 16 All 834 ref to.) The Court executing a decree can go into the disputed question of the transfer of decree under s. 244 C P Code as amended by Act (VII of 1888). **Dwar Buksh Sirkar v Fatik Jali**
26 Cal 250=3 C W N 222.

Notes:—Fol 27 Cal 670; 25 Mad 529; 28 Mad 87=14 M L J 474. Ref:6 A L J 71. F B: 31 All 83 F B.

C P C (1908) S. 47=(1882, S. 244)-*Contd.*

(6) Appeal & second appeal—*Contd.*

503—S. 47 of (1908)=Ss. 244 and 232 of (1882).

Where a Court on the application of a transferee of a decree for execution decides that he is not a transferee under s. 232, or that he is transferee but not a representative of the party to the suit, or that by rerson of limitation he is not entitled to obtain execution of the decree, it has determined a question specified in s. 244 of the Code of Civil Procedure and an appeal lies.

Badri Narain v Jai Kishen Dass.
16 All 483.

Notes:—Fol 27 Cal 670; 25 Mad 545. Ref 26 Cal 250. 20 Mad 378; 21 Mad 388; 7 M L J 89; 25 All 443, 26 All 447, 11 C W N 433, 1 A L J 61; 6 C L J 437.

(16) Party on record though wrongly—Rights of appeal.

504—C P C S. 47=S. 244 of 1882.

A party who has been put upon the record whether rightly or wrongly, is so far a party to the suit that he has a right of appeal under Act XXIII of 1861 s. 11. **Bhuggobutty Kowar v Money.** **2 C L R 545.**

(17) Question between the legal representativa & judgement debtors—Appeal.

505—C P C S. 47, O 21 r 16=(1882 Ss 244, 232)—Appeal.

When an application by the executor to the estate of a Hindu lady to execute a decree which fell to her share upon a partition of her husband's estate between herself and her sons was refused on the objection of the sons and the judgment-debtors that the lady had only a life interest in the decree and that it passed on her death to her sons:—*Held*, that an appeal lay from the order under s. 244 C P C, the question arising being a question between the legal representative of the lady and the judgment-debtors. **Hridoy Kant Bhattacharjee v Behari Lal Mookerjee.**
11 C W N 239.

(18) Application for execution of whole decree by one of several joint decree-holders—Dismissal of application—Appeal.

506—C. P C S. 47 of (1908)=Ss. 244 & 231 of (1882)—An application for execution of the whole

C P C (1908) S.47=(1882,S.244)-*Contd.*

(6) Appeal & second appeal—*Contd.*

decree was made, under Section 231 of the Civil Procedure Code, by one of four joint decree-holders, but was dismissed by the District Judge on the ground that the decree could not be executed until all the decree holders joined in the application. It appeared that the judgment-debtor was not summoned to defend the application, but on appeal from the District Judge's order he was impleaded as well as the other co-decree-holders. The Divisional Judge ordered that the execution should proceed on the applicant joining with him such of his co-sharers as were willing to execute the decree jointly with him, and impleading the rest who objected and declined to take out execution, and that the Court should take possession of the entire land decreed, and separate off the shares of applicants from those of the others through the agency of the Collector. The judgment-debtor appealed to the Chief Court and it was contended on his behalf that the order of the District Judge under Section 231 of the Code was not appealable, and that, therefore, the order of the Divisional Judge was without jurisdiction and void.

Held, following 17 Mad., 394, that the Divisional Judge had jurisdiction to hear the appeal.

Although, if an application under Section 231 of the Code is dismissed without summoning the judgment-debtor or issuing process, and the latter is not made a party to the appeal the question may be one beyond the province of the Appellate Court to adjudicate upon, yet if, as in the present case, the judgment-debtor is impleaded on the appeal, the question then becomes one under Section 244 of the Code and an appeal lies.

The Court refused, under the circumstances of the case, to interfere with the order of the Divisionl Judge on the merits **Mir Khan v Jinde Khan** 28 P R 1898.

(19) Assessment of mesne of profits—Interlocutory order under S. 244—Applicability.

507—There is no general principle which should determine the assessment of mesne profits in every case. The Court ought, first, to ascertain the fact of each case and the nature of plaintiff's possession of the land before ouster, and then

C P C (1908) S. 47=(1882,S.244)-*Contd.*

(6) Appeal & second appeal—*Contd.*

determine the principle applicable in the particular case. (9 W R 473; 13 W R 37; 16 W R 21 and 17 W R 156 ref to;3 C W N 748 explained). Where a Subordinate Judge fixed upon a principle for assessment of mesne profits arbitrarily and directed the production of evidence accordingly:—*Held* that such order was not an interlocutory order, but an order under S. 244 of the Civ. Pro. Code against which an appeal would lie. **Surja pershad Narain Singh v Reid** 6 C W N 409= 29 Cal 622.

Notes:—Ref: 35 Cal 1000=12 C W N 650; 7 C L J 197= 12 C W N 285; 6 C W N 732:

See also **Sirdar Bahadur Singh v Bijai Bahadur Singh.** 5 C W N 52.

(20) Sale, confirmation of—Whether order under S. 244—Applicability.

508—There is no limitation for an application to deposit landlord's fee as prescribed by the Bengal Tenancy Act, and for confirmation of the sale and the granting of the sale certificate.

An order upon such an application may be regarded as one under sec. 244, cl (c) C. P. C. and as such an appeal and a second appeal lie. **Krishna Chandra v Anukul Chandra** 6 c W N 190.

(21) Confirmation of sale without payment of landlord's fee—Sale. Validly of—Application for possession by auction purchaser.

509—Civil Procedure Code, S. 47 of (1908)= Ss. 244, 318—Appeal, second appeal:

Where the sale of a permanent tenure was confirmed without previous payment of the landlord's fee in the manner required by s. 13 of the Bengal Tenancy Act, and the judgment-debtor objected to the auction purchaser's application for being put into possession under S. 318 C. P. C., on the ground that the sale was invalid: *Held* —that the question was one under S. 244, C. P. C. and a second appeal lay. (19 Cal 683 s c 19 I A 166 relied on).

Mohim Chandra Bhattacharjee v Ram Lochan Dey, 7 C W N 591.

C P C (1908) S 47=(1882,S 244)-*Contd*

(6) Appeal & second appeal—*Contd.*

(22) Decision purporting to be under appeal.

510 C P C S. 47=(1882 S. 244).

Held, that where an order appealed from purported to decide questions to be dealt with under Section 244 Civil Procedure Code, the party against whom it is passed is entitled to an appeal therefrom. (23 Mad 517; 28 Mad 127 Fol:)

Srimat Bhayankaran Rangancharlu v Sirmat Bhayankaran Ranganathacharlu 2 M L T 307.

(23) Application to have set aside execution of decree.

511—C P C S 47, O 21, r, 89; s 115,=(1882 ss 244, cl (c) 310A and 622).

Held that the question whether the judgment-debtors had a right to apply under s 310A, to have sale set aside and the other questions arising in the case being questions relating to the execution of the decree, that they arose between the judgment-debtors and the decree-holder and that therefore there was an appeal in the case and an application under section 622, was not entertainable. **Lalta v Deputy Commissioner Sitapur, as Manager, Court of Wards, Katesar Estate. 5 O C 377.**

(24) Application for amendment of sale proclamation-Appeal.

512.—C P C S 47; O 21 rr 66, 70=(1882 Ss244 287 cl (c).

An application by the judgment-debtor against a proceeding under S 287 clause (e) C P C (1882), to have the sale proclamation amended by inserting in it the proper value of the property advertised for sale, falls under s 244 and is as such open to appeal.

Where an application is made by a debtor objecting to the value of the property as stated in the sale proclamation, it is certainly the duty of the Court executing the decree to make an enquiry and to satisfy itself that the amount stated in the sale proclamation is substantially correct. (30 Cal 617 ; 8 C W N 257 ; 2 C W N 542 Fol). **Lachman Pershad Singh v Ganga Pershad Singh. 6 Ind Cas 180.**

C P C (1908) S 47=(1882, S.244)-*Contd.*

(6) Appeal & second appeal—*Contd.*

(26) Sale in execution—Collusion—Material irregularity—Second appeal.

513—C P C S 47; O, 21 r. 90; S 104; O 43 ; r 1=(1882 Ss 244, 311 and 588.).

A sale was held in execution of a decree. An application was put in for setting aside the sale under Ss 244 and 311, on the allegation that there was a material irregularity, and that the sale was due to a collusion between the opposite parties and the Amin:

Held, that the application was both under Ss. 244 and 311, and a second appeal did lie to the High Court. (30 Cal 142 : 3 C W N 6 ; A W N (1899) 184 : A W N (1906) 3 Ref).

Lachman Misra v Ram Jas Sahu 2 Ind Cas 983.

514-C P C S 47; O 21, r 90=(1882 Ss. 244, 311) —Appeal—Second appeal :—

When the judgment-debtor does not seek to set aside the sale on the ground of any material irregularity in the publication or conduct of the sale as contemplated by S 311, C P C, but on grounds, which if valid, can be advanced only under Section 244 of the Code, for instance, the ground that the decree in execution of which the decree-holder purchased the property has been subsequently set aside, a second appeal lies (27 Cal 810 ; 31 Cal 499 ref to). **Ramyad Sahu v Bandeswari Kumar Upadhay. 6 C L J 102.**

(26) Second appeal—Sale, petition to set aside—Fraud alleged not proved—sale set aside for irregularity.

515.—C P C S 47 ; O, 21, r 90 : S 104, O 43, r 1=(1882 Ss 244, 311, 588).

A mere allegation of fraud in an application under s 311 of the Code of Civil Procedure without any attempt in any way to substantiate it, cannot give a right of second appeal in a case which would not otherwise have arisen (18 Cal 442 ; 22 Cal 302 ; 19 Mad 29 foll, 4 C W N 538 explained and distinguised) **Umakant Roy v Nath Sanyal. 5 C W N 124=28 Cal 4.**

Notes :—Dist: 31 Cal 385.

(6) Appeal & second appeal-*Contd.*

516.—C P C S 47. O 21 r 89=(1882 Ss 244, 310-A,)—Application to set aside the sale on the ground of the decree-holder's fraud—Appeal.

An application by the judgment-debtor to set aside sale of his property in execution of a decree passed against him, on the ground that the sale was brought about by the fraud of the residents (who included the decree-holder) of the village where the lands were situate, falls within the purview of s. 244, C P C (1882) (30 Cal 143 concurred in.)

An appeal lies from an order passed under s. 310-A, C P C (1882) when it also falls within s. 244 of the Code (9 Bom L R 15=31 Bom 207 foll) **Harihar Kant v Rama Pandu 11 Bom L R 1113=4 Ind Cas 253. =33 Bom 698.**

517.—C P C S 47 (1908) and O, XXI, r 90—Fraud—Payment to decree-holder before date of sale—Fraud in conduct of publication of sale—Second appeal, whether lies.

An application to set aside an execution-sale was made on the ground of fraud, the fraud being that the decree had been satisfied by payment to the husband of the decree-holder on the day before the sale, but the payment was not certified and the sale was held: *Held*, that the matter did not come within the scope of O. XXI, r 90 of the Code, inasmuch as the fraud alleged was not fraud in the conduct of publication of the sale, but it came within the scope of s 47 of the Code, and that, therefore, a second appeal lay: *Held*, also, that, so far as the execution Court was concerned, the payment could not be regarded as having been made, and the allegation of fraud consequently fell to the ground, and that the sale could not be set aside.

Alokeshi Dasi v Biraj Mohini Dasi. 10 Ind Cas 625.

(27) Second appeal—Application to set aside sale, ground of fraud.

518.—C P C S 47; O 21. r 90=(1882 Ss 244, 311.)

Where an application was made to set aside a sale, alleging fraud facts and circumstances sufficient to support the allegations of fraud and each allegation was pressed before both the lower

(6) Appeal & second appeal—*Contd.*

Courts, the application is one falling under S 244, even though the District Judge on appeal lies in such a case. The test in such cases is to consider what the application was and whether at the time it was made it was an application under s 244. (26 Cal 324 and 26 Cal 539 followed 28 Cal 4 dist). **Kokil Singh v Edal Sigh 31 Cal 385.**

Notes:—*Ref*: 11 C W N 1011. F. B.

(28) Decree—Fraud—Questions relating to execution between parties to the suit—Auction—purchaser a third party.

519—C P C S 47 of (1908)=S 244 of (1882)—

A Judgment-debtor made an application against the decree-holder and auction purchaser to have the sale set aside on the ground of fraud or irregularity in publishing or conducting the sale.

The application was rejected by the Court of first instance. On appeal to the Subordinate Judge the decision of the first Court was reversed. On second appeal to the High Court by the auction-purchaser it was contended that no appeal could lie at his instance.

Held,—inasmuch as the application was under s 244 of the C P C a second appeal would lie. The question of a right to a second appeal does not turn upon who may happen to be the appellant but upon whether or not the case is one within S. 244 of the C P Code.

Hira Lal Ghose v Chundra Kanto Ghose. 26 Cal 539. 3 C W N 403.
See Bhubon Mohun Pal v Nanda Lal Dey. 26 Cal 324. 3 C W N 399.
and Motilal Chakrabatty v Russick Chandra Bairagi. 26 Cal 326 Note. 3 C W N 395.

Notes:—Fol: 25 Bom 418; 31 Cal 385; 27 Cal 197; 6 C W N 279; 283. Appr 6 C W N 279. Ref: 32 Bom 572=10 Bom L R 752.

(29) Auction-sale.

520—C P C Ss. 47, 104, cl. (i) O. XXI, rr. 89, 92 O. XLIII, r. (1) (i).

A deposit by the judgment-debtor to set aside a sale can only be made under s. 89 of O. XXI. It does not come under s. 47 of the Code.

C P C (1908)-S.47=(1882 S.244)-*Contd.*

(6) Appeal & second appeal—*Contd.*

An order refusing to receive it and to set aside the sale, or an order setting aside the sale, is made under r. 92 of O. XXI, and an appeal lies to the District Judge under O XLIII, r. 1 (i), and no second appeal lies to the High Court.

Sita Nath Roy v. Hare Krishna Sahu, 6 Ind Cas 573.

(30) Appeal against order setting aside sale.

521—C P C S. 47, O. XXI, rr. 89, 91, 92—Sale set aside—Right to refund of poundage fee.

15 C L J 89.

(31) Execution sale—Collector's order setting aside—Appeal to District Judge.

522.—C P C S.47=S.244-No appeal lies to the Civil Court of the Board of Revenue against an order of the Collector passed under s 312 Code of Civil Pro. But where the Collector sets aside a sale as void *ab initio*, his order must be looked upon as one passed under s. 244 Code of Civ Pro. It will therefore have the force of a "decree" and an appeal will lie against it to the Civil Court.

Muhammad Yusuf Ali Khan v Hasan Fatima 2 A L J 130=1905 A W N 55.

(32) Application by prior purchaser to set aside a subsequent sale of same property—Sale set aside by Munsiff-Appealability of Munsiff's order.

523.—C P C S 47 (1908) O 21, r 90 s. 115 (=Ss. 244, 311, 622, Civ Pro Code, 1882)—Order of lower Court wrong on question of law—Power of High Court to interfere in revision—Bengal Tenancy Act s 153.—

The present petitioner purchased a holding under a money-decree. Two years later, the same holding was sold in execution of a rent decree and purchased for Rs 25 by the decree holder thereof. Thereupon an order was made by the Munsiff, upon an application by the petitioner under the conjoint effect of ss 311 and 244 of the Code, setting aside the second sale. The purchaser under that sale appealed to the Additional District Judge, who, without going into the merits, reversed the order of the Munsiff. The petitioner, thereupon, moved the High Court on the ground that no appeal lay to the Additional District Judge and that the Judge was wrong in

C P C (1908) S.47=(1882 S.244)-*Contd*

(6) Appeal & second appeal—*Contd.*

stating that the petitioner had no *locus standi*. *Held*, the effect of the order of the Munsiff was practically to hold that the second purchaser had no title to the land, and the order certainly decided a question relating to title to the land or to some interest in the land as between parties having conflicting claims thereto. Here the parties had conflicting claims thereto. An appeal, therefore, did lie to the Additional District Judge, under s. 153 of the Tenancy Act, and, consequently, he was not acting without jurisdiction, when he made his order. (28 Cal 116 Dist). As to the second point:—What the Additional District Judge meant by stating that the petitioner had no *locus standi* was that the petitioner was not a representative of any of the parties within the meaning of s 244. If the Judge was wrong on that point he was wrong upon a question of law and not of jurisdiction, and the case, in consequence, did not fall within s. 622. The same observations applied as to whether or not the petitioner was a person whose immoveable property had been sold within the meaning of s. 311 of the Code. Rule discharged **Ganga Charan Bhuttacharya v Sashi Bhusan Roy 1 C L J 255=32 Cal 572.**

Notes -Fol 32 Cal 957 F B=9 C W N 721=1 C L J 476.

(33) Judgment-debtor, objection by—Decree holder—Small Cause Court suit—Second appeal—Revision—Separate suit.

524.—C P C S 47; O.21 rr 58, 63; S.102=(1882 Ss 244, 278, 283 and 586)

Held that an objection made under s 278 by a party to the decree is governed by s 244 C P C and therefore an appeal lies against an order passed on such cases.

Held further that the suit being of a nature of Small Cause, no second appeal lay (Supp I O 60; 17 Cal 711; 17 All 245; 19 Bom 328; 12 All 579; 25 Cal 872; 18 All 481 ref to) **Mussammat Umutul-Athar Begam v Baldeo Das. 8 O C 405.**

525-526.—C P C S 47 (1908); O XXI r 58 [=Civ Pro Code 1882 ss 244; 278]—Personal decree against member of tarwad—Attachment of tarwad property—Claim by judgment-debtor that property not liable to attachment—Appealability of order in claim case.—

(6) Appeal & second appeal—*Contd.*

Where a member of a Malabar trawad against whom a personal decree had been passed applied for the release of property attached in execution of the decree on the ground that the property formed the common tarwad property, the claim fell under s 278 and not under s. 244 of the Code, and no appeal lay from the order passed on the petition. **Abdur Rahiman Kutti Haji v Kunhammed Koya. 10 M L J 85.**

Notes—Dist: 30 Mad 215=17 M L J 377=2 M L T 31.

(34) Appeal against order passed under s. 244 C P C.

527.—C P C Ss 47, 102=S.244—Appeal against order passed under s. 244, Civ Pro Code, in execution of Small Cause Court decree. **11 C W N 861.**

(35) Objection by judgment-debtor that more had been delivered to the auction-purchaser than was included in his sale-certificate—Objection disallowed.

528-529.—C P C S 47=(1882 S. 244)—No appeal—Execution of decree—Objection by judgment-debtor that more had been delivered to the auction purchaser than was included in his sale certificate—Objection disallowed—Appeal.

Certain landed property was put up for sale in execution of a decree. On the property stood a house. After the sale the auction-puachaser obtained possession of the house. The judgment-debtors objected that the house should not have been delivered, inasmuch as no mention was made of it in the sale certificate. This objection was disallowed.—*Held*, that the order disallowing the judgment-debtor's objection did not fall within S. 244 of the Code of Civil Procedure and was not otherwise appealable. (20 Mad 487; 13 Cal 326 ref to.) **Ram Adhar v Narain Das. 1902 A W N 157=24 All 519.**

(6) Appeal & second appeal—*Contd.*

530.—C P C S 47; O 21, r 95=(1882 Ss. 244 and 318).

When an application is made by the assignee of the decree-holder purchaser for an order under s. 318 of the Civ. Pro. Code, the mere fact that the judgment-debtors put in an objection does not make it an application under s 244 of the Code, so as to entitle the judgment-debtor to appeal against the order passed by the Court of first instance or by the Court of first appeal. (I C W N 658, Ref.). **Mahomed Mosraf v. Habil Mia. 6 C L J 749.**

Notes.—Ref 6 A L J 71 F B; Fol: 31 All 82 F B=1 Ind Cas 416=5 M L T 185.

531—C P C S.47=(1882) S 244—No appeal—Attachment and decree for sale on a mortgage—Objection by mortgagor that decree has been satisfied—Objection disallowed:—

There is no appeal against an order disallowing an objection to the sale of a mortgage decree obtained by the judgment-debtor against the mortgagor-appellant passed in execution of decree obtained against the mortgagee. **Ishri Dat v Mewa Lall. 1903 A W N 206=26 All 136.**

(36) Objection by judgment-debtor that he is trustee in respect of the property attached-Applicability of.

532—C P C S 47=(1882 Ss. 244, 278:)

Where a property is attached in execution of decree and the judgment-debtor objects on the ground that although he is in possession of the same, such possession is not in his account, but on account of two idols (or Hindu deities), and the property is *debatur*, and he has no personal rights in it. *Held*, that the objection does not fall under the provisions of S. 244, C P C but it is a claim under S. 278 and no appeal lies against an order passed in such a case. (16 Cal 1; 17 Cal 711; 23 Bom 246; 2 All 752; 7 All 36, 15 Cal

C P C (1908) S.47=1882 S 244)-*Contd*

(6) Appeal & second appeal—*Contd.*

437: 23 Bom 237 ref to. **Bhajahari Pal v Ram Lal Das. 6 C W N 63.**

Notes:—Ref: 8 C L J 20.

(37) Appeal from an order made on application for appointment of a Commission.

533—C P C S. 47; O 26, rr 13, 14; S. 104; O 43, r 1=(1882 Ss. 244, 396 and 588)—

An application, under S. 396 of the Code for the appointment of a Commission, is not a matter which comes within the scope of S. 244. No appeal lies from the order made on the application, since it is not an order, from which a right of appeal is given by S. 588 of the Code. (28 Mad 127 Diss. C M A 14 of 1906 Fol:) **Mallayya v Subbarayudu. 17 M L J 144.**

(38) Partition decree—Application for appointing Commissioner—Limitation Act art 178-Order rejecting on ground of limitation-Appeal

534—C P C—S. 47=1882 Civil Procedure Code, S. 244.—

Where a compromise decree is passed for partition and one of the parties apply for the appointment of a Commissioner an order rejecting the application on the ground that it is barred by limitation is a decree and is therefore appealable under S. 244. C P C. Such appeal is not taken away by the fact that the Court rejecting the application wrongly assumed the existence of a decree to be executed. An application for the appointment of a Commissioner is not governed by Art. 178 of the Limitation Act and is not subject to any rules of limitation.

A Court in order to bring the litigation to an end may appoint a Commissioner without being put in motion by any part. **Latchmanan Chetty v Ramanathen Chetty. 14 M L J 436=28 Mad 127.**

(39) Sale under first mortgage—Surplus sale proceeds—Second mortgagee entitled to—Appeal against order awarding surplus proceeds-Practice-Appeal treated as revision.

535—C P C S. 47=(1882) S. 244—Civ Pro Code S. 244—Mortgage-decrees.

Two brothers, K and T, mortgaged their property to B. K then mortgaged his share to B.

C P C (1908 S.47=(1882 S.244)-*Contd*

(6) Appeal & second appeal—*Contd.*

T's interest passed to other persons. B brought a suit for sale upon his first mortgage and obtained a decree. The sale of the property satisfied the first mortgage and left a balance, B applied for half the money so left as a second mortgagee of K's share. The first Court adjudicated upon the rights of parties and awarded half to B, & half of the money to transferees of T's share. The lower appellate Court reversed the decree. *Held* that B was entitled to half of the surplus sale proceeds as a second mortgagee of K's share.

Held, also, that the more regular procedure for the first Court would have been to refer the rival claimants of the money to a civil suit to establish their respective rights.

Held, further, that there was no question relating to the execution, discharge or satisfaction of the decree within the meaning of s 244 C P Code, as between the decree-holder or his representative on the one side, and the judgment-debtor or his representative on the other, and no appeal lay from the order of the Court of first instance.

Appeal treated as revision and followed. 18 Bom 681 Ref. **Bakhtamar Lal v. Baru Mal. 4 A L J 492=A W N 1907: 201.**

(40) Decree—Execution—Application by another decree—holder under s 295 for rateable distribution Proceedings transferred to the Collector—Sale by Collector—Refusal to set aside sale.

536—C P C—S. 47; O 21, r. 89; Ss. 73, 68, 70, 71=(1882 Ss. 244, 310A, 295, 320)—Execution proceedings—Sale of property by Collector—Appeal—Confirmed sale can be set aside.—

Held, (1) that an appeal would lie from an order under S.310A of the Code, where the case fell under S. 244 (c) of the Code, (25 Bom 418, *qualified.*)

(2) that the Code conferred no power on the Collector to set aside a sale under S. 310 A nor was there any rule vesting that power in the Collector. The power to act under S. 310 A continued in the Court, notwithstanding the transfer of execution to the Collector;

(3) that there was nothing in S. 310A which

C P C (1908) S.47=(1882 S.244)-*Contd.*

(6) Appeal & second appeal—*Contd.*

precluded the Court from setting aside a sale, merely because it had been confirmed,

(4) that it is not incumbent upon the judgment-debtor to deposit in Court anything except that, for which S. 310A has made provision.

Pita Moti v Chunilal Harakchand. 9 Bom L R 15=31 Bom 207.

537—S.47=Ss 244; 73, O XXI, r. 55—Decree--Execution-Attachment—Application for rateable distribution—Satisfaction of attaching creditor's claim by payment into Court—The payment cannot be rateably distributed—Attachment ceases to exist—Property cannot be sold at the other creditor's instance under the attachment—Questions relating to execution—Second appeal—High Court.

In execution of their decrees, two decree-holders attached the judgment-debtor's property; other decree-holders also applied to execute their decrees against the judgment-debtor without issuing attachment. On the 22nd September 1909, the day fixed for the sale, a third person, at the instance of the judgment-debtor, paid into Court, under O. XXI, r 55 of the Code of 1908, money sufficient to satisfy in full the decretal claims of the two attaching creditors. On an *ex-parte* application made to it, the Court ordered rateable distribution of the monies so paid into Court and sale of further properties which had been attached towards further satisfaction of the claims of the judgment-creditors. Against this order the judgment-debtor appealed to the District Court. During the pendency of the appeal, the other properties were sold in execution in January 1910, and the sale was, notwithstanding the judgment-debtor's objections, confirmed. The judgment-debtor appealed to the District Judge who dismissed the appeal on the 30th June 1910. In June 1911, the first appeal by the judgment-debtor came on before the District Court, but as the question of the confirmation of the sale had already been decided by that Court against the judgment-debtor, no further proceedings were taken. On appeal:

Held, (1) that the order dated the 20th June 1910, having been a question in execution between the parties to decrees, fell under the provisions of S. 47 of the Code of 1908, and was appealable.

C P C (1908) S 47=(1882 S.244)-*Contd.*

(6) Appeal & second appeal—*Contd.*

(2) That the sale in January 1910 was not valid, for the property was not duly attached at the time of the sale, and the attachment already levied had come to an end by the payment into Court on the 22nd September, 1909.

(3) That the money paid into Court under O. XXI, r. 55, was not "assets" held by the Court within the meaning of S. 73 of the Code, and could not be distributed rateably among other decree-holders who had merely applied for the execution of their decrees. **Sorabji v Kala Raghunath, 13 Bom L R 1193.**

(41) An order passed under s. 295 between different decree-holders.

538—S 73 (O C S 295) S 47 (O C S.244)-Appeal-An order under S 295, C P C passed between persons not parties to the decree, but between decree-holders of two totally different decrees is not appealable but is liable to be set aside in revision under S 622 C P C. (26 Mad 176; 28 Bom 458 ref. to). **Jagadish Chandra Shaha v Kripanath Shaha. 36 Cal 130**

(42) Appeal—Question relating to execution—Order refusing to grant a certificate—No appeal—No revision.

539—C P C—Ss. 47, 5, 65, O 21 r 94; S. 115 =(1882 Ss 244, 316, 622).

No appeal lies against an order refusing to grant a certificate of sale to the decree-holder auction-purchaser, the question determined being not one relating to the execution, discharge or satisfaction of the decree I C W N 658. The auction-purchaser being also decree-holder is a party to the suit within the meaning of S. 244, C P C (18 All 36; 27 Cal 34.) **Jagarnath Marwari v. Kartick Nath Pandya. 7 C L J 436.**

(43) Order cancelling decree-Collector's certificate under s. 10.

540—C P C S. 47=S. 244 of 1882.

An order cancelling a decree on the production of a certificate given by the Collector under S. 10 of Act III of 1874 for the purpose of stopping execution of the decree is an order under S. 244, and is therefore appealable like a decree. **Ramangowda v. Shivapa 1890 P J 263.**

C P C (1908) S.47(=1882 S.244)-*Contd.*

(6) Appeal & second appeal—*Contd.*

(44) Appeal—Restitution—Claim for interest—Final adjudication as to interest.

541—C P C, S. 47=(1882 s. 244):—

Where a decree is reversed and a claim of restitution for the money collected under the decree with interest is made in execution and the executing Court determines finally the rate of interest payable which is the only question in dispute between the parties, such order is appealable. (14 M L J 359 distinguished) **Narayana Pattar v Gopalakrishna Pattar. 15 M L J 247.**

(45) Order refusing to stay a decree—Impossibility of restoring status quo—Whether appeal lies.

542—S. 47, O. 41 r 5=(1882 Ss. 244, 545) Letters Patent of the High Court S. 15

Held that the impossibility of restoring the parties in *status quo*, may or may not be good ground for granting a stay, but it does not render the order refusing the stay, a 'judgment" and no appeal lies from such order (24 Mad 358 Fol)

Kodiya Sahib v Syed Rahimatalla Sahib. 3 M L T 307.

(46) Order refusing stay of execution—decree—Discretion of the lower Court.

543—S. 47 of (1908)=s. 244 of 1882.

An order passed by an appellate Court under S. 545 of the Code of Civil Procedure, refusing to stay execution is one against which no appeal lies. **Ramchandra v Balmukund 6 Bom L R 780.**

(47) Where the case in which the decree being executed before the appellate Court that Court has the power to stay execution.

544—C P C S. 47=(1882 s. 244).

Quære· Whether the same power exists where the appeal is only against the decree sought to be executed? **Pasupati Nath v Nanda Lal Bose. 28 Cal 734=5 C W N 67**

Notes:—Dist: 9 C W N 123, Ref: 3 C L J 29 34 Cal 1037 F B=11 C W N 1030=6 C L J 298 Fol: 33 Cal 927=3 C L J 67. Dist: 31 Cal 1081; 36 Cal 923, 14 C W N 179.

C P C (1908) S 47=(1882 S.244)-*Contd.*

(6) Appeal & second appeal—*Contd.*

(48) Direction by an appellate Court whether appealable—Reference by the Privy Council.

545—C P C S. 47=(1882 secrion 244).

An order made, pursuant to an appellate decree, by a subordinate Court is an order made in execution and so appealable (17 Mad 343 Ref:)

Prayaga Dossjee Yaru, Mahant v. Tirumala Anandampillai Purisa Sriranga Chayulu Yaru. 4 M L T 92=31 Mad 406

(49) Claim as by shebait—Decree for personal debt.

546—S. 47; O 21 r 58=(1882 Ss. 244, 278)—Appeal:—

A claim to attached property preferred by the judgment-debtor in the capacity of a Shebait to a Hindu Deity, when the decree was obtained against him for his personal debt, comes within S. 244 C P C and not under S. 278. When such a claim was investigated summarily as a proceeding under S. 278, and the lower appellate court held that no appeal lay: *Held* that the proceedings of the first Court under s. 278 C P C were null and void and without jurisdiction; and the first Court was directed to conduct the proceedings in the manner directed by s 244 (17 Cal 711 referred to). The investigation having been held in the first Court as a proceeding under s. 278 the High Court passed the order in exercise of its revisional powers although the matter came before it in second appeal **Beg Raj Marwari v Sreemutty Kundali Debya 8 C W N 353,**

Notes:—Ref. 8 C L J 20,

(50) Qestion as to the appointment of a manager of the property of a religious institution—Right of appeal.

547:—S. 47 of 1908=s. 244 of 1882.

A decree of the High Court declared its holder entitled as the Pandara Sannadhi, or religious chief, of an adhinam, to see that a competent person, from among the Tambirans who had received initiation at that institution, was appointed to fill the then vacant office of Tambiran, mana-

C P C (1908) S.47=(1882 S.244)-*Contd*

(6) Appeal & second appeal—*Contd.*

ging certain maths. The decree directed that the Pandara should name a Tambiran of his Adhinam for the office, whom after inquiry as to his fitness the subordinate Court should appoint. If that Court found him unfit it was to appoint a Tambi ran o' that adhinam upon its own selection In execution the Pandara named a Tambiran for the office, bnt died before the inquiry as to his fitness His successor, as head of the adhinam, petitioned to withdraw the nomination, naming another Tambiran. The subordinate Court made an order disallowing the withdrawal, and, after inquiry as to the fitness of the first named Tambiran, appointed him to the office. The High Court on the Pandara's appeal, decided that the first nomination had been competently withdrawn, and directed an inquiry as to the fitness of the person secondly named, finding on the evidence that the first named was not fit. *Held* on the appeal of the Tambiran first named, that the question as to his right was one that has arisen between the parties to the suit, and related to the execution of the decree within the meaning of s. 244, sub s. (*c*), C P Code, and that he could appeal from the order made. **Ponnambala Tambiran v Sivagnana Desika Gnana Sambandha Pandara Sannadhi. 17 Mad 343=L R 91 I A 71.**

Notes—Ref: 31 Mad 406.

(51) Redemption decree-Period for redemption Enlargement of the period.

548.—C P C S. 47=(1882 S. 244.)

An application for enlarging the time fixed in a decree for redemption can be entertained even after expiry of the prescribed period, under proviso to s. 93 of the Transfer of Property Act 1882.

An order declining to enlarge the time fixed for redemption is appealable under s 244 Civil Procedure Code. 1882. **Rango v. Bhomshetti. 8 Bom L R 554=26 Bom 121.**

(52)—Mortgage—Sale confirmation of—Setting aside sale-Limitation-Partition of mortgaged property-Co-sharer if a necessary party-Redemption.

549.—C P C S. 47 O 21 r 90 C P C (Act XIV of 1882), Ss. 244, 311—Limitation Act s 18.

A mortgagor whose property has been sold under a decree absolute on the mortgage may come in and question the validity of the sale, although his right to redeem may have been long since extinguished by the decree and a person to whom he has transferred his interest may also do the same.

Ordinarily the provisions of s 311 C P C can be availed of any when the sale has not been confirmed and within the period of thirty days from the date of sale, but if the right of the applicant to apply under the section was concealed from him by fraud, he would by operation of s. 18 of the Limitation Act and notwithstanding the confirmation of the sale have thirty days within which to make his application from the date on which the fraud first became known to him.

N. and M. executed a mortgage bond to the respondents whereby the former as one of several co-sharers in certain parcels of land mortgaged her undivided share in the same to secure the re-payment of the loan, her co-obligor M, joining in the bonds as personal security, subsequently by an ekrar the co-sharers partitioned the property, and the appellant who was one of the co-sharers became exclusively entitled to a large number of the parcels affected by the mortgage. In a suit upon the mortgage in which the co-sharers including the appellant were all made parties. Defendants on the allegation that the division made upon the ekrar was not valid, no relief was asked for specifically in respect of the ekrar the mortgagee prayed for a decree for the amount claimed for a declaration that the properties were liable for the amount decreed and for realisation of the decretal amount by sale of mortgaged properties as well as from the mortgagors personally, the co sharers defendants did not defend the suit which was decreed in terms of the prayers.

Held that the appellant (Defendant No 5) by failing to contest the suit did not lose his conclusive interest in the properties which resulted from the partition but he took the parties allotted exclusively to him subject to the extent of the interest previously belonging to the mortgagor, to the mortgagee.

That the effect of the partition was to extinguish as between the mortgagor and the appellant the interest of the former in the property allotted to the latter to vest it in the appellant, so that the position of the appellant before a close and-

C P C (1908) S.47=(1882,S.244)-*Contd.*

(6) Appeal & second appeal—*Contd.*

logy to that of a purchaser of the equity of redemption in the mortgaged property.

That the fact of the Defendant No 5 (the Appellant) not being made a party to the proceedings in execution had not the effect of making the sale nullity.

That although the sale was not a nullity, it was liable to be set aside on a proper application made in the manner prescribed by law.

Golam Ahad Chowdry v Judhisthir Chandra Shah. 7 C W N 305=30 Cal 142.

(53) Execution of decree-Incumbrances by third parties-S. 287 applies & not S. 244 therefore no appeal.

550.—C P C S 47=Ss. 244, 287—An execution creditor obtained a decree for the first instalment due under the mortgage bond and for interest and for the sale of the mortgaged property in satisfaction of such moneys. In execution proceedings the subordinate Judge orders his claim to have a charge on the property for the other instalments to be included in the proclamation of sale.

It was argued that section 287 applied to incumbrances put forward by third parties and not to a mortgage bond on which was passed the decree, the execution of which is being sought and that therefore the order must be taken to fall under section 244 and thus open to appeal.

Held, that this was an order under section 287 and not under section 244 and that therefore no appeal lay. **Ebrahimji v Ram Chandra. 1894 P. J, 48.**

(54)—Order for stay of sale of mortgaged properties in execution.

551.—C P C S. 47=(244 (c))—Appeal—Order for stay of sale of mortgaged properties in execution of mortgage decree.

31 Cal 373.

(54 A)—Application to re-open foreclosure.

552.—C P C S. 47=S. 244—Application to re-open foreclosure—Second appeal.

29 Cal 644.

(55) Petition to re-open execution-Receiver.

553.—C P C Ss. 47, 99 S.114 O 47, r 1=(1882 —Ss. 244, 578, 623).

11 C.C 111

C P C (1908) S.47=(1882,S.244)-*Contd*

(6) Appeal & second appeal—*Contd.*

Where such an application was made by the decree-holder referring to both ss. 244 and 623 C P C, and the first Court thought that the latter section was inapplicable and re-opened the proceedings under s. 244.

Held—That even if s. 623 only was applicable the order of the first Court could not, having regard to sec 578 C P C, be interfered with on appeal. **Nilratan Khasnobish v Ram Rutton Chatterji. 5 C W N 627.**

(56) Execution proceedings-Review—Appeal.

554.—C P C S. 47, O 47, rr. 7,9=(1882 Ss.244 629).

An order passed on review of a previous order in an execution proceeding is open to appeal, as it is an order under S. 244 C P C, 1882, relating to the execution of a decree. **Adhar Mandal v Keshab Chandra Mana. 5 Ind Cas 483.**

(57) Final order in execution proceedings.

555-556—C P C (1908) S. 47=1882 S. 244.

An order dealing with the only point in dispute between the parties and not intended to be incorporated in any other order to be passed later, dealing as it were with the whole case, is a final order and therefore, appealable. **Narayana Pattar v Gopala Krishna Pattar. 28 Mad 355.**

(58) Privy Council—Leave to appeal—Final & interlocutory order—Remand—Cardinal point.

557—C P C S 47 (1908)—S. 109, Sch I, O 45 and S. 2—An order of remand which determines only a part of the case and leaves other matters still to be determined is not a "final" order, within the meaning of S. 109, Code of Civil Procedure. Final and interlocutory orders distinguished. 17 All 112, L R 3 C P D 67 and L R (1891) 1 Q B D 734 ref to.

Baijnath Dass v Sohan Bibi 6 A L J 786.

(59) Transferee's suit for declaration that an assignment of a decree is valid-Maintainability of order S. 232; appealability of.

558—S. 47; O 21, r. 16=(1882 Ss. 244, 232) Act VII of 1888, S. 26—Effect of.

C P C (1908) S.47=(1882,S.244)-*Contd.*

(6) Appeal & second appeal—*Contd.*

In suit for a declaration that an assignment to the plaintiff of a decree is maintainable, S. 26 of Act VII of 1866 has not taken away that right. An order under S. 232 C P C, is applicable.

Bommanapatti Veerappa v Chintakunta Srinivasa Row 26 Mad 264.

Notes:—Ref 14 M L J 401; Foll: 28 Mad 50 F B.

(60) Order on petition objecting to the value in the sale proclamation.

559—C P C Section 47=(1882) Ss.244, 28 (c).

An order on a petition objecting to the price fixed in a sale proclamation as inadequate relates to a matter contemplated by s. 287 (e) and is appealable under s 244 C P C. **Ganga Prasad v Raj Coomar Singh.** 30 Cal 617

Notes:—Ref: 27 Mad 259. F B.=14 M L J 57.

(60A) Higher grade causing property to be put up for sale in execution.

560—C P C., Ss. 47, 63=S 244. of 1882.

Court of higher grade causing property to be put up for sale in execution of lower Court's decree—Legality—Appeal. 11 O C 41

(61) Decree—Execution—Court to which a decree is sent for execution—Executing a decree—Jurisdiction of the first Court.

561—C P C S.47. O.21 r 7=(1882-Ss.244, 225).

When a decree is sent to a Court for execution that Court can, under s. 225 of the Civil Procedure Code, go into the question of the jurisdiction of the Court passing the decree, if it sees reason to do so. If that Court comes to the conclusion that the first Court had no jurisdiction to pass a decree and declines to become the executing Court, the order so passed does not fall within the purview either of s. 244 or s. 588 of the Civil Procedure Code, and cannot be appealed against.

Bhagvantappa v Vishwanath. 6 Bom L R 342=28 Bom 378.

Notes:—Dist: 30 Bom 101=7 Bom L R 659.

(62) Declaratory decree—Decision as to executability.

562—C P C., Ss. 47, 2.=S. 244 of 1882.

C P C (1908) S.47=(1882,S.244)-*Contd*

(6) Appeal & second appeal—*Contd.*

Declaratory decree—Decision as to executability of—Appeal. 10 M L T 437.

(63) Intermediate between preliminary and final decrees.

563—C P C. S. 47—Order intermediate between preliminary and final decree—Execution—Appeal. 13 Ind Cas. 170

(64) Application by Collector in pauper suit.

564—C P C., S. 47—Recovery of Court-fees by Government.

Held that a Collector applying on behalf of Government, under s 411 of the Civil Procedure Code, for recovery of Court-fees by attachment of a sum of money payable under a decree to a plaintiff suing *in forma pauperis*, might be deemed to have been a party to the suit in which the decree was passed, within the meaning of s. 244 (c) of the Code, and that an appeal would, therefore, lie from an order granting such application. **Janki v Collector of Allahabad.** 9 All 64.

Notes:—Fol: 13 All 326, Con: 23 Mad 73. Ref 18 Mad 439; 18 Bom 237.

(65) Suit by minor in forma pauperis—Order directing next friend to pay Court fees—Collector's application to execute dismissed-Appeal-Revision.

565—C P C, S. 47 of 1908=S. 244 of 1882.

Where on the dismissal of a suit by a minor *in forma pauperis*, the next friend was directed by the decree of the Court to pay the court-fees due to the Government and the application of the Collector to execute the decree against the estate of the next friend was dismissed on the ground that on his death his estate had passed to his son by survivorship unaffected by the decree.

Held, on appeal by the Collector that he was not a party to the suit and could not avail himself of the provisions of Ss. 2, 244 and 540, and that, therefore, no appeal lay against an order disallowing his application to execute the decree.

Held, that the next friend of the minor could not (at least in respect of an order under S. 412)

(6) Appeal & second appeal—*Contd.*

be considered to be a party to the suit within the meaning of S. 244 and that on this ground also the order was not appealable.

Held, also, that as no question of jurisdiction was involved, the Court could not exercise its powers of revision under S. 622 of the Code of Civil Procedure. **Collector of Trichinopoly v Sivaramakrishna Sastrigal 23 Mad 73=9 M L J 265**

(66) Liability of defaulting purchaser—Appeal from order under s. 293—Re-sale.

566—C P C., S. 47 of (1908)—1882 Ss 244, 293, 306.–Re-sale, appeal from order under s. 293.

A decree-holder in execution of the decree, obtained leave to bid, the property of the Judgment debtor having been brought to sale. At the sale one person who was alleged to be the agent for the decree-holder bid for Rs.90000, and the property was knocked down in the name of the decree-holder who however in a few minutes repudiated the bid and did not pay the deposit. The property was again brought to sale and was knocked down for Rs. 42100. The judgment debtor then filed a petition to recover from the decree holder the loss by resale. His petition was rejected. *Held*, on appeal that an appeal lay against the order rejecting the petition as the question was one arising between parties to the suit. **Vallabhan v Pangunni 12 Mad 454.**

Notes:—Dist: 15 Mad 226; 19 Mad 29. Ref: 13 Mad 504; 16 Mad 20; 18 Mad 439 Fol: 28 Mad 87=14 M L J 475.

(67) Decree for sale—Order absolute—Execution—Suit.

567—C P C., S. 47 of (1908)=S. 244.

Proceedings on an application for order absolute for sale are not in execution of the decree for sale, but continuation of the suit, and an appeal lies against the order as from an original decree. (25 Mad.244 diss from). **Pramatha Chandra Roy v Khetra Mohan Ghose 29 Cal 651**

Notes:—Fol: 10 C L J 91. Ref: 6 Bom L R 1043=33 Cal 867=4 C L J 141; 10 C L J 115: 16 C L P R 111; 4 L B R 83=14 Bur L R 323.

(6) Appeal & second appeal—*Concld.*

(68) Order passed in execution between parties to suit—Decree—Appeal—Execution of decree–Varying of decree.

568—C P C., S. 47 (=s. 244. Civ. Pro. Code, 1882).

All orders passed in execution between parties to the suit in which the decree was passed, or their representatives, fall under s. 244 though they may be passed under any of the succeeding sections dealing with the execution of decrees, and if such orders are not specified in s. 588 they are decrees and are appealable. A Court executing a decree has no pawer to vary the decree, however harsh it may seem **Maung Lu Nyo v Kaung Hla Pyu L B R 1893—1900, 375.**

(69) Execution of decree—Attachment—Appeal.

569—C P C, S. 47, O XXI, r 17 (=ss. 244 (c) 245, proviso, Civ. Pro. Code, 1882)—

In execution of a decree, the decree-holder having first attached the landed property of the judgment-debtor which was more than sufficient to satisfy the claim, again attached his household property of inconsiderable value. The judgment-debtor objected to the latter attachment and prayed under the last clause of s. 245, Civ. Pro. Code, for its release. On his application being summarily rejected, he preferred an appeal. *Held* that an appeal validly lay from the order passed by the Court below, which was a *quasi* decree determining a question raised between the parties to the suit under s. 244 (c) of the Civ. Pro. Code. **Jaswant Singh v Bishun Lal. A W N 1888, 155.**

(70) Decree for pre-emption.

570—C P C S 47 of 1908=Ss.244, 214 of 1882.

A successful plaintiff in a pre-emption suit paid part of the purchase money in foreign circle currency notes. The Court in the first instance accepted the notes in payment without any objection, and afterwards allowed the plaintiff two more days to supply currency notes of the Lahore Circle, or other legal tender, which order was complied with.

Held, also, that an appeal lay from the order in question under Section 244 [c], Civil Procedure Code, the order relating to the execution of the decree. **Iftikhar Ali v Sahib Ram. 67 P R 1892.**

C P C (1908) S.47=(1882. S.244-*Contd.*

7 SEPARATE SUIT LIES.

(1) Formal possession under decree.

571—C P C., S. 47 1908=S. 244. of 1882. Symbolical possession under decree—Separate suit for actual possession—Cause of action—Execution—Ss. 244 cl (c): 263, 264—

Plaintiff obtained a formal possession of certain properties in execution of his decree; the actual possession of part of the premises being left with the defendant who refused to vacate it on due service of a notice by the plaintiff. The plaintiff did not evict the defendant but brought a separate suit for that purpose. *Held*, that such a suit would lie. *Semble*—that the formal possession in execution of a decree for possession gives a cause of action against a defendant who remains in occupation of the premises which may be enforced in a regular suit. **Shama Charan Chatterji v. Madhub Chundra Mookerjee, 11 Cal 93.**

Notes.—Ap 24 Cal 715; 8 C W F 49. Ref 19 Mad 53; 28 All 722=3 A L J 504=(1906) W N 213.

572,—C P C S. 47 (1908) =Civ. Pro. Code, 1882, s. 244—Symbolical possession—Separate suit—Question of maintainability of suit-Second appeal.

The delivery of formal possession in execution of a decree for possession gives a cause of action against a person in actual occupation of the property. His occupation in spite of the execution is that of a trespasser who commits a fresh act of dispossession, and a separate suit therefore lies for recovery of possession from him. A question was raised whether it was open to a defendant, who had contested a suit for possession on the ground of limitation in the lower Courts, could raise the contention for the first time in second appeal that the suit was barred under s. 244, Civ Pro Code. But the point was not decided. **Hassan Raja Chaudry v Kalidas Chandra Singha, 8 C W N 49.**

573—C P C S. 47 (1908)=S. 244—Execution of decree—Objection by judgment-debtor that the auction-purchaser had taken possession of property to which he was not entitled, maintainablity of—Necessity of separate suit.

C. P.C. (1908) S.47=(1882, S.244)-*Contd.*

(7) Separate suit lies—*Contd.*

Where a judgment debtor objected that the auction purchaser had taken possession of property to which his sale certificate gave him no title, *held*, that the question in dispute should be decided by a separate suit and could not be decided under s. 47, Civ Pro Code. (31 All 82 Ref). **Maharaj Singh v. Jagan Nath and Man Rai, 14 O C 70.**

(2)—Decree for delivery of possession of equity of redemption—Wrongful delivery of land—Suit by mortgagee for restitution of land so delivered.

574.—C P C S. 47=S.244-Wrongful delivery of land instead of equity of redemption—Application of S. 244.

S. 244 bars a regular suit where the question relating to execution of a decree is raised *bona fide*. But when the decree itself is. on the face of it wholly irrelevant to the question raised, and the wrong-doer takes the plea of bar to shield his unlawful gain secured even against the express orders of the executing Court possibly in collusion with the officer executing the decree, and in the absence of the judgment-debtors, S. 244 would seem to have no application. So, where a person sued to enforce his right of pre-emption, in a property subject to mortgage, and got a decree directing delivery of possession of the equity of redemption therein, but in execution of the decree, the Patwari delivered possession of the property itself, instead of the equity of redemption, a regular suit by the mortgagee, claiming restitution of the property so wrongfully delivered cannot be said to be barred by S. 244, as the question raised in the suit does not relate to the execution, discharge or satisfaction of the decree. Even if there were any room for doubt on this point the plaint may be treated as an application for execution of decree for claiming restitution of lands wrongfully delivered by the Patwari in executing the decree. (11 W R 516 Fol. 22 Cal 483, 22 All 121, 28 Mad 64, 32 Cal 332 Fol. 5 Mad 391, 7 Mad 255 23 Mad 55, 16 Mad 287. 4 Mad 285, 12 W R 85, 14 W R 39, 12 Bom 449, 9 All 229, 8 C W N 353, 9 P R 1889, 63 P R 1901. 45 P R 1904 Ref.) **Karam Chand v Khuda Bakhsh. 5 P R 1907. =40 P W R 1907=23 P L R 1908.**

575.—C P C S. 47 (1908).—O XXI rr. 35 and 36 (=ss. 244, 263 264 Civ Pro Code 1882)-Decree

C P C (1908)-S.47=(1882, S.244-*Contd.*

(7) Separate suit lies—*Contd.*

for possession—Delivery given—Subsequent dispossession—Remedy by way of suit.

The plaintiff in a suit having obtained a decree for possession of her share in the family properties got joint possession in pursuance of the decree. Subsequently at her instance the decree was amended into one for partition. Later on, being dispossessed, she brought the present suit for possession. She did not make any attempt to execute the amended decree. *Held* that the amendment of the decree the satisfaction of which had been recorded was a nullity. The fact that she was ousted from joint possession gave her a fresh cause of action in respect of which a fresh suit was maintainable. **Pathambi v MytheenBibi 12 M L J 96.**

(3) Decree set aside—Decree exparte—Second decree satisfied-Suit for possession by judgment debtor—Not barred.

576.-C P C Ss 47, 144 (I)=(1882 Ss. 244, 583)-Sale under.

S. 583 C P C only applies to a case where a party is entitled to a benefit by way of restitution or otherwise under a decree passed in appeal.

K obtained an *ex-parte* decree for sale on foot of a mortgage. The property mortgaged was sold in execution of that decree, and purchased by the decree-holder who obtained possession. The *ex-parte* decree was subsequently set aside and another decree was satisfied before the property could be sold a second time. K, however, continued in possession and this suit was brought to recover possession from him. The Court below dismissed the suit on the ground, that it was barred by ss. 244 and 583 of the Code. *Held* that s. 583 did not bar the suit. *Held*, further, that s. 244 has no application inasmuch as the decree had been satisfied and the defendant had no interest left in the property and the question was not one as to execution, discharge or satisfaction of the decree. **Gridhari Lal v Khushali Ram 6 A L J 383=31 All 364=1 Ind Cas 744.**

(4)—Suit for actual possession—Delivery of formal possession.

577.—C P C S. 47=(1882 S. 244)—Limitation Proceedings in execution.

C P C (1908) S.47=(1882,S.244)-*Contd.*

(7) Separate suit lies—*Contd.*

Delivery of formal possession in execution of a decree effects a complete transfer of the property and furnishes a good foundation for a suit when the defendant refuses to deliver up actual possession. S. 244 of the Code does not bar a suit for actual possession inasmuch as the proceedings in execution end with the delivery of formal possession. (11 Cal 93; 24 Cal 715, 19 All 499 Ref. **Jagan Nath v Milap Chand, 3 A L J 504=A W N 1906, 213=28 All 722.**

Notes:—Ref 30 All 231=5 A L J 547; (1908) W N 93.

(5)—Delivery of symbolical possession—Wrong delivery—No nullity—No bar to separate suit.

578—C P C S.47, O 21 r 96=1882 Ss.244,319-No bar.

Delivery of symbolical possession even though erroneously made i e. even though made under circumstances which do not make s. 319 applicable operates to give the person so put in possession a fresh cause of action and to place the judgment debtor in the position of a trespasser, and consequently, a suit by the assignee decree-holder purchaser for actual possession of the properties purchased is not barred by s.244 C P C. Symbolical possession delivered under circumstances under which S. 319 C P C is not applicable is not a nullity. (24 All 715, 22 Bom 667 Ref:) **Govind Bhiraji v Venkata Sastrulu, 17 M L J 598.**

(5) Suit for refund of purchase money by auction purchaser on sale being set aside—No bar.

579.-C P C S. 47=1882 s.244-Relating to the execution of a decree,

The question of the auction purchaser's right to obtain refund of the purchase money is not a question falling within cl (c) of s. 244. *Obiter* Even if it were, the suit may be treated as an application for determining the question of refund. **Jotindra Mohan Tagore v Mahomed Basir Chowdhury. 32 Cal 332.**

Notes.—Fol 5 P R 1907=40 P W R 1907=23 P L R 1908, Ref: 10 C W N 374.

C P C (1908) S.47=(1882,S.244)-*Contd*

(7) Separate suit lies—*Contd.*

(7) Refund of purchase money when judgment-debtor has no saleable interest in the property sold—Suit for such refund whether maintainable—Remedy.

580—C P C S. 47: O 21 r 93 (Act XIV of 1882 ss II, 315.)

S. 315 of the Code of Civil Procedure is not exhaustive and does not confine an execution purchaser to the special remedy provided by that Section and a suit lies under Sec 11 of the Code for a claim to get a refund of this purchase money when the judgment debtor is found to have no saleable interest in the property sold. **Hari Doyal Sing Roy v Sheikh Samsuddin. 5 C W N 240=28 Cal 155.**

Notes.—Ref 5 All 577; 13 All 383; 11 Mad 269.

(8) Attaching creditor's-suit for refund money wrongly paid to him

581.—C P C S. 47 of 1908=S 244.

A suit will lie by a prior attaching creditor to compel a decree-holder, whose attachment is subsequent in date, to refund money obtained by him under an order of the Judge of a subordinate Court, in contravention of the provisions of s. 270, Code of Civil Procedure; but it mtst be a suit to set aside the Judge's order. **Wooma Moyee Burmonya v. Ram Bukhsh Chetlangee 16 W R 11.**

Notes.—Fol 17 W R 227; 11 Cal 718; 13 Cal 159.

(9) Money paid in execution by mistake.

582.—C P C S. 47=S. 244 of 1882—Recovery of excess payment.

Where the plaintiff sued defendant in a Civil Court for recovery of a sum alleged to have been paid by plaintiff to defendant under a mistake, in excess of the sum due in satisfaction of a decree of the Small Cause Court. *Held*, that such a suit was in the nature of one for damages cognizable by the Court of Small Causes, and was not barred by the terms of section 11 of Act XXIII of 1861, the question involved in the claim not being one which could properly arise in execution proceedings, that must be confined to matters embraced in the decree passed between the parties to the suit. **Agra Savings Bank, Limited v. Sri Ram Mitter, 1 All 388.**

Notes:—Dist: 2 All 61 F B. Con: 5 All 94.

C P C (1908) S.47=(1882,S.244)-*Contd.*

(7) Separate suit lies—*Contd.*

583—C P C S. 47 of 1908=S. 244—Question as to payment to decree-holder out of Court—Separate suit — Res judicata — Civil Procedure Code (1877), s. 258.—

An order under s. 258 of the Code of Civil Procedure is appealable under s. 244; no separate suit lies since the question is *res judicata* between the parties. **Guruvayya v. Vudayappa, 18 Mad 26.**

Notes:—Dist: 20 Mad 369, 21 Mad 409.

584—C P C S. 47=S. 244 of 1882—Suit by a judgment-debtor as part-purchaser of a decree.—

Some of the decree-holders sold their share in the decree to some of the judgment-debtors. The rest of the decree-holders gave security as required by S. 231 and obtained the execution of the whole of the decree notwithstanding the objection of the judgment-debtors who had purchased a part of the decree. Therefore the judgment-debtors, the purchasers of the part of the decree brought a suit for a declaration of their right of purchase and for the recovery of the proportionate share of the money in the hands of the decree-holders. *Held*, that the plaintiffs were entitled to the relief sought for, that S. 258 did not affect the suit which was brought not in the allegation that the decrees were satisfied by the plaintiffs' purchase but on the contrary was founded upon the proposition that the decrees were not satisfied. 11 Bom 6 referred to. *Held* further that the claim was not one within the words 'relating to the execution of the decree' in S. 244 inasmuch as it did not raise any question in respect of the furtherance of or hindrance to, or the manner of carrying out, the execution of the decree. **Haragobind Das Koiburto v. Issuri Dasi, 15 Cal 187.**

Notes:—Ref: 2 M L J 14.

(10) Payment twice —Suit for recover of that amount—Maintainable.

585—C P C S.47; O 21 r 2=(1882 Ss.244,258).

Sections 244 and 258 of the Code of Civil Procedure do not preclude the institution of a suit by a judgment-debtor for recovery of money, which he had paid to the decree-holder privately and the payment of which, not being certified, could not be recognised, and for which the de-

C P C (1908) S.47=(1882 S.244)-*Contd.*

(7) Separate suit lies—*Contd.*

cree-holder had taken out execution over again. (3 All 538; 21 Mad 409 fol.)

Gendo v. Nehal Kunwar, 5 A L J 475= A W N 1908, 220=30 All 464.

586—C P C S. 47 of 1908=S. 244—Civil Procedure Code Act XIV of 1882; Sections 244 and and 258—Fraudulent sale in execution, suit to set aside adjustment of decree uncertified.—

A suit will lie to set aside a sale in execution of a decree had in fraud of an agreement between the decree-holder and the judgment-debtor that on payment of a particular sum execution proceedings shall not be taken although the sum when paid was not certified to the Court. (3 C L R 414 followed. 6 Bom 146 dissented from.)

Ishan Chunder Bandopadhya v. Indro Narain Gossami, 9 Cal 788=12 C L R 391.

Notes:—Not Fol: 30 All 254. Ap: 15 Cal 179; 187. Fol: 10 Cal 354. Dist: 15 Bom 155. Con: 21 Cal 437. Ref: 17 Cal 769 F B; 11 Bom 6 F B; 8 C W N 395; 31 Cal 480.

(11) Fraud—Cause of action—Regular suit.

587—C P C S. 47 (1908)=S. 244 S. 258.—of (1882).

The holder of a money-decree consented to accept in satisfaction of the decree, a part payment in cash and lease of certain lands for five years rent-free. The judgment-debtor fulfilled his agreement. But the decree-holder executed his decree against the judgment—debtor who brought the present suit for a declaration that the money-decree was satisfied and for damages against the decree-holder. *Held*, that such a suit would lie. (5 B L R 223; 5 Mad 397; 6 Mad 41; 3 All 533, 538; 9 Cal 788, followed. 6 Bom 146 not followed). **Poromanand Khasnabish v. Khepoo Paramanick, 10 Cal 354.**

Notes:—Ap: 15 Cal 187. Dist: 21 Cal 437. Ref: 20 Cal 32; 10 Bom 288; 11 Bom 6 F B. Fol: 16 M L J 54.

(12) Sale certificate, suit to set aside when decree has ceased to be executable.

588—C P C S. 47=(1882 S. 244).—

Plaintiff sued to have a sale certificate set aside. The decree was dead at the time of the suit. *Held*, there was nothing to prevent him from bringing a regular suit to set aside the certificate, if he was within limitation for a regular suit. (10 Cal 538, 19 Cal 683, 25 Cal 718, 20 Mad 349; 22 Bom 267 and 16 W R 269 (Civ) Ref:)

Nga Sa Gyi v. Nga Ye Ban, U B R (1905), Civil Procedure, 36.

589—C P C S. 47-Public Demands Recovery Act, S. 19, Cl. (2)—Certificate sale, suit to set aside—Fraud—Code of Civil Procedure (Act XIV of 1882) S. 244, how far applicable:—

A suit to set aside a certificate sale on the ground of fraud is not barred under the provisions of S. 244 of the Civil Procedure Code. S. 19, Cl. (2) of the Public Demands Recovery Act, 1895, as amended in 1897, provided that a certificate may be enforced and executed in the manner provided by Ch. XIX of the Civil Procedure Code for enforcement of decrees for money and *all the provisions of that Chapter*, except S. 310 A and of Ch. XX shall apply *so far as they are applicable*. There are at least *three* tests for determining whether a particular provision is applicable, and if so, how far; *first*, such provisions only are applicable as apply to the enforcement and execution of the certificate as a decree for money, an application to set aside a sale is neither the enforcement nor the execution of the certificate; *secondly*, the provision sought to be applied must not contain any restriction which makes it inapplicable; *thirdly*, the provision must not be inconsistent with the provisions of the Public Demands Recovery Act. S. 244 of the Civil Procedure Code is, by reason of the first two tests, inapplicable to certificate proceedings. (1 C L J 538 Dist: 1 C L J 360 Doubted and Dist:) **Raghubans Sahai v. Fulkumari, 1 C L J 542=32 Cal 1130.**

(13) Suit to set aside decree and sale for fraud.

590—C P C S. 47=(1882—S. 244)—Sale.—

A suit to set aside a decree and the sale in execution thereof and to recover the property.

Kedur Nath Mukerjee v. Prosonna Kumar, 5 C W N 559.

Notes:—Dist: 4 A L J 392. Ref: 11 C W N 579; 29 All 418; W N (1907) 112.

C P C (1908) S.47=(1882 S.244)-*Contd.*

(7) Separate suit lies—*Contd.*

(14) Suit to set aside Court-sale—Plaintiff no party to fraud—Effect.

591—C P C S. 47 (=Civ. Pro. Code, 1882, s. 244)—Purchaser no party to fraud.—

It is clear that s. 244 does not bar a suit by a person who is no party to the decree from bringing a suit to set aside a sale held in execution of a fraudulent decree. In such a suit, it is not necessary to establish that the purchaser was also implicated in the fraud by which the collusive decree was obtained, and the execution-proceedings were conducted. (24 W R 260, Dist. 6 C W N 283, Ref:) **Hungsha Majillya v. Tincowri Das Karmakar, 8 C W N 230.**

(15) Suit to set aside sale—Possession of a grove—Not barred-Must be tried on its merits.

592—C P C—S. 47 of(1908) =S.244 of(1882). One M sued S for possession of certain property. By the final decree in this suit the title of S was established in part of the property claimed,namely *mauzah* X, and M became entitled to possession of certain other property claimed by him. In execution of this decree against S, M obtained possession of a one-seventh share of a grove called Y. Now one F who held a decree against M brought this one-seventh share in the grove to sale and bought it himself. Thereupon S brought the present suit to set aside the sale on the ground that the grove was in *mauzah* X. Both the lower Courts held that the grove belonged to the plaintiff but the lower appellate Court held that the suit was governed by s. 244 of the Code of Civil Procedure and therefore no separate suit would lie. *Held* that the lower Court was wrong and the suit must be tried on the merits. **Shib Charan v Fazl Ali. (1884) W N 59.**

(16) Non-service of notice under S. 10, Public Demands Recovery Act-Suit to set sale on ground of.

593—C P C—S. 47, O. XXI, r. 92—Non-service of notice under s. 10, Public Demands Recovery Act,effect of—Suit to set aside sale on ground of non-service. **11 C W N 745=34 Cal 787.**

C P C (1908) S.47=(1882 S.244)-*Contd.*

(7) Separate suit lies—*Contd.*

(17) Claim to attached property

594—C P C S. 47=S. 244—Suit to set aside sale in execution.

A decree-holder took out execution against A and B.When B's property was attached,his widow, C, came forward and laid claim to it on the part of her minor son, urging that, as B was not liable under the decree, his propetty could not be sold. The objection was disallowed and the property was sold. *Held* that s. 11, Act XXIII of 1861, did not prevent C from suing to set aside that sale and recover B's property on the ground that B was not liable under the decree. **Issan Chunder Dass v Chundro Bodinee. 7 W R., 361.**

Notes.—Fol: 12 C L R 333. Dist: 7 W R 442.

(18) Execution—Fraudulent—decree—Separate suit or applicalion.

595—C P C—Ss. 47, 158.=S. 244 of 1882.

A judgment obtained by manifest fraud upon a Court binds neither the Court, which passes it, nor any other Court; it matters not whether the judgment impugned has been pronounced by an inferior or by the highest Court of judicature in the realm.

Where a decree has been obtained by fraud, the remedy is by a separate suit and not by an application under s. 47 of the Code.

No person has any vested rights in procedure. Alterations in the procedure are always restrospective unless there be some good reasons against it (9 Mad. 81; 21 Cal. 605; 24 Cal. 546; 26 Cal. 326; 3 C. W. N. 395; 27 Cal. 197; 20All. 370; 2 H. L. C. 257, I Jo. and Lat. 178; 6 Ir, Eq., R. 569 and 26 Bom. 545, 3 App. Cas. 603; 3 Q B. 160; 9 B. and S 86, 37 L J. Q. B. 80; 87 L.T. 540: 16 W. R. 540; 8 Bom. 511; 12 Cal. 583; 18 Bom. 42, 21 Bom. 822; 27 Mad. 538 and 14 M. L. J. 340, Ref:) **Shamsheryar Khan v Gopal Chand. 7 Ind Cas 11.**

(19) Sale in execution of decree—Tender of debt by transfer of property.

596—C P C S. 47=S. 244 of(1882)

A obtained a decree against B on a hypothecation bond and sought to attach the property but his application was struck off for default. B sold the property to

C P C (1908) S.47=(1882,S.244)-*Contd.*

(7) Separate suit lies—*Contd.*

C under a registered sale-deed. When A again applied for execution of his decree C petitioned for leave to deposit the judgment-debt together with costs under s. 291 of the Code of Civil Procedure. The application of C was refused and the sale of the property was proceeded with, the decree-holder purchasing it himself. This suit has been brought by C to set aside the sale. *Held* that the decree-holder was entitled to his debt and nothing more, the sale must therefore be set aside. *Held* further that the suit was not barred by s. 244 of the Code of Civil Procedure. **Bihari Lal v Ganpat Rai 10 All 1, 7 W N 238.**

(20) Defence if barred—Sale certificate no obstacle.

597—C P C—S. 47; S 65; O. 2I. r. 94=(1882 Secs, 244 316).

A defendant in a suit is not debarred by section 244 of the Code of Civil Procedure from raising a point in defence of his title even though he could have raised it but did not raise it in former execution proceeding to which he was a party.

If a party to suit is not put out of Court by section 244 of the Code of Civil Procedure, he is not affected by the grant of sale certificate to the auction-purchaser under section 316 of the Code. **Chandramoni Saha v Halijennessa Bibi. 9 C L J 464=4 Ind Cas 168.**

(21) Remedy of judgment-debtor on creditor failing to certify.

598—C P C-S. 47 of (1908)=s 244 of (1882) Creditor's failing to certify-Judgment-debtor's remedy—Civil Pro. Code 1877 S. 258, 244.

In 1878 a certain quantity of grain was given by the judgment debtor to the decree-holder in satisfaction of decree and the latter failed to certify satisfaction under s. 258 of Civil Pro. Code and nevertheless executed the decree the judgment-debtor filed a suit for damages. *Held*, that s. 244 does not take away the remedy for the wrong suffered by the judgment-debtor. **Viraraghava v Subbakka 5 Mad 397.**

Notes.—Ap: 8 Mad 277 F B. Fol. 10 Cal 354; 6 Mad 41; 23 Bom 394 Dist; 18 Mad 26; 11 Bom 6 F B. 16 M L J 54. Ex 15 Mad 302. Ref: 21 Cal 437; 20 Mad 369; 10 Bom 288; 30 Mad 545

C P C (1908), S.47=(1882 S.244)-*Contd.*

(7) Separate suit lies—*Contd.*

(22) Illegal Sale-Separate suit.

599—C P C—S. 47=(1882 s. 244.)

S. 244 and the sections which deal with proceedings after sale have no application to cases arising under Act X of 1859, and, therefore, the only remedy open to a judgment-debtor under that Act, whose property has been illegally sold, is by suit. (10 W R 341 relied upon.)

Damodar Misra v Iswar Chandra Chowdhury. 7 Ind Cas 387.

(23) No bar—Suit by subsequent mortgagee for recovery of surplus sale proceeds.

600—C P C—S. 47,=(1882 S. 244)—Mortgage suit.—

S 244 is no bar to a suit by a subseqent mortgagee for recovery of the surplus sale proceeds by the prior mortgagee himself (after satisfaction of his first mortgage) in satisfaction of the same decree obtained by him in respect of an altogether different transaction behind the back of the subsequent mortgagee. **Berham Deo Prasad v Tara Chand. 9 C W N 989=33 Cal 92.**

Notes:—Ref: 10 C L J 150.

(24) Puisne mortgagee paying of decree, rights of-in execution

601—C P C—S. 47=(1882—S 244).

The existence of a decree cannot, by the operation of S. 244 bar a fresh suit between the parties in respect of rights which cannot be worked out without additions to the decree which the Court of execution had no power to make. **Gopi Narain Khanna v Babu Bansidhar. 27 All 325=9 C W N 577=2 A L J 336=7 Bom L R 527=15 M L J 191=32 I A 123 P C.**

Notes:—Ref: 29 Mad 491. Dist: 32 Mad 485; 19 M L J 728.

(25) Mortgage—Redemption—Possession.

602—C P C—S. 47=(1882—s. 244)

In a suit for redemption by B, the eldest son of the mortgagor, a consent decree was passed whereby B was to pay Rs. 250 in yearly instalments of Rs. 50, and he obtained possession of the property. In default of payment of any one instalment the property was to revert to the

(7) Separate suit lies—*Contd.*

possession of the mortgagee; but B was at liberty to pay the whole of the balance due at the end of any Chaitra and the mortgagee was to redeliver possession. On a default in payment by B, the property went into the possession of the mortgagee. B having died in the meanwhile, his younger brother filed a separate suit to redeem the property:—

Held, that the separate suit was maintainable. **Govinda v Babaji. 6 Bom L R 1100.**

(26) Mortgage of decree by decree-holder-Attachment of decree on same date by decree-holder's creditor—Subsequent attachments by other creditors—Priority.

603—C P C—S. 47; O, 21 r 53; Ss. 64, 73=(1882 Ss. 244 273, 276, 295)—Withdrawal of first attachment—Rateable distribution—Rights of mortgagee of decree—Lien—Burden of proof—Mortgage decree.

The first defendant mortgaged a decree to the plaintiff on 3rd November 1904. The tenth defendant who had obtained a decree against the first defendant, on the file of the Sub-Judge's Court attached the decree and the order of attachment was communicated to the Munsiff on the same day as the date of the mortgage, viz 3rd November, 1904. Subsequently defendants Nos. 11 and 12 also attached the same decree. The tenth defendant having afterwards withdrawn his attachment, the first defendant executed his own decree, and the amount realised was kept in deposit in Court The plaintiff sued for the recovery of his mortgage amount from the amount in deposit in Court. Defendants Nos. 11 and 12 claimed priority.

Held, (1) that S. 244 Civ. Pro. Code 1882 was no bar to the plaintiff's suit.

(2) that the mortgage by first defendant to the plaintiff was not made "during the continuance of the attachment" so as to invalidate it under Ss. 273 and 276 C P C 1882;

(3) that the receipt by the Munsif of the notice of attachment by tenth defendant was not a judicial act to justify the presumption that it was received at the earliest point of time on the date of receipt and to cast on the private alienee the burden of proving that his transaction was prior;

(7) Separate suit lies—*Contd.*

(4) that eleventh and twelfth defendants were not entitled to a rateable distribution of the amount in deposit in Court as it is essential to a valid claim for rateable distribution that the assets should have been realised by the tenth defendant executing the first defendant's decree by way of executing his own decree;

(5) that the plaintiff had a lien on the amount in deposit in Court and not merely a personal claim against the first defendant; as a mortgagee is entitled to a charge upon the property which through no fault of his, takes the place of the mortgaged property. **Yenkatrama Iyer v Esnmsa Rotwhen. 5 Ind Cas 92=7 M L T 143=20 M L J 330. 33 Mad 429.**

(27) Suit by partition for possession by purchaser of co-parcener's rights in execution sale.

604—C P C—S. 47=(1882 S 244)—Suit lies.

S. 244 is no bar to a suit for partition by a purchaser of a co parcener's rights in joint family property in execution sale of a decree against the co-parceners. **Velumalai Chetti v Srinivasa Chetti. 29 Mad 294.**

(28) Suit by assignee of a decree for declaration of validity of assignment -Maintainability,

605—C P C S. 47=S. 244 of 1882.

A suit lies at the instance of the assignee of a decree for a declaration as to the validity of his assignment. The amendment of section 244 by Act VII of 1888 has not taken away this right. **Bommanapati Veerappa v Chintakuna Shrinivasa Rau. 26 Mad 264.**

(29) Compromise decree—Specific performance suit for.

606—C P C S. 47=(1882 S 244)—No bar—Estoppel;—

Where a previous suit for khas possession was compromised and dismissed, defendant agreeing to execute a kabuliyat in plaintiff's favour and plaintiff sued again for specific performance of the contract to execute the kabuliyat, there being no direction for its execution in the decree in the previous suit. *Held*, that the present suit was not barred under S. 244, C

C.P.C.(1908)-S.47=(1882, S.244)-*Contd*

(7) Separate suit lies—*Contd.*

P C. Where after the compromise but before executing the kabuliyat, defendant who, under the compromise was entitled to a ten years' lease assigned the land, and plaintiff sued for ejectment on the ground that defendant had forfeited his tenancy by such assignment *Held*;—That plaintiff had not acted in contravention of the compromise and was not precluded from suing on that compromise. **Chuni Lal Dutta v Hira Lal Dutta. 7 C W N 158.**

(30) Party against whom no decree was passed not precluded from bringing a suit

607.—C P C—S. 47=(1882—S. 244)—No bar—Exonerated defendant—Party to suit in which the decree was passed.—

S. 244 of the Code of Civil Procedure presupposes a decree enforceable by the decree-holder against the person between whom and the decree-holder the question referred to therein arises. It has no application to questions arising between the decree-holder and persons against whom there is no decree to be executed. Where, therefore, certain persons had intervened in a suit as defendants and the suit was disposed of without any decision of the claim set up by them and without any decree being passed affecting them, it was held that they (or their assignees) were not precluded from bringing a suit to have released from attachment the property claimed by them in the former suit, but as to their title to which there had been no adjudication. (11 B L R P C 149 foll: 15 Mad 226; 10 W R C R 191; 12 Cal 458; 1893 A W N 67; 11 All 741 and 18 All 52 approved; 23 Mad 361; 8 Mad 473; 22 Mad 131, and 17 Bom 49 dissented from. 8 All 146; 1899 A W N 184; and 21 Mad 45 ref.) **Kalka Prasad v Basant Ram. 1901 A W N 97=23 All 346.**

Notes—Fol: 29 Cal 696; 6 Bom L R 697; 26 All 447.

Notes.—The above case is of no use under the new Code See s 47 Expl II.

(31) No bar—Decree-holder constructing in contravention of the directions in the decree.

608.—C P C S 47=(1882-S 244)—Execution, discharge or satisfaction of the decree.—

Where the effect of a decree is to declare the plaintiff's right to build over a certain area and prohibit the defendant from interfering with such right, if the decree-holder makes any constructions contrary to the right which the decree has declared that is a matter which does not relate to the execution, discharge or satisfaction of the decree, and the Court has no power to enter into it in execution proceedings. If the decree-holder has exceeded his rights, the judgment-debtor should seek remedy by suit. **Saudagar Mal v. Gopi. 2 A L J 573.**

(32) Question of mesne profits

609.—C P C S 47 (=old s. 244)—

If the question of mesne profits is not dealt within the decree, a separate suit for its recovery is maintainable. Where a decree-holder, who had come into possession legally in execution, was finally held not entitled to such possession until he paid a certain sum, his possession was held to be wrongful for which mesne profits were claimable. **Jamyat Singh v Nihal Chand 60 P R 1890.**

Notes.—Ref: 29 P R 1902=83 P L R 1902; Cited, 29 P R 1902=83 P L R 1902.

610.—C P C S 47 (1908)—(=Civ Pro Code, 1882, s. 244)—Mesne profits—Execution proceedings—Separate suit—Appeal.—

S. 244 (c) of the Code of Civil Procedure does not authorize the executing Court to determine the amount of mesne profits due to the decree-holder in a case in which the decree did not mention mesne profits. Where, in a suit for possession of land, valued at Rs 3,000 for purposes of jurisdiction, a decree was passed for possession on payment of Rs. 1, 430 raised for necessity, and the execution Court awarded also mesne profits of value in excess of the pecuniary jurisdiction of the Divisional Court: *Held*, that the suit was cognizable in appeal by the Divisional Court, and the fact that the decree-holder wrongfully claimed in execution proceedings, mesne profits in excess of the appellate jurisdiction of that Court, did not oust its jurisdiction to hold that such a claim did not lie. (60 P R 1890, 7 All 170, 17 Cal 968, 22 Cal 443, P C; 55 P R 1887, 40 P R 1892 Ref.) **Khazan Singh v Khushal Singh 83 P L R 1902=29 P R 1902**

C.P.C. (1908) S.47=(1882,S.244)-*Contd.*

(7) Separate suit lies—*Contd.*

611.—C P C S. 47 of 1908=s 244. of 1882.

13.—Partition—Accounts—Manager's liability to account—Right to mesne profits previous to partition—Mesne profits subsequent to partition, how recoverable—Civil Procedure Code Act XIV of 1882, Secs 13 and 244—Hindu Law—Joint family.

Although, as a general rule, no member of an undivided Hindu family can have any claim to mesne profits previous to partition, yet mesne profits may be allowed on partition where one member of the family has been entirely excluded from the enjoyment of the property, or where it has been held by a member who claimed to treat it as impartible, and therefore, exclusively his own.

Where a decree for partition, is silent about mesne profits subsequent to the institution of the suit a party is at liberty to assert his right to such profits by a separate suit. Sec 244 para 2 of the Code of Civil Procedure Act XIV of 1882 expressly reserves such a right of suit. **Bhivrav v Sitaram 19 Bom 532.**

Notes.—Ap 21 All 425 F B. Fol: 32 Cal 118.

(33) Claim for mesne profits & interest by representatives in title of the judgment-debtor—Decree-holdor's claim for interest on the purchase money.

612.—C P C Ss 47, 144 (1)=(1882 Secs 244 and 583)—Execution-sale—Decree-holder's possession as purchaser—Sale set aside.—

In execution of a decree, the decree-holder (appellant) purchased the property and obtained possession. The purchase-money was set off against the amount due under the decree, which contained no provision for future interest on the amount decreed. On the sale being set aside, the judgment debtor's representatives in title (respondents) paid the decree-holder decretal amount and possession of the property was restored to them. Then the respondents applied in execution proceedings for mesne profits and interest. The appellant contended that a separate suit was required and that he was entitled to interest in respect of his purchase money.

Held, that the claim of the respondents to have the questions in dispute determined in the execution proceedings was justified by sections

C.P.C.(1908)-S.47=(1882, S.244)-*Contd*

(7) Separate suit lies—*Contd*

583 and 244 of the Code of Civil Procedure (Act XIV of 1882), and that the claim of the appellant to be allowed interest was absurd **Munshi Prag Narain v Thakur Kamakhia Singh. 10 C L J 257=6 M L T 303.**

(34) Recovery of mesne profits for period between decree of High Court in appeal and decree in review—Separate Suit.

613—C P C (1908) Ss. 47, 144 (1) (=ss. 244, 583 Civ Pro. Code, 1882) —Execution—Review —Application in execution.

Where M, D, defendsnt in a partition-suit was deprived by the High Court of a house allotted to him by the first Court and, subsequently, the High Court, acting under Ch. XLVII, set aside its decree and M D having recovered possession of the house, applied under s. 583 of the Code for mesne profits. *Held*, that s. 583 had no application, the order entitling M D to restitution having been passed under Ch. XLVII, not in appeal under Ch. XLI. *Held*, further, that, it was not necessary for M D to bring a separate siut, one of his remedies was by " summary process," *i. e.*, by an application under s, 244 and the application might be deemed to be one under that section. (10 M I A 203 Ref: 9 W R 402, 25 All 441 27 All 485 Appr) Semble, also, that the lower Court would have an inherent right to order restitution of what had been declared to have been improperly taken. (1 Call 484 22 Call 981 Ref.) It was further urged that in any case M D could not recover more than three years' mesne profits. *Held*, that the applicant having been guilty of gross laches in not applying for review for many years should get mesne profits only from the date of the High Court's decree in review. **Collector of Meerut v Kalka Pershad, A W N 1906, 171=3 A L J 556=28 All 655.**

(35) Suit for money paid under decree afterwards reversed.

614—Ss. 47 of 1980=s244.

In a suit of 1867 the present defendant obtained a decree for possession of a certain village and mesne profits for one year. Pending an appeal against that decree, execution was stayed on the present plaintiff depositing a note for Rs. 15,000 as security. The decree was affirmed on appeal, and the present defendant had the note sold in execution and drew out

C. P.C.(1908)S.47=(1882, S.244)-*Contd.*

(7) Separate suit lies—*Contd.*

of the proceeds a sum for mesne profits for subsequent years; but an appeal was preferred in the execution-proceedings to the High Court, which set aside the execution so far as concerned the mesne profits for the years subsequent to that to which the original decree related. The present plaintiff thereupon attached and sold the village to recover the balance: before that amount was paid to the present plaintiff, the present defendant brought a suit against him in the District Court, and there obtained a decree for mesne profits for the subsequent years, and in execution drew the amount of the decree out of Court. In second appeal, however, the High Court, on 26th September 1881, reversed the decree of the District Court, where upon the present plaintiff applied for restitution under Civil Procedure Code, s. 583, which application,was ultimately disallowed. The present suit was brought to recover the amount to which that application related. *Held*, that the suit was not barred by the provisions of Civil Procedure Code s. 244.

Narayana v Narayana I L R 13 Mad 437.

Notes:—Ref: 24 Mad 341.

(36) Decree against a person personally-Sale of property—Claim by him as shebait.

615-S. 47=(1882 S. 244)—Applicability of S. 244:

That sec 244 of the Civil Procedure Code was no bar to the present suit inasmuch as it was brought by the shebait to set aside a sale of trust property in execution of a money-decree passed against him in his private capacity. (17 Cal 711 ref to). **Ramkrishna Mahapatra v Mohunt Padmacharan Deb Goswami. 6 C W N 663**

Notes.—Ref: 34 Cal 249; 11 C W N 361; 8 C L J 20, 6 C L J 442, 35 Cal 249 Fol: 12 C W N 308.

Notes:—The law is changed under the New Code.

616—C P C S.47: O 21 r 58=(1882 ss.244 & 278.)

A suit instituted by the shebait of an idol to have it declared that property sought to be sold in execution of a personal decree against the plaintiff is the endowed property of the idol is maintainable (6 C W N 663 Fol: **Amar Chand Kundu v Nani Gopal Mukerjee. 12 C W N 308.**

C P C (1908) S.47=(1882, S.244)-*Contd.*

(7) Separate suit lies—*Contd.*

(37) Decree for permanent injunction—Land purchased from decree-holder by another person.

617—S. 47=(1882 s. 244)—Vendee bringing a fresh suit for injunction.

The plaintiff's predecessor-in-title obtained a permanent injunction restraining the defendants from obstructing the former in his right of way. After the decree the plaintiff became the purchaser of the property with reference to which the right of way was enjoyed. He was again obstructed by the defendants in using the way: and so plaintiff filed a suit against them. The lower Courts held that the plaintiff's remedy lay in executing the decree and not in filing a fresh suit.

Held, there was no bar to the plaintiff's suit inasmuch as the injunction did not run with the land. **Jamsedji Manekji Kotwal v Haria Daya. 10 Bom L R 18=3 M L T 139=32 Bom 181**

(37A) Suit for administration by judgment creditor against executor-Mal-administration.

618—C P C Ss. 47; 50=(1882 Ss. 244,234) No bar judgment-debtor's death.

Certain persons who had obtained a decree against a person, since deceased, failed to realise the decretal amount by executing the decree against the executrix of the judgment-debtor. They then instituted a suit against the executrix charging her with mal-administration and asking for administration of the judgment—debtor's estate. *Held* that the suit involved a much wider question than one merely relating to the execution of the decree, and was not barred by s. 244. C P C (24 Cal 473 ; 11 Bom 27) **Saratmani Debi v Bhatta Krishna Banerjee. 12 C W N 614.**

(38) Rival decree-holders.

619—C. P. C. S. 47=S. 244-Right of action—Act VIII of 1859, s. 270.

A regular suit will lie at the instance of one decree-holder against another for a refund of money that has been erroneously paid away to

(7) Separate suit lies—*Contd.*

the latter contrary to the provisions of s. 270 of Act VIII of 1859. Gogaram v Kartick Chunder Singh B L R Sup Vol 1022:9 W R, 515.

See Gokool Dass v Gungesher Singh 3 N W 164

(39) Dispute between decree-holder & purchaser of a share in joint property belonging to judment-debtor and decree-holder

620—W, obtained a decree for possession of her share in joint property against A. Before execution R attached and sold that property as A's and N purchased it. W was afterwards put in formal possession of her share. W's application for mutation of names was refused she brought the present suit. *Held* that in view of the fact that the property was undivided revenue paying property W was only entitled to be put in formal possession. As soon as she was put in formal possession she obtained all that she was entitled to under the decree and when the defendant resisted her, she was entitled to bring a suit. (26 All 447 Dist.)

Held, further that it was not necessary to bring N upon the record on account of his purchase as he was a purchaser *pendente lite*. Wilayati Begam v Nand Kishore. 5 A L J 547= 30 All. 231=1908 A W N 93.

621—C. P. C. S. 47; O 21, r. 95=(1882 Ss. 244 and 318)–Dispute between judgment-debtors—Application for possession.

A dispute between the judgment-debtors does not relate to the execution, discharge or satisfaction of the decree, and cannot be gone into by a Court executing the decree. Where, therefore certain property was sold in execution of a decree and the sale was confirmed, but the purchaser applied under s. 318, Civ. Pro. Code that possession be made over to one of the two judgment-debtors, to which the other judgment-debtor objected, on the ground that the property was purchased with her money, which she had given to the other judgment-debtor, who had misappropriated it, but she did not apply to set aside the sale; *held*, that the dispute did not relate to the execution

(7) Separate suit lies—*Contd.*

of the decree, but should be settled in a separate suit brought for the purpose and no appeal lay to the High Court from the order refusing to determine the dispute between the judgment-debtors. Kastura Kunwar v Gya Prasad 4 A L J 47=A W N 1907 29=29 All 207.

(40) Razinama—Rights under—Suit for jewels—Not barred.

622—C. P. C. S. 47—Razinamah prevails—Hindu Law does not apply.

Where, in accordance with the terms of a Razinama, the wife is to wear certain jewels and at other times, they should be in the husband's custody, and a suit was brought to recover them from the husband by the wife, the suit is not barred by s. 47, Civ. Pro. Code. When the rights of parties are reduced to writing and embodied in a Razinama, their rights cannot be governed by the Hindu law. Chellammal v Krishnaswamy Iyer 1912, 1 M W N 166.

(41) Restitution.

623— C. P. C. S.47 of 1908=S. 244.

Held that a suit for the recovery of money (Rs. 92), on the ground that the same had been realized by the defendant by taking out execution of a decree held by the defendant against the plaintiff, but which decree had been satisfied, though the Court executing the decree did not recognize such payment, as the payment had not been certified, was not barred by s. 244, Code of Civil Procedure. Jhanda, 1 W N 25.

(42) Restitution due in virtue of the modification in appeal of the decree of a rent court—Procedure

624—C P C Ss. 47, 144 (1)=(1882 Ss. 583, 244) Rent Court's decree—Restitution due in virtue of the modification in appeal of the decree of a Rent Court—Procedure.—

Held, that although s. 583, C P C., might be applied by analogy to proceedings before Courts of Revenue under Act No. XII of 1881 s. 244 could not be applied to such proceedings. The remedy, therefore, of a person entitled to a refund in consequence of the reversal of modification on in appeal of a decree passed under Act XII of 1881 by a Court of Revenue is twofold;

C P C (1908) S.47=(1882, S.244)-*Contd.*

(7) Separate suit lies—*Contd.*

both by means of an application in execution and by a separate suit. (8 W R P C II referred to). **Masihulluh Kuar v Majidunnisa 1903 A W N 207=26 All 149.**

(43) Crops misappropriated while in possession under decree afterwards set aside on appeal.

625—C P C S. 47=S. 244 of 1882—Separate suit for the value of the crops.

The defendant had obtained a decree against the plaintiff for arrears of rent and of ejectment. In execution of this decree he got possession and carried away certain crops then standing on the land. On appeal the decree was set aside and the plaintiff got back the possession of the tenure. The plaintiff sued for the value of crops taken away by the defendant while in possession under his decree. *Held*—S. 11 of act XXIII of 1861 does not bar such a suit. **Shurnomoyee v. Patarri Sirkar. 4 Cal 625.**

Notes—Dist: 22 Cal 877. Ref: 25 Cal 692 F B 35 Cal 265.

(44) Execution of decree—Separate suit for value of crops cut while under attachment—Jurisdiction.

626—C P C S. 47=S. 244 of 1882.

In a previous suit for arrears of rent, the defendant had obtained two decrees against the plaintiff and had got the latter's crops attached in execution. Subsequently the plaintiff brought a suit for the value of the crops against the defendant on the allegation that the latter had forcibly carried away the produce of certain fields while under attachment and appropriated the same himself. *Held*, that the question was one that could properly be said to relate to the execution of decree within the meaning of s. 244 of the Code of Civil Procedure, and that therefore a separate suit was not maintainable. *Held*, further, that if the Court had jurisdiction to decide the original suit and to execute the decree, it would not be deprived of its jurisdiction by the mere fact that under s 244 of the Code, in deciding a question between the parties, it would have to award to one party or another something beyond the limits of its ordinary pecuniary jurisdiction. **Indardawan Singh v Kamakhya Singh 20 C 315.**

C P C (1908) S.47=(1882, S.244)-*Contd.*

(7) Separate suit lies—*Contd.*

(45) Suit for recovery of mesne profits—Suit for value of crops wrongly appropriated.

627—C P C S. 47=S. 244 of 1882—Decree for costs—Sale of immoveable property in execution—Suit to recover mesne profits—Right of suit—C P Code s. 583.

In A's suit against B for compensation B obtained a decree for his costs. A appealed while the appeal was pending B executed the decree in his favour and in execution bought and took possession of certain immoveable property of A. The appellate court remanded the case and a decree was made in favour of A and he got back his property. A then brought a suit for the value of crops misappropriated by B during the period he was in possession. In second appeal it was contended that s. 244 C P Code prohibits such a suit. *Held* —s. 244 of C P Code 1882 has no application because the question for decision did not arise until the decree ceased to exist and such a suit was not barred by s. 244 C P Code. (3 Cal 720, 14 Cal 484, 20 W R 238, 415: 22 W R 435: 25 W R 337: 7 All 170 Ref: 19 W R 413 distinguished). **Coffin v Karbari Rawat. 22 Cal 501.**

(46) Question of title between decree-holder & third person.

628—C P C S. 47=S. 244—Separate suit.—

The plaintiffs in a suit for money obtained a decree against all the defendants except P, and among them K. On appeal, the Court of first appeal gave them a decree against P. In execution of this decree, they attached and were paid, as belonging to P, certain money deposited in the Government Treasury in K's name. On appeal by P, the Court of second appeal reversed this decree, and restored the decree of the first Court dismissing the suit as regards P. P thereupon applied in execution of his decree for a refund of the money. The plaintiffs objected on the ground that the money belonged to K. *Held*, that the Court executing P's decree was not competent to decide the question whether the money belonged to P or to K, such question not being one between P and them only, but involving and raising a question of title between him and K as to their conflicting claims, *inter se*, to the money. **Pusai v. Mahadeo Prasad, 6 All 12.**

C P C (1908)-S.47=(1882, S.244)-*Contd*

(7) Separate suit lies—*Contd.*

(47) Objection raising question of title between party added as representative, and the person whom he represents—Order disallowing objection.

629—S. 47 of 1908=S. 244 of 1882.

In a suit by G against I represented by I for possession and declaration of title as a purchaser the suit was decreed, it being declared that G was the purchaser. In the execution of this decree I objected on the ground that he was entitled to a half share of some and to the whole of the other properties and that his brother I had no right in them The executing court disallowed this objection. And I brought a suit against G to get his right established. *Held* that the order passed in the execution proceedings disallowing I's objection was no bar to the suit. (6 Cal 777; 8 C L R 117 followed.) **Gourmoni Dabee v Jagut Chunder Audhikari, 17 Cal 57.**

Notes:—Ap: 17 Cal 711 F B.

(48) Decree for sale on a mortgage—Mode of intervention of third party claiming an interest by succession in the property decreed to be sold.

630—S. 47=S. 244—An interest by succession in the property decreed to be sold—C. P. C., (1882), s. 278—Right of suit.

Two heirs of a Mahomedan woman took possession on her death of certain immoveable property left by her to the exclusion of the third heir, their sister. They mortgaged that property. The mortgagee brought a suit, and obtained a decree for sale. After decree, one of the mortgagors died and his sister was brought upon the record as his representative. The property was sold, and subsequently the sister brought a suit against the auction-purchaser for recovery of her share in the mortgaged property. *Held* that s. 244 of the Code of Civil Procedure did not apply, and that the suit was maintainable. (14 Cal 631, and 13 All 313, referred to.) **Sanwal Das v Bismillah Begam. 19 All 480.**

Notes:—Ap: 21 All 356. Ref: 32 Mad 429; 19 M L J 401; 6 Bom L R 1043; 1049; 21 All 277; 30 Mad 26. Dist: 9 C L J 358; 26 All 152. Fol: 32 Cal 265; 16 M L J 545.

C.P.C.(1908)-S.47=(1882, S.244)-*Contd*

(7) Separate suit lies—*Contd.*

(49) Impartible estate —Custom of Inalienability—Objection and money decree distinction between.

631.—C P C S 47—Execution of decree against last owner—Mortgage decree—Incidents of objection in execution unsustainability of—Mortgage decree—Attachment—Effect of :—

It is settled law that for purposes of succession an impartible estate descends *as if* the estate of the father was joint and not separate. But the whole estate is in the holder for the time being and the successor does not take the estate by survivorship. He takes it as the assests of the last holder and is liable to pay the debts of the last holder as his representative to the extent of those assests. 30 Mad 454 app: 29 Mad 453 not fol 10 All 272 ref. to. A custom of inalienability does not involve a coparcenary with the other members of the family ; and consequently does not affect the rule above laid down, namely that an impartible estate does not descend by survivorship to the next heir. 30 Mad 261 ref. to. It is not open to the son to set up a custom of inalienability of the estate in execution proceedings against the estate ; but he should do so only by a separate suit. **Zamindar of Karvetnagar v Prayag Dassji. (1909) 19 M L J 401=32 Mad 429.**

(50) Suit to establish right to property released from attachment-Objection by a person not a party to the suit.

632.—C P C S 47 of (1908) = 1882 Civil Procedure Code, Sections 244, 280 and 283.

Plaintiff a decree-holder against whom an order for release of certain property from attachment had been passed under Section 280, Civil Procedure Code, on the objection of a person not a party to the suit, sued to establish right to such property. *Held*, that the suit lay and that no appeal lay under Section 244 as the property was released on the objection of a person not a party to the suit. **Devi Ditta v Miran Baksh. 63 P R 1889.**

(51) Execution proceedings—Objection to execution not allowed—Separate suit.

633.—S 47 of (1908)=S 244 Civil Procedure Code of 1882.

(7) Separate suit lies—*Contd.*

A decree was obtained against plaintiff as representative of her brother. In execution of the decree she objected to certain land being sold, alleging that the land was her own and not liable to satisfy the decree under Section 244 of the Code of Civil Procedure. Her objection was disallowed, and the land was sold and purchased by defendant, who obtained the sale certificate and was put in possession. Plaintiff then sued defendant to set aside the Court sale, and obtained a decree. No appeal having been preferred against that decree, plaintiff now sued defendant for possession. *Held* that the provisions of sec 244 did not bar the suit. **Kettilamma v Kelappan 12 Mad 228.**

Notes—Ref : 21 Bom 205.

(52) Objection to execution by party who had been a defendant but had been excluded from the proceedings in appeal.

634—C P C S 47 (1908) O XXI, rr 58, 63= (Civil Procedure Code, 1882, Sec 244, 278, 283)—Execution of decree.

One M brought a suit for arrears of rent against K and his wife, and obtained a decree against both. In appeal the femal defendant got the decree set aside so far as it affected her property. The decree-holder, however, sought to execute his decree against the property of the wife alleging it to be the property of the husband. The wife objected under sec. 278 of the Civ Pro Code, but her objection was disallowed. She appealed and her appeal was admitted on the ground that she was a party to the suit who raised a question in the sense of s. 244 of the Code : *Held*, that this procedure was erroneous, the objector's remedy being by way of suit under section 283 of the Civil Procedure Code.

Masih-Ullah v Kifayati, A W N 1893, 67.

Notes:—Ap: 23 All 346.

(53) Person obstructing the decree-holder at the instigation of the judgment debtor-Suit by the person so obstructing.

635.—C P C S 47=S 244 of 1882.

Held, that a person who, at the instigation of the judgment-debtor, obstructed the decree-holder in obtaining possession of property is

(7) Separate suit lies—*Contd.*

not a party to the suit within the meaning of s. 244 ; so orders passed against him under ss 329 and 332 do not bar a suit. (17 Cal 769 referred to) **Bishen Dyal Singh v Sagro Singh. 2 C W N 511.**

(53A) Issue in the form of an objection in separate suit.

636—C P C S 47 of 1908=S 244 of 1882 does not prohibit the trial of any issue involved in questions coming under that section if the issue is raised by the defendant in a suit brought against him but section 244 prohibits a separate suit for the determination of certain questions coming under it. (8 All 146 Dist.) **Bhiram Ali Saik Shikdar v Gopi Kanth Shaha. 24 Cal 355=1 C W N 396.**

Notes-Fol: 33 Mad 242; 27 Cal 187; 7 C W N 607 ; 26 Cal 946 ; 727 ; 27 Cal 415 ; 4 C W N 571; 679. Ex : 5 C L J 294. Ref 11 C W N 513 ; 6 C L J 43 , 34 Cal 199; 26 Cal 937 ; 9 C W N 973 ; 11 C W N 83 ; 19 M L J 1 ; 7 C W N 573. Dist: 30 Bom 290=7 Bom L R 941 ; 13 C W N 630.

(54) Omission to oppose execution of decree

637—C P C—S. 47=S 244 of 1882 Suit to set aside illegal sale.

A suit will lie to set aside a sale made in contravention of the terms of s. 64, Bengal Act VIII of 1869, the judgment-debtor not being bound to oppose the sale in the proceedings in execution. **Bama Soonduree Dossee v Mudhoo Soodun Biswas. 25 W R , 156.**

(55) Party wrongly appearing on record.

638—C P C—S. 47 of 1908=S. 244-Suit for money paid in execution of decree—Parties appearing on decree not parties to suit.

S sued *K* for possession of certain land, and H, claiming to be owner of the property, asked leave to come in and defend the suit; but his application was refused. The suit was dismissed, and *S* appealed naming H as a respondent, and a notice in the usual form was served on H. He, however, did not appear, and the decree of the first Court being reversed, a decree, in which H was included, was given for possession. H subsequently brought a suit

(7) Separate suit lies—*Contd.*

to have his title to the property declared making S a defendant, and obtained a decree declaring his title. Pending H's suit, S took proceedings in execution of the decree to recover a sum awarded her either as costs or mesne profits, whereupon A, to prevent a sale of the property, deposited the amount in Court, and S received it on account of her decree. In a suit brought by H against S to recover the amount so paid,—*Held* the plaintiff was entitled to recover. The judgment in the first suit having been set aside by the proceedings in the second suit, there was no bar to the suit by reason of the money having been paid in execution of the process of the Court H was not a party to the first suit so as to make the question one between the parties, and relating to the execution of the decree. **Sherokumari Debi v Shitaram Haydra.** 13 B L R., Ap, 17.

(56) Plaintiff suing in a character separate from that in which decree was passed against him

639—C P C S. 47 of 1908=S 244 of 1882—Separate suit not barred.—

A judgment-debtor, upon the attachment of certain land in execution of decrees passed against him personally by the Revenue Court, instituted a suit for a declaration and establishment of his right to such land, not as his own property, but as wakf, of which he was mutawalli or trustee. *Held*, that, inasmuch as the plaintiff was not suing in his own right, but in his capacity as custodian, trustee, or manager of the wakf property, and he must therefore be taken to fill a character separate from that in which the decrees were passed against him by the Revenue Court, his suit was not barred by the provisions of s 244 of the Civil Procedure Code. (5 All 406, and 2 All 752, referred to). **Nath Mal Das v Tajammul Hussain,** 7 All 36.

Notes:—Fol: 6 C W N 63; 15 Cal 437; 23 Mad 195 F B; 6 C W N 63. Dist: 16 Cal 603; 7 All 547. Ref: 16 Cal 1; 23 Bom 237; 8 All 626; 12 All 313. F B; 23 All 263.

(57) Insolvency petition—Vesting order composition with—Creditors—Dismissal of petition—Re-vesting Attachment—Trustee's right to claim—Maintainability of suit.

640—C P C S. 47 of 1908=S. 244 of 1882—

(7) Separate suit lies—*Contd.*

S. 7 of the Insolvency Act 1843, provides that if, after the making of any vesting order the insolvent's petition should be dismissed, the vesting order becomes null and void from and after such dismissal, provided however, that all acts done by the Official Assignee in the interim will be good and valid and has the effect of revesting the property in the insolvent retrospectively from the date of the vesting order. Where a vesting order is made and then the insolvent enters into a composition with his creditors and his insolvency petition is afterwards dismissed, such composition deed is valid and upon the dismissal of the petition the property revests in the insolvent. A trustee under a composition-deed executed by the judgment debtor before attachment of his property is entitled to bring a suit to set aside the attachment and such a suit is not barred by S. 244 C P C (27 Mad 452 approved.).

Kothandara Ma Routh v. Murugesa Mudali, 13 M L J 372.

(58) Decree - Execution surety—Surety-bond liability of the surety under the bond—Suit can lie to enforce liability—Practice—Procedure.

641—C P C S. 47, 147=S 244.—

The liability of a surety under his bond for the performance of any decree or for the restitution of any property taken in execution of a decree, can be enforced by a separate suit.

Motilal Virchand v. Chandrasangji Himatsangji, 13 Bom L R 909.

(59) Court sale—Defaulting purchaser—Re-sale—Deficiency in price—Recovery of deficiency from defaulting purchaser-Suit for recovery of amount so realised.

642—C P C S. 47 of 1908=S. 244 of 1882—Not barred.—

S. 47 (1), Civ. Pro Code, 1908, does not bar a separate suit by a person, who as defaulting purchaser in a Court-sale, was ordered to make good the deficiency in price that resulted in consequence of a re-sale, for setting aside the order and for recovery of the sum of money realised from him on account of such deficiency.

Parbat v. Bindraj, 7 N L R 134.

C.P.C.(1908)-S.47=(1882, S.244)-*Contd.*

(7) Separate suit lies—*Contd.*

(60) Judgment-debtor—Question of right to possession.

643—C P C S. 47 of 1908=S. 244 of 1882—Civil Procedure Code (1882), ss. 332 and 335 —

T's predecessor in interest had a mortgage on certain land and was made a party to a partition-suit, in which a share in the land was allotted to a member of the family, subject to a proportionate share of T's mortgage and also subject to a proportionate share of a certain decree debt The then plaintiff got his share of the property made over to him. After the date of the decree, *i. e.*, the decree in the partition suit, T purchased the equity of redemption in the mortgaged property from certain members of the family. In a subsequent execution of the partition decree, part of the land was sold for money due as costs and mesne profits by T's vendors of the equity of redemption, and T was ejected. T objected under s. 332 of the Code, but the Court refused to order re-delivery In a suit brought by T for possession, —*Held*, that T was not a judgment debtor within the meaning of ss. 244, 332 and 335 Civil Procedure Code, and that the suit was not barred by the provisions of s. 244. (15 Mad 226 followed.)

Vasudeva Upadyaya v. Visvaraja Tirthasami, 19 Mad 331.

Notes:—Dist. 29 Mad 131.

(61) Question relating to execution—separate suit.

644—C P C S. 47 of 1908=S. 244 of 1882 —

Plaintiff sued four Hindu brothers to enforce the mortgage lien of her husband She obtained a decree in her favour. Against this decree, sons of one of the defendants appealed and the decree was reversed as against them Plaintiff however executed her decree against the other defendants by attachment & sale of their three-quarters share in the land. The plaintiff was the purchaser at the Court sale. She was, however, obstructed in obtaining possession by those sons of one of the defendants who had appealed & who were successful. Plaintiff therefore brings this suit for possession of three-quarters share in the land & for partition. *Held*, that, the suit was not barred by Section 244.

Nagamuthu v. Savarimuthu, 15 Mad 226. See also 19 Mad 331.

Notes:—Ap: 33 All 346. Fol: 19 Mad 331. Dist: 22 Mad 131. Over: 23 Mad 361 F B.

C.P.C.(1908)-S.47=(1882, S.244)-*Contd*

(7) Separate suit lies—*Contd.*

(62) Decree for moiety in favour of defendant—Right of such defendant to claim moiety of money realised in execution.

645—C P C S. 47 of 1908=O.XXI, r. 15 [=Civ. Pro Code 1882, .244 and 231.]—

In a suit on a mortgage bond executed in favour of the plaintiff and sixth defendant, a decree was passed for a moiety of the mortgage amount in favour of sixth defendant. The plaintiff in execution of his half-share brought the mortgaged property to sale. Then the sixth defendant applied that it should again be sold for his half-share, but was informed, it could not be sold twice over. Thereupon, he applied for payment to him of half the sale proceeds. *Held* that his remedy lay by a separate suit and not in execution proceedings, inasmuch as the decree had not been passed jointly in favour of plaintiff and sixth defendant within the meaning of s. 231, Civil Pro. Code, but was in favour of each separately for his own moiety.

Kuttiana Goundan v Muttia Goundan, 2 M L J 14.

(63) Claimant in execution proceedings—Damages for tort—Party to suit.

646—C P C—S. 47 of (1908)=S. 244.

A sold to B certain logs of timber, and 95 logs were delivered to B in part performance of the contract. C brought a suit against A and B, claiming the logs under another title. Pending this suit C entered into an agreement with D, selling him the logs in the event of being successful in his suit. The judgment of the Court of first instance was in C's favour, and under such judgment D obtained possession of the logs in suit. This judgment was on appeal reversed. B then brought a suit in the nature of an action of trover against C and D for the logs and damages. The Court, without entering into the merits, dismissed the suit on the ground that it was not maintainable, as the same relief would have been obtained under the provisions of s. 11, Act XXIII of 1861. *Held* by the Judicial Committee, reversing such judgment, that there had been a miscarriage, as that section did not apply, the suit by B against C and D being to recover damages for a tort alleged to have been committed by C and D, and that the latter was

(7) Separate suit lies—*Contd.*

not a party to the original suit or bound by the judgment in that suit. **Aga Syed Abdool Hossani v Lenaine. 13 Moore's I A., 69**

(64) Auction purchaser not a representative of either party to a suit—Sale in execution of property belonging to a person other than the judgment-debtor

647—C P C S. 47 (1908)=S. 244.

Defendant No 1 obtained a decree on a mortgage on the 31st May 1882 against H, and caused certain property to be sold in execution. Plaintiff claimed under a sale by the sons of H on the 31 st July 1882. *Held*, that as plaintiff did not claim title from H the judgment-debtor in the former suit, and defendant No. 2, the auction-purchaser, could not be held to be the representative of either party, the suit was not barred by s. 244 of the C P Code. Held further, that the suit was not premature, since plaintiff was entitled to sue when his property was sold in execution as belonging to some one else **Shivram Chintaman Joshi v Jivu. P J 1888, 55 =13 Bom.34.**

Notes:—Dist: 18 Mad 13. Ref: 24 Cal 62 F B.

(65) Consent decree—Claim to take all debts—Separate suit.

648—C P C S. 47=S. 244.

By a consent decree the plaintiff was declared entitled to take over all the debt of the firm of the plaintiff and of defendants 4 and 5 (managing members,) and the defendants 4 and 5 were ordered to give a list of such debts to the plaintiff, which list was given. Defendants 1, 2 and 3 had paid their debt before the decree but the payment was not entered by defendants 4 and 5 in the books of the firm. The plaintiff sued 1, 2 and 3 to recover the debt, and in case they proved payment to recover the same from 4 and 5.

Held, that the claim could be enforced by a separate suit only and not under s. 244 of the C P. Code. **Ramu v Motiram. 1896 P J 483.**

(66) Decree against minor without proper representation suit to set aside, right of.

649—C P C S. 47=(1882 s. 244)—No bar.

(7) Separate suit lies—*Contd.*

S. 244 does not bar a suit to recover property from a decree-holder who obtained his decree relating to the property against the plaintiff when a minor without proper representation in Court or from such decree holder's vendee. **Ramchandar v Chheda Lal. 1905 A W N 122.**

(67) Representative of deceased person.

650.—C P C S. 47 of 1908=S. 244—Execution of decree—Party—Civil Procedure Code, ss. 201, 209—Representative.

In a former suit for possession of immoveable property against J and her father, and subsequently revived against J as the representative of her father, possession and mesne profits were decreed against J in her representative capacity, while as against her individual capacity the suit was dismissed. The decree-holder after obtaining possession attached and sold, in satisfaction of its decree for mesne's profits, J's private property, notwithstanding her objections, and himself became the purchaser but never obtained possession. This sale, ordered on the 8th October 1863, was confirmed by the Judge on 15th March 1864. The present suit was brought by J for confirmation of her possession of her private property by cancellation of the execution sale. *Held* (Macpherson and Ghover JJ., dissenting) that such suit was maintainable, and that J in her individual capacity was not a party to the suit in which execution issued within the meaning of s. 11 of Act XXIII of 1861. **Wahed Ali v Jumayee. 2 B L R F B 73=11 W R F B 1. Pootee Begum v Indurjeet Kooer. 12 W R 201.**

In the same case on appeal the decree of the High Court was affirmed under circumstances of the case, but held, (contrary to the opinion of the majority of the Full Bench).—Where a decree against a person in a representative capacity has been properly passed, and proceedings have been taken under it to obtain execution against the party in his representative character, he is a party to the suit with respect to any question which may arise between him and the other parties relating to the execution of the decree within

(7) Separate suit lies—*Contd.*

the meaning of Act XXIII of 1861, s. 11.
Chowdry Wahed Ali v. Jumaee.
11 B L R P C 149=18 W R 185
Oseemunissa Khatoon v Ameeroonnissa Khatoon. 20 W R 162.

(68) Death of party to suit before final decree in appeal- Subsequent proceedings in execution taken against representatives of such party.

651—C P C S. 47 of (1908)=S. 244 of (1882)—Execution of decree.

A decree was given to the defendants (then plaintiffs) in 1856 for possession of land and mesne profits against numerous defendants, including A. Some of them including A appealed to the Sardar Dewani Adalat, but A died before the decree of the latter Court. His representatives were not brought on the record; but in (1881) (the amount of the mesne profits having been determined in 1877) certain persons were made parties, as representatives of A to various proceedings in execution of the decree for mesne profits which ended in the sale of certain property which had been A's. Subsequently these representatives sued to recover the property sold on the ground that they were no parties to the decree under execution. *Held* that the suit was not barred. (13 All 53 P C) referred to. *Held* also that as it had not been shown that by reason of the plaintiff not objecting that they had been improperly brought on the record of the execution proceedings, the defendant had induced to accept a less favourable arrangement for the satisfaction of the decree than he might otherwise have done, there was no estoppel against the plaintiffs.
Beni Prasad Kunwar v Mukteshar Rai
19 W N 101=21 All 316.

652—C P C S. 47=S. 244 of 1882—Separate suit—Questions for Court executing decree.

Three out of six decree-holders sold their share to A who applied under s. 332. His application was rejected on the ground that the purchase was benami for some of the judment-debtors. The assignee and the alleged real purchasers brought a separate suit. It was contended that the suit is barred by s. 244.

Held that the assignee was not a party to the suit in which the decree was passed, nor the representative of any such party, and that the suit was not barred. Halodhar Shaha v Hargobind Das Koiburto. 12 Cal 105.

(7) Separate suit lies—*Contd.*

Notes:—Fol: 14 Mad 478; 20 All 539. Ref: 16 All 483.

653—C P C S. 47 (1882—s. 244).

Held that the court executing a decree could not in execution reopen the question as to whether certain persons brought on the record as representatives of the deceased plaintiff, and, as such, made respondents in the appeal, had been properly joined as parties or not. Venkatachala Reddi v Venkatarama Reddi.
24 Mad 665.

(69) Assignment of decree—Execution—Separate suit

654—C P C S. 47=S. 244 of 1882.

Plainliff was the assignee of a decree who applied for execution, his application was rejected and he was never brought on the record as decree-holder. Plaintiff now sued to set aside the order by which execution was refused to him and prayed for a declaration of his right to execute the decree. Held that the provisions of s. 244 of the Code of Civil Procedure do not apply to the plaintiff and bar his suit. Raman v Muppil Nayar 14 Mad 478

Notes:—Ref: 16 All 483; 26 Mad 264.

(70) Transferee from auction purchaser.

655—C P C S 47=[1882 s. 244].

A transferee from an auction purchaser can recover possession of property from transferee of the judgment debtor, by a regular suit, and not by an application under s. 244 C P C 31 All 82 Ref: Hira v Amar Singh. 2 Ind Cas 454

(71) Application for execution by beneficial holder of decree—Application dismissed—Suit for declaration of applicant's right to execute the decree.

656—C P C S. 47 of 1908=S. 244.

A person whose application to be placed on the record under s. 232 had been rejected can sue for a declaration that he is the person entitled to

(7) Separate suit lies—*Contd.*

execute the decree. (4 All 457 and 12 Cal 105) referred to. **Sheoraj Singh v Amin Uddan Khan.** **18 W N 145=20 All 539.**

Notes.—Doubt: 28 All 613=3 A L J 428=(1906) W N 183.

657—C P C S. 47 of 1908=S. 244.

Suit to declare that the defendant is a benamidar of plaintiff.

S. 244 C. P. Code cl. [c] does not bar a suit brought by A to obtain a declaration that B's decree against C and a decree brought in the name of D were really purchased by the plaintiff for his own benefit. **Gour Mohun Gouli v Dinonath Karmokar.** **25 Cal 49=2 C W N 76.**

Notes:—Fol: 8 C L J 485 Ref: 31 All 82 F B; 6 A L J 71 F B; 21 Mad 388.

(72) Liability of property for debts.

658—C P C S. 47=S. 244—Separate suits of father.

Whether property seized by a judgment-creditor in the hands of his deceased judgment-creditor's son is held by the son under such circumstances as render him liable for his father's debt is a question which cannot be tried in execution proceedings, but must form the subject of an independent suit. **Ramanoogro Singh v Kishen Kishore Narain Singh.** **23 W R 265.**

Notes—Fol: 24 W R 364; 22 Bom 475.

659—C P C S. 47-A suit was for money brought against a zamindar but both the parties put in a razinama and the decree was passed in 1867 according to razinama under which the defendant hypothecated certain estate and undertook to pay money in five instalments. The razinama was not registered but a memorandum of the decree was registered under S. 42 Act XX of 1866 The last instalment fell due on the 25th February 1870. The zamindar died in 1873 and the decree was kept alieve till then. Execution proceeding against the estate in son's hands were taken but were set aside in appeal. In January 1882 a suit was brought to recover the amount of the last instalment due under the decree of 1867. Held that the suit was maintainable & was

(7) Separate suit lies—*Contd.*

barred neither by s. 244 of the Civil Pro. Code nor by limitation. **Arunachala v Zamindar of Sivagiri.** **7 Mad 328.**

Notes.—Fol: 13 Mad 265. Con: 10 Mad 117. Ref: 16 Mad 99 ; 17 Mad 122 ; 9 Bom 198 F B ; 19 M L J 401 ; 32 Mad 429.

660—C P C S. 47=S. 244 Civil Procedure Code-Obligation of a son to pay debt of deceased father-Nature of that obligation.

The question is whether a son's pious obligation under the Hindu Law to pay debt of his father out of his share in the ancestral property is a matter which relates to the execution of a decree passed against his father who died afterwards but before execution, within the meaning of s 244 of the Code of Civil Procedure. *Held*, it is an obligation distinct from that created by the decree which was passed against the father that if the decreed debt was either illegal or immoral, the sons would be under no obligation to satisfy it, though the decree against the father might be perfectly rated and that the questions contemplated by S. 244 are those which relate to the enforcement of the obligation created by the decree. It is one thing to execute a decree as it is, and another to add to the obligation created by it so as to extend its scope.

Such an obligation must be decided by a separate suit and S. 244 would not be a bar to it. **Aribudra v Dorasami.** **11 Mad 413.**

Notes—Not Fol: 20 Bom 385. Fol: 13 Mad 265 ; W N (1907) 159 ; 4 A L J 424 ; 29 All 544. Ref: 16 All 449 ; 21 All 301 ; 5 C L J 491 F B ; 34 Cal 642 F B ; 11 C W N 593 F B.

661—C P C S. 47. A money decree payable by instalments had been obtained on a mortgage against a Hindu father and his two sons in October 1877. The father having paid part of the debt died on 28th December 1883. In execution of the decree the decree-holder attached the family property. The two sons of the mortgagor who were born subsequent to the suit objected to the attachment so far as it affected their shares and the District Judge raised it and directed that a fresh decree should be obtained against them as they were not parties to the suit. Of the two elder sons who were parties one died in coparcer-

C.P.C.(1908)-S.47=(1882, S.244)-*Contd*

(7) Separate suit lies—*Contd.*

nary without issue and the other died leaving two minor sons. The decree-holder sued the sons of the mortgagor and their nephews to recover the amount of all unpaid instalments and the objection put forth was that the question whether ancestral property was liable or not for the father's debt in the present suit was one which related to the execution of decree in the former suit and that the order whereby the attachment was raised was an order under s. 244 of the Civ. Pro. Code, and no fresh suit could be brought. *Held*, that the plaintiff was not barred from maintaining a suit by s. 244. **Ramayya v Venkataratnam. 17 Mad 122.**

Notes—Dist: 2 C W N 603. Con: 23 Mad 292. Ref: 28 All 508=3 A L J 274=(1906) W N 117; 14 M L J 84; 27 Mad 243 F B.

(73) Decree against father—Execution against son—Assets—Separate suit against the son—Necessity of.

662—C P C ss. 47, 50 (=Ss. 244, 234, Civ. Pro. Code, 1882)—Mitakshara family—Decree against the father in a representative capacity or not—Question not in execution.

The interest of the father in a *Mitakshara* family in the ancestral properties is not asset in the hands of the son when he dies, and consequently proceedings cannot be taken against the son as the legal representative of the father under s. 234, Civ Pro Code. If after the death of the father in a *Mitakshara* family against whom alone a personal decree was passed, the creditor wishes to proceed against the son, it must be not because he is the heir or the legal representative, but upon the ground of his obligation to pay his father's debts; and whether having regard to the character of the debt, the obligation can be enforced against the son, cannot be determined in a proceeding either under s. 254 or s. 244, Civ. Pro, Code, but ought to be determined by a separate suit. (20 Bom 385, Diss; 13 Mad 265, 16 All 449 *Relied on.*). The question whether the decree was obtained against the father in his representative capacity cannot be gone into in the course of execution of the decree. Where the decree against the father is in his representative capacity, no proceeding under s. 234, Civ. Pro. Code, need be taken. **Juga Lal Chaudhuri v Audh Behari Prosad Singh. 6 C W N 223.**

C P C(1908) S.47=(1882 S.244)-*Contd.*

(7) Separate suit lies—*Contd.*

Notes.—Fol: 31 Cal 224; Rel on 3 A L J 668 =A W N 1906, 281; Ref: 6 O C 272, 8 C W N 843, 1 N L R 178, 5 C L J 491, F B =11 C W N 593=34 Cal 642; Dist 3 C L J 131=33 Cal 676, 5 C L J 80=11 C W N 163.

(74) Adjustment of a decree—Right to sue.

663—C P C S. 47=Section 244 of 1882.

While the execution proceedings were in progress, T, a judgment-debtor gave a mortgage bond in satisfaction of his judgment-debt to G, the decree-holder. This arrangemet was not sanctioned by the court and it ordered execution to proceed, the application for execution was then struck off in the absence of the parties and the decree-holder again applied for execution before another officer who was then presiding over the Court whose duty it was to execute the decree. This officer when the arrangement was mentioned to him sanctioned the same and the case was struck off as fully satisfied. The present suit was bronght on the above mortgage deed. The Lower Courts held that the bond was invalid. *Held*, that the mortgage bond was not invalid and that the order rejecting the arrangement had no force of a decree under section 244 Civil Procedure Code. **Ganeshdas Krishnaji v Rai Singh. 3 C P L R 54.**
See 7 All 424: 17 Bom 23; 21 Cal 437 and 542; 15 Mad 302. Contrary 27 Bom 96.

664.—C P C S. 47=S. 244 of 1882—Relief obtainable in execution—Adjustment of decree—Assignment of decree—Civ Pro 1877, ss 244, 258.

M, who held a decree against S. for possession of certain immoveable property and costs, assigned such decree to S by way of sale, agreeing to deliver the same to him on payment of the balance of the purchase-money. He subsequently applied for execution of the decree against S, claiming the costs which it awarded. S thereupon paid the amount of such costs into Court, and, having obtained stay of execution, sued *M* for such decree, claiming by virtue of such assignment. The lower Court held that the suit was barred by the provisions of s. 244 of Act X of 1877, and also, treating such assignment as an uncertified adjustment of such decree, that it was barred by the terms of the last paragraph

C P C. (1908) S.47=(1882, S.244)-*Contd.*

(7) Separate suit lies—*Contd.*

of s. 258 of that Act. *Held* that the suit was not barred by anything in either of those sections. The words "any Court" in the last paragraph of s. 258 refer to proceedings in execution and to the Court or Courts executing a decree. **Sitaram v Mahipal.** 3 All 533.

Notes.—Ap: 15 Cal 187. Fol: 10 Cal 354; 5 All 269; 7 All 124. Dist. 10 Bom 155 Ref: 18 Mad 26; 10 Bom 288; 11 Bom 6 F B.

665.—C P C S. 47=S. 244 of 1882=Adjustment of decree out of Court—assignment of decree—Separate suit—Civ Pro Code 1877 ss. 244, 258.—

S, alleging that a money-decree against him held by G had been adjusted out of Court by a payment in cash and the delivery of certain property, and that *M* had notwithstanding such adjustment applied for execution of such decree and recovered the amount thereof, as the Court executing such decree had refused to determine whether it had been satisfied on the ground that such adjustment had not been certified, sued *M* for the money which he had paid him out of Court. *Held* that the suit was not barred by the provisions of section 244 of Act X of 1877 or of section 258 of that Act. The last paragraph of section 258 means that the Court executing the decree shall not recognize an uncertified payment or adjustment out of Court. It does not prohibit a suit for money paid to a decree-holder out of Court, and the payment of which, not being certified, could not be recognized, and which the decree-holder had not returned, but had misappropriated, by taking out execution of the decree a second time and securing the amount in full through the Court. **Shadi v. Ganga Sahai.** 3 All 538.

Notes.—Fol: 10 Cal 354; 5 All 269; 7 All 124; 30 All 464=(1908) W N 220=5 A L J 475. Dist 10 Bom 155; 20 All 254; 16 M L J 54. Ref; 18 Mad 26; 10 Bom 288; 11 Bom 6 F B; 6 A L J 403.

666.—C P C S 47 of 1908=S 244-Adjustment of decree out of Court—Instalment bond.

Parties to a decree executed an instalment bond by way of adjustment of the decree. It was not certified to the Court under s 257A, and s

C P C (1908) S.47=(1882, S.244-*Contd.*

(7) Separate suit lies—*Contd.*

258. *Held* that the Court executing the decree was not competent to take cognisance of the bond under s 244 of the Code and that the decree should be executed inspite of the adjustment. (11 Cal 671 explained and distinguished). **Ram Doyal Banerjee v Ram Hari Pal.** 20 Cal 32.

Notes.—Dist: 7 C W N 54; 8 C W N 395. Ref 7 C L J 543=35 Cal 870=12 C W N 674 Fol 12 C W N 485.

667.—C P C S 47=Ss. 244, 258 of 1882—Separate suit to enforce agreement to adjust.

Under ss 244 cl (c), and 258 of the Civil Procedure Code (XIV of 1882), no compromise of a decree which has not been duly certified under the provisions of the last-mentioned section can be recognized by any Court, and a separate suit to enforce such compromise is not maintainable.

Hormasji Dorabji Vania v. Burjorji Jamsetji Vania 10 Bom 155.

Abdul Rahiman v. Khaja Khaki Aruth. London Bombay and Mediterranean Bank v Pestanji Dhunjibhoy 10 Bom 155.

Notes.—Ref: 20 Cal 32.

668.—C P C S.47=Ss.244 and 258—Payment out of Court—Remedy of judgment-debtor—Separate suit not barred.

A decree was satisfied out of Court by payment-The decree holder failed to certify the payment to the Court as required by S. 258, C P C and the judgment debtor too failed to apply to the Court within the time limited. The decree-holder then applied to execute the decree, and the Court allowed him to realise the decree-amount in execution overruling the objections of the judgment-debtor as made beyond time. The judgment-debtor then filed a suit for damages against the judgment-creditor for not certifying the payment to the Court.

Held: that the suit was maintainable and that neither S 244 nor S. 258 was a bar to it: (18 Mad 26=19 Mad 230, distinguished).

Periatambi Odayan v. Vellaya Goundan 21 Mad 409=8 M L J 51.

C P C (1908) S.47=(1882) S.244)-*Contd.*

(7) Separate suit lies—*Contd.*

Notes.—Fol 29 Mad 312=16 M L J 33; 17 M L J 527; 30 All 464=1908 W N 220=5 A L J 475. Dist: 16 M L J 54.

669—C P C S 47=S 244-Uncertified adjustment of decree—Separate suit by judgment debtors to recover the property obtained by the decree-holder in execution of his decree—

M obtained decree for possession and mesne profits against the plaintiff. They then made an ekararnamah by which the defendant received his mesne profits plus Rs 168 and relinquished ½ of the property in favour of the plaintiffs. And the remaining half of the property was sold to the judgment-debtor. The heirs of the decree-holder applied for the execution of the decree and inspite of the judgment-debtor's objection that the decree was satisfied, obtained possession of the property. The judgment-debtor brought a regular suit for a declaration of title to as well as for the recovery of possession of the property. The defendants contended that under s 244 C P Code no separate suit will lie. *Held*—that such a suit was maintainable and that S 244 C P Code is not a bar to it. (31 Cal 437 distinguished).

Iswar Chandra Dutt v Haris Chandra Dutt 25 Calc 718: 2 C W N 247.

Notes.—Ref 31 Cal 480.

670.—C P.C. S 47=(1882) S 244—Agreement to share costs.

D and H obtained a decree against S. and L on an award. The decree directed defendants to pay plaintiff's costs. In execution L alleged that the award had been filed with his consent, and that before the proceedings filing it commenced. D and H had entered into an agreement with him that no such costs as the Court would award should be recovered from him; and that if the whole of the costs should not be recovered from S then the deficit should be borne by D and H and himself half and half.

Held that the existence and validity of such an agreement as the above ought to be determined in execution under sec 244 of the Civil Procedure Code and not by a separate suit.

Laldass v. Kishoredas 1896 P J 534= 22 Bom 463.

Notes.—Dist 39 Cal 810 Ref 31 Cal 480; 31 Mad 467=18 M L J 542. Diss 31 Cal 179.

C P C (1908) S.47=(1882, S.244)-*Contd.*

(7) S parate suit lies—*Contd.*

671.—C P C S 47 of 1908=S 244—Separate suit—adjustment not certified—Agreement not to execute a decree—Judgment-debtor's suit to stay execution—C P C S 258.

In 1887 a decree was satisfied out of Court, but the satisfaction was not certified to the court.—In 1840 the defendant applied for further execution of decree. Plaintiff brought suit for declaration that the defendant had no right to execute the decree and for an injunction The defendant contended that s 244 bars the suit. Held that S 244 is not limited by s 258 and that the suit was not maintainable, that where a decree is satisfied by an agreement out of Court and such agreement is not satisfied to the Court, a subsequent suit on the agreement is not maintainable if the object of the suit is to restrain the decree-holder from executing the decree in contravention of the agreement.

Azizan v Matuk Lal Sahu 21 Cal 437.

Notes.—Ap. 22 Bom 463 F B; 8 C W N 395; 31 Cal 480. Dist. 25 Cal 718; 23 Bom 394. Ref: 30 All 254.

672—C P C S. 47 of 1908=S. 244—Suit to set aside a sale on the ground of an adjustment of the decree out of Court—Adjustment not certified—Civil Procedure Code (1882,) s. 258.—

Held, that no separate suit would lie to set aside a sale held in execution of a decree on the ground that the decree had been adjusted out of Court when in fact no such adjustment of decree had been certified in the manner provided by s. 258 of the Code of Civil Procedure. (3 All 538, 13 All 339. distinguished. 9 Cal: 788, and 14 Cal 576 not followed 19 Cal; 695; 21 Cal; 437, and 15 Mad, 302, referred to) **Jaikaran Bharti v Raghunath Singh. 20 All 254**

Notes—Ref: 8 C W N 395: 31 Cal 480.

673—C P C S 47 of 1908=S 244 of 1882.—Agreement not to execute decree—Breach of contract-Suit to recover damages.

The provisions of s. 244 of the Civil Procedure Code are no bar to suit to recover damages for breach of a contract not to execute a decree.

Hanmant Santaya Prabhu v Subbabhat 23 Bom 394.

674.—C P C S 47 of 1908 =1882, S. 244.—Question as to adjustment between decree-holder and third party.

(7) Separate suit lies—*Contd.*

Certain immoveable property having been attached in execution of a decree for money, dated in 1879, directing the sale of such property, *T*, who had purchased such property in 1880, objected to the attachment. His objection having been disallowed, he sued to establish his right to the property and for the removal of the attachment. He claimed on the ground amongst others, that the decree of 1879 had been wholly adjusted. The alleged adjustment had not been certified under s. 258 of the Civil Procedure Code. *Held* that the provisions of that section did not debar the Courts trying the suit from determining, as between *T* and the decree-holder, whether the decree of 1879 had been adjusted or not (3 All, 533, and 3 All 538, followed.) **Tegh v. Amin Chand** **5 All 269.**

Notes:—Dist 10 Bom 155.

675.—C P C S. 47=S. 244 of 1882.—Adjustment of decree—Suit to recover instalments due under a mortgage made in adjustment of a decree.

A suit will not lie to enforce an uncertified agreement of adjustment of a decree against a judgment-debtor, the consideration for which is that it shall operate in satisfaction of the decree, as there is in that case no consideration which the Court can recognize, and therefore no valid consideration for the judgment debtor's agreement. The plaintiff was the assignee of a decree obtained by one O K against the defendants on the 5th May 1883. By that decree O K was declared entitled to recover Rs 9,961-5-6, with interest at nine per cent from the defendants; and payment was ordered to be made to him of the said sum by weekly instalments of Rs 200. In order to secure the payment of the said instalments, the defendants were required to execute a mortgage to O K of certain property with power to him to sell the same, and to execute the decree for the whole amount in case of default for six months. O K assigned the decree to the plaintiff in the present suit and subsequently to the assignment (*viz*, on the 21st July 1883) the defendants executed to the plaintiff the mortgage on which the present suit was brought. The mortgage deed, after reciting the above facts, stated that the defendants had agreed to satisfy the amount of the decree, and it contained a covenant by the defendants that they would pay Rs 9,961-5-6 with interest at six per cent by monthly instalments of R400 from the 21st August 1883. The mortgage, therefore differed from the decree both with regard to the instalments and the rate of interest. The plaintiff sued to recover the sum of Rs 4,207, being the amount of instalments due to him under the said mortgage. *Held* that the suit would not lie, as the mortgage was an adjustment of the decree, and had not been certified to the Court, as required by s 258 of the C P C.

Abdul Rahiman v Khoja Khaki Aruth ruth. **11 Bom 6.**

Notes:—Ap 11 Bom 724. Fol 11 Mad 469. Dist 15 Cal 187 Ref: 20 Cal 32; 21 Cal 437; 12 Bom 235; 13 Bom 171; 21 Bom 122; 22 Bom 463 F B; 31 Cal 480; 8 C W N 395.

676—C P C—S. 47=S. 244 of 1882.

A Court, sanctioning an agreement to give time to a judgment debtor, or recording an adjustment of a judgment-debt, is executing the decree. **Rangji Kashiram v Bhaiji Harjivan.** **(P J 1886, 151=11 Bom 57.**

Notes:—Ap: 16 All 129; 5 M L J 140; 18 Mad 26. Fol: 7 C W N 172.

(75) Satisfaction or part satisfaction out of Court, but not certified.

677—C P C S 47 of 1908=S. 244.—Subsequent execution of decree for full amount—Suit for money previously paid—Civil Procedure Code Act (X of 1877), s 258—Limitation Act (XV of 1877), sch, 11, Art 161.

A suit for the recovery of money paid to a judgment-creditor out of Court in satisfaction of a decree but not certified is barred by s. 244 (c) of Act X of 1877, and by the last paragraph of s. 258 as amended by Act XII of 1879.

Patankar v Devji. **6 Bom 146.**

Notes.—Over 11 Bom 6 F B. 734; Diss 7 All 124 Not Fol; 9 Cal 788; 10 Cal 354. Disap 15 Cal 187. Fol; 10 Bom 155. Ref; 10 Bom 288; 22 Bom 463 F B.

(76) Part satisfaction of decree out of Court.

678—C P C S 47 of 1908=S. 244—Part satisfaction out of Court—Separate suit.

C P C (1908) S. 47 = (1882, S. 244)-*Contd.*

(7) Separate suit lies—*Contd.*

S. 244 cl. [c] of Act X of 1877 does not allow the question as to part satisfaction of a decree to be raised in a separate suit. That section applies to parties or their representatives. But a plaintiff cannot on that ground alone evade the application of the section by adding an unnecessary party. **Kristo Mohinee Dossee v Kaliprosonno Ghose.** **8 Cal 402.**

Notes:—Appl: 14 Cal 809 F B: Con: 11 Bom 313. Ref 13 All 195; 26 Bom 437; 26 Mad 686 F B.

679.—C P C S. 47 of 1908 = S 244 of 1882—Suit to recover money paid-Civil Procedure Code 1877, s 258.

In 1879 a judgment-debtor paid Rs 100 to S, who promised to pay the same to the judgment-creditor and to get the latter to certify satisfaction of the decree to the Court. The money was paid to the judgment-creditor, who not only did not certify satisfaction of the decree, but executed it and again collected the amount from the judgment-debtor. *Held*, following 5 Mad 397, that the provisions of the Code of Civil Procedure, 1877 (prior to amendment), did not debar the judgment-debtor from suing either S on his express promise or the judgment creditor to recover the amount paid by S to the latter. **Musutti v Shekharan.** **6 Mad; 41.**

Notes:—Fol 10 Cal 354. Dist 16 M L J 54. Ref 13 Mad 128; 6 Mad 43; 11 Bom 6 F B; 15 Bom 370.

680.—C P C S. 47 of 19 8 = S. 244—Question as to satisfaction of decree between transferee of decree and judgment-debtor- Civil Procedure Code s. 258.

On an application for execution of a decree being presented by a transferee decree—holder, the judgment-debtor opposed, alleging in his petition that he had transferred certain immoveable property to the petitioner in consideration of his paying the judgment debt to the original decree-holder and that the petitioner had discharged the debt, but subsequently having got the decree transferred to himself instead of entering up satisfaction of the decree fraudulently applied for execution. Satisfaction had not been entered up under s. 258 Civil Procedure Code.

C.P.C. (1908) S. 47 = (1882, S. 244)-*Contd.*

(7) Separate suit lies—*Contd.*

Held that there must be an inquiry into the truth of the judgment-debtor's allegations and if proved the petition for execution must be dismissed and further that s 258 Civil Procedure Code, was inapplicable to the present case since that section applies only to the case of parties who stand in the relation of judgment-debtor and judgment-creditor at the date of the transaction.

Rama Ayyan v Sreenivasa Pattar **19 Mad 230.**

Notes.—Dist 21 Mad 409.

681.—C P C S 47 = S 244 of 1882—Execution-Agreement not to execute a decree—Suit to restrain execution—Civil Procedure Code, Sec. 244—Res judicata—Agreement not to execute regarded as satisfaction of decree—Civil Procedure Code, secs. 257 A, 258, & 373.

Mukund and Antaji were partners, and as such were indebted to Haridas. Antaji died, and subsequently the debt was settled between Haridas on one side and Mukund and Antaji's widow, as guardian of her minor sons, on the other. For a moiety of the debt a bond was passed by Mukund to Haridas and for the other moiety by the widow of Antaji. Haridas filed a suit against Mukund and got a decree, which was satisfied. Haridas then sued the widow on her bond. The Court allowed her objection that she was not competent to give a bond binding her sons personally and of its own accord made Mukund a defendant, and passed a decree against Mukund and Antaji's estate. Haridas assigned this decree to Ramchandra who applied for execution against Mukund. Mukund thereupon filed this suit against Haridas and Ramchandra praying for an injunction against the execution of the said decree and for damages against Haridas. He alleged that during the pendency of the suit in which the said decree had been passed, Haridas had agreed that he would not obtain a decree against him, and that, if such a decree were passed, he would not execute it. The Lower Appeal Court rejected the plaint holding (1) that as between the plaintiff Mukund and the defendant Ramchandra the question in issue was *res judicata*, and (2) that there was no cause of action against the defendant Haridas. On appeal to the High Court.

***Held*, that, as between Mukund and Ram-**

C P C (1908) S. 47=(1882, S. 244)-*Contd.*

(7) Separate suit lies—*Contd.*

chandra, the suit was not *res judicata*. The alleged agreement by its very terms provided for the event of the decree being passed, and was only intended to prevent its being executed. (11 Bom 708, distinguished.) It having been urged that the question was one which could be decided in execution, and that under Sec 244 of the Civil Procedure Code the present suit would not lie.

Held, that the words relating to execution in Sec 244 must be restricted to "the contents of the order made or to how far it has been carried out," and do not, therefore, include an agreement not to execute the decree. It being further contended that the agreement raised a question as to the "satisfaction" of the decree, and was, therefore, void without the sanction of the Court.

Held, that the satisfaction contemplated by Sec. 244 must have arisen out of some transaction between the parties subsequent to the decree.

Mukund Harshet v Haridas Khemji P J 1892 P 29; 17 Bom 23

Notes:—Dist: 21 Cal 437; 22 Bom 267; 463 F B. Fol: 6 C W N 796. Ref: 5 M LJ 140.

682—C P C Ss. 47=S 244 of 1882.

Decree—Uncertified adjustment—Separate suit for declaration.

No suit will lie for a declaration that a decree has been satisfied by private agreement.

Per Curiam

The effect of S. 258 of C P C is to exclude proof of an uncertified agreement in execution proceedings, but not to limit the operation of S. 244 as to having a separate suit. **Bairugulu v Venkayya. 15 Mad 302=2 M L J 112:**

See also 21 Cal 437.

Notes:—Fol: 21 Cal 437: 31 Cal 480; 8 C W N 395; 12 C W N 485. Ref: 20 All 254.

(77) Sanction of Court—Absence of sanction, effect of decree—Entry of satisfaction.

683—C P C S. 47=S. 244 C P C (1882-Ss. 257 A, 258)—An agreement between the decree-holder and the judgment-debtor securing some additional benefit to the former does not become a part of the decree by sanction of Court, but can only be enforced in a separate suit. Without sanction of Court such agreement is void and cannot be enforced either in execution or in a separate suit To hold that the section does not make it void for a separate suit is to defeat the very policy of the section which is intended to protect judgment-debtors from being coerced by threat of execution proceedings to submit to unconscionable extortion by the decree-holders and is also opposed to the clear terms of the section. A sanctioned agreement to give time for the payment of the judgment debt operates as a stay of execution under S. 244. An agreement which adjusts the decree is enforceable in a separate suit, even though sanction has not been obtained if it does not secure the payment of any sum more than the amount payable under the decree. If the sanctioned agreement makes any sums payable towards the decree in any particular manner and payments are so made, such payment should be certified to the Court under S. 258; otherwise such payments will not be recognised in subsequent execution proceedings. The judgment-debtor can only sue for breach of contract if such payments were not given credit for. An application for sanction under S. 257-A is not a step in aid of execution and cannot furnish a fresh starting point of limitation for execution.

Venkatagiri Aiyar v Sadagopachariar 14 M L J 359.

(78) Satisfaction of decree out of Court.

684—C P C Ss 47 of 1908=S. 244 of 1882. Civil Procedure Code, 1877. s. 258.—Suit for damages against decree-holder for execution of decree after satisfaction—

A decree-holder who although he has settled with his judgment-debtor out of Court, yet nevertheless sues out execution against him, will be liable to an action for damages at the hands of the judgment-debtor. Ss. 244 and 258 of Act X 1877 have made no change in the law in this respect. **Guni Khan v Kconjo Behary Sein 3 C L R., 414.**

Notes:—Ap: 9 Cal 788; 7 All 124. Dist: 21 Cal 437. Ref: 11 Bom 6 F B.

(6) Separate suit lies—*Contd.*

(79) Money paid in satisfaction of decree out of Court

685—C P C S. 47 of 1908=S. 244-Civil Procedure Code (VIII of 1859), s. 206

N, having obtained a decree in a suit against K, requested him to discharge certain sums due on outstanding bonds which N had given to third parties, promising to credit the sums so paid to the amount due under the aforesaid decree. *K* paid as requested, but N took out execution in full of the decree; and the Court refused to recognize the payments made by K out of Court. In a suit by K for the money paid as aforesaid,—*Held* that the payments not having been made directly in adjustment of a decree, the suit was not barred within the rule laid down in 3 Mad 188.

Kunhi Moidin Kutti v Ramen Unni. 1 Mad 203.

(80) Value of elephant accepted in satisfaction of decree, but not delivered.

686—C P C S. 47=S 244 of 1882-Separate suit.

The plaintiff held a decree against the defendants, and agreed to take an elephant in satisfaction, the defendants promising, if satisfaction were entered up, to be responsible for the value of the elephant, should it be claimed and recovered by any other person. It was so claimed and recovered, and the plaintiff sued for its value. *Held* that the suit was not barred by s. 11 of Act XXIII of 1861. **Muthra Chowdry v Sheoruttun Mull 6 N W 126.**

(81) Failure to apply within time-Right to maintain a suit not affected—Execution sale-Unincumbered property sold—Presumption.

687—C.P. C. S. 47; O, 21, r 95=(1882 ss.244, 318)—Where 6 annas of a judgment-debtor's property were incumbered and nearly 4 annas were not incumbered and four annas were sold in execution of a simple money decree, held that the incumbered 4 annas must be presumed to have been sold. The presumption is in favour of the auction purchaser having bought unincumbered property so far as it is possible for him to do so

Held further that the fact that the auction purchasers failed to apply within time to be put in possession under section 318 of the Civil Procedure Code, does not deprive them of their right to bring a regular suit. **Sheo Narain v Nurmuhammad 29 All 463=4 A L J 434.**

Notes:—Over: 31 All 82 F B. = 6 A L J 71 = 5 M L T 185=1 Ind Cas. 416. Reversed 5 A L J 20=30 All 72=1908 W N 12.

(7) Separate suit lies—*Concld.*

8. SEPARATE SUIT BARRED.

(1) Question relating to the execution of decree.

688—C. P. C. S. 47= (O. C. S. 244)-Separate suit.

Held, that a party professing to be injured in any way by an execution proceeding is not entitled to obtain relief by a separate suit, if he has not availed himself of a remedy open to him under Section 244. **Gurbachan Singh v Ram Sahai. 8 P R 1902.**

(2) No bar to suit on unsatisfied order of insolvent—Court for costs.

689—C. P. C. S. 47=S. 244 of 1882.

S. 244, C. P. C., is no bar to a suit on an unsatisfied order in insolvency for payment of costs. **Annoda Prasad Bannerjee v Nobo Kishore Roy 1904, 9 C W N 952 at 955= 33 Cal 560.**

(3) Question as to title raised and decided in execution proceedings.

690.—C P C S. 47=S. 244 of 1882.

The question that ought to have been taken in execution proceedings cannot be taken in a seperate suit. **Nimba v. Sitaram Parji Desppande. P J (1885) 67=10 Bom 458.**

Notes.—Ap: 16 Cal 603. Fol: 16 Cal 1. Dist: 11 All 74. Ref: 15 Cal 437; 17 Mad 399; 23 Bom 237; 8 All 626; 13 All 74.

(4) Suit brought under circumstances where the proper remedy was by application under S. 244—Plaint may be treated as application.

691—C. P. C. S. 47=S. 244 of 1882.

Held that in a suit by judgment-debtors to have a sale in execution of a decree set aside under circumstances in which their proper reme-

C P C(1908) S 47=(1882, S.244)-*Contd*

(8) Separate suit barred—*Contd.*

dy was by an application under s. 244 of the Code of Civil Procedure, the plaint may be treated as an application under s. 244 of the Code of Civil Procedure.(22 Cal., 483) followed. (22 Mad, 347) referred to. **Jhamman Lal v Kewal Ram. 19 W N 219; 22 All 121.**

Notes.—Not Fol: 5 Bom L R 1036. Fol: 28 Mad 64. Ref: 32 Mad 425.

692—C P C S. 47=(1882) Civil Procedure Code (Act XIV of 1882), s. 244.

Where a plaint is barred under section 244 C P C, it may be treated as an execution application under that section. **Poonithoth Ammalu Amma v Othalakattil T Mammi Kutti 7 M L T 428 =6 Ind Cas 776.**

(5) Loss or destruction of decree—Regular suit

693—C P. C. S. 47=S. 244 of 1882.

A decree passed for money was lost or destroyed: the decree-holder, on suing out execution, was referred to a regular suit. *Held* that the existence of the decree and of its terms might have been enquired into in the execution department, and that the order of the Court, to which application for execution was made, could not confer jurisdiction on a Court to entertain such a suit. **Ranjeet v Choonee Lall. 1 Agra 78.**

(6) Error of procedure—Jurisdiction.

694—C. P. C. S. 47=S. 244—Same Court.

A sued B and others for the foreclosure of a mortgage of certain lands. It was decided that B was not liable and was therefore entitled to be discharged. But the decree was not drawn up in accordance with the judgment and the claim was decreed against B whose lands were delivered in execution to A. B then applied to the Court to correct the decree and his name was struck off entirely. B now sued to recover possession of his lands on the ground that possession had been given in execution. *Held* on second appeal that as the suit was instituted in the same Court which would have had to determine the matter in the execution department, there was at most only an error of procedure and no exercise of jurisdiction by the Court which it did not possess and that section 244 Civil Procedure Code does not bar the

C P C (1908)-S.47=(1882, S.244)-*Contd.*

(8) Separate suit barred—*Contd.*

suit. (14 Cal 605 approved). **Sadaram v Dhanurjoy 8 C P L R 3.**

(7) Illegal acts done in executing order -Question in execution-Jewels taken but not mentioned in attachment.

695—C P C. S. 47=(1882 s.244)—Bar-Breaking open almyrah.

A claim by a judgment-debtor that the decree-holder in executing decree by attachment of the former's moveable property caused certain almyrahs to be broken and took away jewels without mentioning the same in the attachment list and without crediting the same for the decretal amount is one falling under S. 244, C P C. and must be determined only by the Court executing the decree.

Krishnamurthy Aiyar v Narayanswamy Aiyar 14 M L J 295.

(8) Suit to recover money wrongly realized—Not maintainable.

696—C P C S. 47 of (1908)=s. 244 of (1882).

This was a suit to recover certain money which had been deposited in Court to the credit of the plaintiff, but which money the defendants had got attached and paid to them in the execution of a decree which the defendants held against the present plaintiffs. The plaintiff alleged that he had been specially exempted from the operation of the decree held by the defendants. *Held* that the suit was a suit brought by a judgment-debtor to recover money alleged to have been wrongly realized from him by execution of a decree in a suit to which he was a party and was therefore not maintainable under s. 244 of Act X of 1877. (2 All, 61) **Ramapat Misr v Kalarath Pandey. 1 W N 79.**

(9) Irregularities in the execution of revised decree affecting parties to the original decree.

697—C P C S. 47, O. 21 r. 90=C P C ss 244, 311—Partial review, effect of.

A decree for sale of certain items of property was made against twelve defendants, of whom the 12th defendant was in possession of item 6 of the properties ordered to be sold. Subsequently the 11th defendant applied for a review and the

C P C (1908) S.47=(1882 S.244)-*Contd.*

(8) Separate suit barred—*Contd.*

Court passed a revised decree so far as he was concerned. The decree-holder then executed that portion of the original decree not affected by the review, and in the course of that execution certain irregularities were committed which prejudiced the 12th defendant in the sale of item 6. In a suit by the 12th defendant for setting aside the sale on the ground of material irregularities.

Held: that the review did not nullify the old decree; but that must be taken to have added certain amendments though the two decrees may be on separate pieces of paper; and

That, consequently, the matter was one which ought to be enquired into in execution under Ss. 244 and 311, Civil Procedure Code, and that no separate suit lay.

Manakkal Bhattathiripad v Manakkal Damodaran, 8 M L J 115

(10) Land wrongly given to defendant in another suit.

698—C P C S. 47=s. 244—Separate suit.

The plaintiff sued to recover certain land of which the defendant obtained possession in execution of a decree in a former suit, in which the plaintiff was a defendant, although it was not part of the land mentioned in the plaint or decree in the former suit. *Held* that the plaintiff's suit could not be maintained, and that his only remedy for the wrongful dispossession was a proceeding under s. 11, Act XXIII of 1861. **Muttuvelu Pillai v Vithilinga Pillai 5 Mad H C R 185**

Notes:—Fol 23 Mad 55. Ref: 12 Bom 449; 6 C L J 527

(11) Question whether lands were included in decree.

699—C P C S. 47=S. 244 of 1882.

In 1853 defendant's father obtained a decree for partition against plaintiff's father and others. An application for execution made in 1861 was finally disposed of in 1882, when defendant. No. 2 was put in possession of the land in dispute as comprised in the share decreed to his father. An application then made by plaintiff for the restoration of the land, on the ground that it was not included in the decree passed in favour of defendant's father was rejected. *Held*, that a

C P C (1908 S.47=(1882 S.244)-*Contd.*

(8) Separate suit barred—*Contd.*

separate suit brought by plaintiff to recover possession of the land, was barred by s. 244 of Act X of 1877. (S. 387 of Act VIII of 1859 and s. 6 of Act I of 1868 discussed.) **Raghunath Ganesh Godbolev Mulna Amad. P J 1888; 39=12 Bom 449.**

Notes:—Fol: 15 Bom 177; 18 Bom 46.

(12) Suit for property wrongly taken in execution of decree—Right of suit-Question of jurisdiction.

700—C P C S. 47=S. 244 of 1882.

By s 244 C P Code 1882 a separate suit will not lie to recover lands taken by the decree-holder through the officer of the Court in excess of the terms of the decree. 12 B L R 201 Referred to.

But when the suit is filed in a court having jurisdiction to execute the decree, the plaint may be regarded as an application to determine whether the lands are covered by the decree in the suit does not fail for jurisdiction. (19 W R 90 and 14 Cal 605 referred to and followed) *Held* also that in such a case it is incumbent upon the defendant to raise the plea of jurisdiction in the court of first instance, the question being not a pure question of land but a question which would depend upon facts.

Biru Mahata v Shyama Churn Khawas 22 Cal 433

Notes:—Dist: 5 Bom L R 1036. Fol 22 Mad 347; 22 All 121. Ref 32 Mad 425; 22 Mad 494; 9 M L J 37; 18 All 106; 22 All 376; 8 C W N 49; 28 Mad 64: 5 C L J 328; 8 C L J 20

(13) Suit against auction purchaser to set aside sale—Barred except in execution proceedings.

701—C P C S. 47=(1882 S. 244)

It is well settled that, as between the judgment-debtor and the decree-holder, an objection to the sale in execution can only be taken in execution under S. 244 C P C. A suit against an auction purchaser is not maintainable, as S. 244 is a bar to set aside the sale except in a proceeding between the parties.

Where the decree is a mortgage-decree the purchaser in execution will be the representative

C P C (1908) S 47=(1882 S.24)-*Contd.*

(8) Separate suit barred—*Contd.*

of the judgment debtor. But in case of a money decree a stranger purchasing the property obtains the rights of the judgment-debtor in the property but is not the representative even of the judgment-debtors, still less can he be the representative of the decree-holder. **Nadamuni Narayana Iyengar v Veerabhadra Pillai, 8 Ind Cas 429.**

(14) Claim to set aside sale as wrongly made.

702—C P C S. 47 of 1908=S. 244.–Decree for sale of land—Objections by representative of deceased judgment-debtor in his own right disallowed—Order reversed on appeal—Claim under s. 278 rejected.

S mortgaged four properties to *M*. *M* obtained a decree against *S* ordering the sale of the properties. *S* died, and *K* was brought in as his representative under s 234 of the Code of Civil Procedure. *M* applied for execution against the four properties as assets of S. *K* objected to the sale of three properties on ground of one being his own acquisition and two remaining being tarwad property. The District Munsif investigated these questions under s 244 of the Code of Civil Procedure, and directed that execution should proceed against all four properties. The District Judge on appeal reversed the decision saying that the Munsif had no power to decide the point and that the proper course for the judgment-creditor was to attach the properties and for the appellant to make a claim under s 278. Eventually the properties were attached and sold and bought by the fifth respondent. Plaintiff brought a suit to concel the sale. *K* thereupon brought a suit to cancel the sales. *Held* that by virtue of s. 244 of the Code of Civil Procedure, the suit would not lie.

Kuriyali v Mayan 7 Mad 255.

Notes:—Ap: 16 Cal 1; 603; 19 Cal 683 P C. Fol: 22 Mad 131; 19 Bom 328, 23 Bom 237. Con. 10 Mad 117 Expl: 16 M L J 545; [1904] W N 61; 26 All 447 F B. Dist 19 M L J 401. Ref: 15 Cal 437; 11 Mad 413; 17 Mad 399; 23 Mad 195 F B: 22 Bom 463; F B 25 Bom 631; 8 All 626; 9 All 605; 30 Mad 26; 32 Mad 429.

C P C (1908) S.47=(1882 S.244)-*Contd.*

(8) Separate suit barred—*Contd.*

(15) Claim to have sale set aside as being under barred decree.

703—C P C S. 47 of 1908=S. 244—Separate suit.

A separate suit will not lie to have set aside a sale made in execution of decree barred at the time of execution; the invalidity should be declared in proceedings in execution as provided in s. 11, Act XXIII of 1861. **Nojabut Ali Chowdhry v Moha Busseeroollah Chowdhry. 11 B L R 42: 20 W R 5.**

See **Golam Asgar v Lakhman Debi. 5 B L R 68: 13 W R 273.**

and **Zameer Sirdar v Asseemooddeen Sirdar. 23 W R 257.**

Urdub Churn Debta v Sookdeb Debta. 24 W R 45.

(16) Claim to have sale set aside as fraudulent.

704—C P C S 47 of 1908=S. 244—Suit by judgment-debtor against judgment-creditor and purchaser to set aside fraudulent sale.

A judgment-debtor who claims to have a sale of his land set aside on the ground of fraud committed by the judgment-creditor, who procured a sale without advertisement, and purchased the property without leave of the Court, is debarred from bringing a suit to set aside the sale, inasmuch as the question is one arising between the parties to the suit and relates to the execution of the decree within the meaning of s 244 of the Code of Civil Procedure, 1877. **Viraraghava Ayyangar v Venkata Charyar. 5 Mad 217.**

(17) Suit to set aside sale on ground of fraud.

705—C P C—S. 47=S. 244 of 1882 and 89 T P Act—Decree nisi not absolute—Ss. 311 and 312 C P Code.

A mortgage-decree directed the sale of the mortgaged property in accordance with S. 88 and 89 of T P Act. The judgment-debtor brought a suit to set aside the sale on the ground of fraud of the judgment-creditor in not making the due proclamation of the sale. The defendant contended that until the decree absolute be made for the sale the right of the mortgagor to redeem existed and the suit might be regarded as a suit for redemption.

C.P.C.(1908)-S 47=(1882, S.244)-*Contd*

(8) Separate suit barred—*Contd.*

Held—on the authority of 17 Cal 761, the suit was not maintainable. An order of sale in such a case would be sufficient authority under s 89 T P Act even if the order did not take the form of decree such as is prescribed for a decree absolute in the case of a suit for foreclosure. Siva Persad Maity v Nundo Lall Kar Mahapatra 18 Cal 139

Notes:—Fol: 28 Cal 73 Ref: 25 Mad 214 F B: 300 F B, Dist: 23 Cal 931; 15 Mad 384.

706—C P C—S. 47=S 244 of 1882—Sale in execution of a decree for arrears of rent—Suit to set it aside on the ground of fraud—Right to suit—C P Code s. 311.

A and *B* were two registered tenants of a landlord of whom *B* died leaving C P and *E* his sons & heirs who made no application for the mutation of their names in the landlord's sherista. Dispute arose as to rents and *A* and *B* deposited certain amount in Court for rents. The landlord brought a suit for the arrears of rent against *A* and *C* and obtained an *ex parte* decree and in execution of the unsatisfied part of the decree purchased the holding himself. *A* and *B* applied under S 311 to set aside the sale alleging that the decree was executed fraudulently that sale proclamation was suppressed, that the decree was incapable of execution in the manner adopted that it could be executed only against the amount deposited in Court which was quite sufficient to satisfy the decree in full. The application was unsuccessful. *A*, *C*, *D* and *E* instituted suit to set aside the sale *Held* -as regards *A* and *C* the suit will not lie. *Held* as regards D and *E* that they were not parties to the rent suit or the execution proceedings held therein and although as the heirs of a deceased tenant who had not got their names registered in the landlord's sherista, they might not be able to question the decree obtained for arrears of rent, they were not thereby precluded from contesting a sale on the ground that it had been fraudulently obtained and that it was competent to them, at any rate, to sue for a declaration that the sale in question did not in any way affect their rights. Jagan Nath Gorai v Watson & Co 19 Cal 341.

Notes.—Dist: 21 Cal 605. Ref: 1 Bom L R 743

707-C P C S 47=S. 244 of 1882-Suit to have an

C.P.C. 1908-S 47=(1882, S 244)-*Contd*

(8) Separate suit barred *Contd.*

execution sale of land set aside—Purchaser at sale sought to be set aside—Fraud, allegation of.

Where questions are raised between the parties to a decree relating to its execution, discharge, or satisfaction, the fact that the purchaser at a judicial sale, who is no party to the decree of which the execution is in question, is interested and concerned in the result, has never been held to prevent the application of s 244 of the Civil Procedure Code, limiting the disposal of these matters to the Court executing the decree. The plaintiffs, in a suit to have the judicial sale of a zamindari set aside, alleged that the decree-holder, in part satisfaction of his decree, had received from them and other co-sharers, in the zamindari, their proportionate amounts of the debt decreed, and had agreed that their shares should be exempted from the execution sale about to take place; that the sale took place, subject to that exemption; that the decree holder, however, with whom some of the co-sharers and the purchasers colluded, fraudulently had the sale set aside, revived the attachment, and caused a second sale, at which all the shares in the zamindari were sold. *Held* that the question, besides that the charge of fraud was not sufficiently specific, was determinable, in virtue of s. 244 of the Code of Civil Procedure, only by order of the Court executing the decree. Prosunno Kumar Sanyal v Kali Das Sanyal 19 Cal 683; L R 19 I A 166.

Notes:—Fol: 1 C W N 656; 3 C W N 6; 21 Cal 447; 25 Cal 175; 26 Cal 424; 539; 18 Mad 439; 23 Mad 55, 22 All 86; 108; 23 All 478, 6 C W N 279; 983; 24 All 209; 25 Bom 418; 31 Cal 480, 12 C W N 485; 11 Bom L R 699. Dist: 20 Mad 487; 8 M L J 7; 31 All 82 F B. Ex: 2 All 450. Ref: 21 Cal 940 F B; 24 Cal 62 F B; 473; 707; (1904) W N 6; 31 Cal 737 6 Bom L R 69; 26 All 447. 4 C W N 538; 22 Bom 46; F B. 23 Bom 237; 1 Bom L R 71, 25 Bom 631; 18 All 163; 20 All 254; 25 Mad 529; 7 C W N 593; 24 All 2 9; 8 W N 39; 9 C W N 134; 27 All 702=2 A L J 461=(1905) W N 62; 5 C L J 328; 490 F B; 34 Cal 642 F B; 9 Bom L R 16; 11 C W N 593 F B; 17 M L J 39; 9 Bom L R 15, 31 Mad 207; 30 Mad 507; 30 All 72=(1908) W N 12=5

(8) Separate suit barred -*Contd.*

A L J 20; 32 Mad 429; 19 M L J 401; 36 Cal 130; 6 A L J 71 F B.

708—C P C S. 47 of 1908=S. 244, of 1882.

Suit for setting aside a sale on the ground of fraud—When a third party is the auction purchaser.

S. 244 does not allow a suit to set a side an execution sale on the ground of fraud even when the real or nominal auction-purchaser, is a person not a party to the original suit. (19 Cal 683; L R 19 I A 166 followed). **Moti Lal Chakerbutty v Russ ck Chandra Bairagi** 26 Cal 328, note 3 C W N 395.

Ram Narain Tewari v Sheo Bhunjan Roy 27 Cal 197

Nemai Chand Kanji v Deno Nath Kanji. 2 C W N 691.

Notes:—Appr: 6 All 417 F B. Fol: 26 Cal 324; 27 All 702=2 A L J 459=(1905) W N 162. Ref: 27 Cal 1.7; 24 All 239; (1904) W N 61; 26 All 417; 5 C L J 328

(18) Public Demands Recovery Act (I of 1895) s. 10 Notice, non service of, effect of—Sale nullity-Suit to set aside—If bars a suit to set aside a certificate sale.

709—C P C S. 47—Limitation Act (XV of 1877), Art. 12—Civil Procedure Code (Act XIV of 1882), section 244, if bars a suit to set aside a certificate sale.—

If a notice under section 10 of the Public Demands Recovery Act has not been duly served the certificate is illegal and void, and the sale based thereon is a nullity.

The person whose property has been sold without service of notice under section 10 is entitled to sue for recovery of possession within twelve years from the date of dispossession.

Where by reason of omission to serve a notice under section 10, there is no legal decree and no legal sale a suit to set aside the sale and to recover possession of the property sold is not barred by section 244 of the Civil Procedure Code.

Elokeshi Dasi v Abinash Chandra Bose. 5 C L J 638.

(8) Separate suit barred—*Contd.*

Notes:—Ref: 11 C W N 756 F B; 34 Cal 811 F B; 5 C L J 696 F B.

(19) Suit to set aside a sale in execution of a certificate.

710—C P C S. 47=C P C (Act XIV of 1882) Sec. 244.—

Under the Public Demands Recovery Act (I of 1895 B. C as amended by Act I of 1897 B. C) section 19, Section 244 of the Code of Civil Procedure is applicable and bars a separate suit when the only grounds alleged for setting aside a sale are irregularities not in the proceedings anterior to decree or in the decree which is sought to be executed, but in the execution proceedings subsequent to decree.

Umed Ali Bhuya v Raj Lakshmi Debya. 33 Cal 84=10 C W N 130=1 C L J 538.

Notes:—Dist: 32 Cal 1130=1 C L J 542. Not Fol: 34 Cal 787. Fol: 5 C L J 555. Ref: 5 C L J 696 F B; 235; 240 F B; 11 C W N 745; 34 Cal 811 F B. Fol: 5 C L J 555.

(21) Irregular attachment and sale—Remedy in execution—Suit to set aside sale not maintainable.

711—C P C S. 47 (=Civ. Pro. Code, 1882, s. 244)—

Where a mortgage-deed was attached and sold as moveable property in execution of a decree, the question was one arising between the parties to the suit in which the decree was passed and relating to the execution of the decree within the meaning of s. 244 and a suit to set aside the sale was not maintainable. **MT Janki v Sarangdhar.** 7 C P L R 14.

(21) Decree for sale against Hindu father—Suit by son—Sale Carried out and confirmed—Suit by mortgagor to set aside not maintainable.

712—C P C S. 47 (=s. 244, Civ. Pro. Code, 1882)—Injunction taken out to stay sale of 1½ biswas.—

Two person mortgaged their property (4 *biswas*) to appellants, who obtained a decree for sale. The sons of the mortgagors brought a suit for

C P C (1908) S. 47=(1882, S.244)-*Cont d*

(8) Separate suit barred—*Contd.*

exemption of their shares. They obtained an injunction for staying the sale with the exception of 1½ *biswas*. But 1½ *biswas* were sold and sale confirmed. The claim of one of the sons was decreed and one *biswas* was exempted from sale. The mortgagors brought this suit to set aside the sale of ½ *biswas* held during the pendency of their sons' suits. *Held*, that the sale having been held under an order absolute, which was in full force the fact that the sale was held during the pendency of a temporary injunction did not render the sale *ab initio* void. *Held*, further, that the remedy, if any, of the mortgagors-judgment-debtors was by an application and not by a suit **Himmat Singh v Hardyal Singh. 2 A L J 694.**

(22) Auction sale setting aside of—Notice under s. 248, service of, object of—Objection not raised in first Court.

713—C P C S 47; O.21 rr 22, 90=Ss. 244, 248, 311—Limitation Act (Act X of 1877), Sch. 11, Arts. 11, 178.

Where an auction-sale was impeached on the ground that the attachment was not properly levied and the sale proclamation had not been served.

Held, that an application to set aside a sale, on the ground that a notice under S 248 of the Civ. Pro. Code, 1882, had not been served, could not be made under S. 311 of the said Code, when the validity of the sale was not attacked on the ground that there was irregularity in the publication or conduct of the sale. As the question of the validity of the sale was a matter relating to the execution of the decree and arose between the parties to the suit, the appropriate procedure was not by way of suit to be brought within one year from the date of the sale, but by way of application to be made under S. 244, and such application might be made within three years from the date of sale under Art. 178, Limitation Act.

The object of the service of the notice under S. 248 of the Code is not merely to give the judgment-debtor an opportunity to show cause why the decree should not be executed, but also to give an opportunity to satisfy it before execution issues.

Where the omission to take any objection as to the non-service of notice under S. 248 of the Code has not prejudiced the auction-purchaser, the appellate Court is justified in entertaining the objection. (1910) 11 C L J 489 Ref. **Lakshmi Charn v Srish Chandra Roy. 13 C L J 162 =9 Ind Cas 584.**

(23) Execution on the ground that the real purchasers were the decree holders who had not obtained leave to bid—Proper remedy.

714—C P C S. 47; O 21. r. 72=(1882 Ss. 244, 294)—Bar—Procedure—Suit to set aside sale in execution on the ground that the real purchasers were the decree-holders who had not obtained leave to bid—Proper remedy by application.

The plaintiff sued to set aside a sale of certain property in execution of a decree against him on the grounds that the sale proceedings had been secretly brought about without the knowledge of the plaintiff, and that the certified auction-purchasers were benamidars for the decree-holders, who had not obtained permission to purchase. *Held* that under the above circumstances the plaintiff's remedy was not by suit, but by application under s. 244, and the last clause of S. 294 of the Code of Civil Procedure. (5 Mad 217; 16 Mad 287; 11 Bom 558; 22 Bom 271; 15 Mad 389, 10 Cal 757; 17 C L 769; 19 Cal 683 and 26 Cal 324 ref to). **Durga Kunwar v Balwant Singh. 1901 A W N 175=23 All 478.**

(24) Suit by judgment-debtor to set aside sale.

715 C P C—(1908) S 47=S 244 of (1882) —Fresh suit.—Civil Procedure Code, s 244.

A judgment-debtor sued the decree holder for recovery of possession of certain land which had been sold in execution of the decree and to set aside the sale, on the ground that the land was not liable under section 9 of the N.-W.P. Rent Act, to sale in execution of decree. *Held*, that the question at issue between the parties was clearly one relating to the execution and satisfaction of the decree, and that the suit was therefore barred by the provisions of section 244 of the Civil Procedure Code. **Janki Singh v Ablak Singh. 6 All 393.**

(25) Sale in execution—Confirmation—Suit to set aside.

416—C P C—S.47=(1882 s. 244)—Bar.

(8) Separate suit barred *Cont'd.*

An objection to the confirmation of an execution sale on the ground that a petition to set aside the sale was compromised by the judgment-debtor's son without authority must be urged in execution and a separate suit to get rid of sale is barred by S 244 C P (I L R 16 All 169 foll).

Adhar Singh v Sheo Prasad 1902 A W N 18=24 All 209

(26) Suit to set aside certificate of sale on ground of irregularity—Barred.

717—C.P.C.S 19=C P C, S. 244, applicability of.

When the copy of the certificate and the notice prescribed under Sec 10 of Act I of 1897 (B C) are issued and duly served the certificate has the force of a decree, and sec 19 of Act I of 1897 (B C) as amended by Act I of 1897 (B C) makes the provisions of sec 244 of the Code of Civil Procedure applicable to proceedings for enforcing the certificate, which bars a separate suit to set aside a certificate sale on the ground of irregularity, (6 C W N 331 Dist).

Art 12(b), sch II of the Limitation Act applies to a suit to set aside such a certificate sale and the period of limitation is one year

Barhamdeo Narayain Singh v Bibi Rasul Bandi. 1 C L J 360=32 Cal 691.

Notes—Doubted 32 Cal 1130=1 C L J 542 2 C L J 501 Ref 5 C L J 96 F P 11 C W N 715 736 F B, 5 C L J 240 F B, 34 Cal 787, 811 F B.

(27) Judgment-creditor buying without Court's permission—No separate suit by Judgment debtor.

718—C P C S 47——A judgment debtor whose property has at a Court sale been brought by the judgment creditor without leave of the Court cannot bring a separate suit as his case falls clearly under S 244 section 244 provides expressly a remedy by application **Genu v Sakharam 1896 P J 393**

(28) Regular suit to set aside summary order.

719—C P C *S 47=S. 244*—Application in summary suit

(8) Separate suit barred—*Contd.*

A person who, in the course of executing a decree, had been put out of possession by an order under rules 69, Act VIII of 1859, and who was compelled to pay the costs of that order, brought a regular suit for its reversal and obtained a decree, which was silent as to the costs of the summary order in consequence of the plaintiff not having demanded them subsequently the plaintiff made an application in the summary suit that the costs of the summary order should be repaid to her *Held* that the Court had no power to entertain it under s 11, Act XXIII of 1861

Toyboon v Mahomed Wajid. 2 C L R 504.

(29) Suit to set aside order in execution of decree.

720 C P C *S* 47=S 244—Where the object of the suit was to set aside orders passed in the miscellaneous department relating to execution of decree,—*Held* that such suit was untenable, s 11, Act XXIII of 1861, having distinctly prohibited all remedy by separate suit and the remedy provided being an appeal from the order complained of.

Amrit Koonwar v Luchmee Narain. 1 Agra, 93.

(30) Order cancelling an execution sale of land—Subsequent suit for possession brought by judgment debtor.

721—C P C S 47 O 21, r 72=(ss 244, 294)—Purchase by decree holder without leave—Re-delivery in execution proceedings—Bars separate suit.

Where a sale of property, in execution of a decree, which is purchased by and put in possession of the decree holder, is set aside at the instance of the judgment debtor on the ground that he had not obtained leave to bid·

Held, that the judgment debtor is entitled to re-delivery in the execution proceedings, and cannot maintain a separate suit **Veeraraghava Aiyangar v Venkata Chariar. 16 Mad 287=3 M L J 25.**

Notes· Fol 23 All 478 Dist. 18 Mad 13, 19 Mad 29, 13 M L J 354. Ref: 21 Cal 789.

C P C (1908) S 47=(1882, S 244)-*Contd.*

(8) Separate suit barred-*Contd.*

(31) Suit for cancellation on the ground of fraud of a sale held in execution of a decree—Proper remedy by application

722—C P C S 47=(1882 s 244) Bar-Execution of decree

Certain judgment debtors brought a suit against the decree holders and the auction purchaser for cancellation of a sale held in execution of a decree, upon the allegations that the sale in question had been brought about by fraud the decree having in fact been previously satisfied *Held* that such a suit would not be the plaintiff's remedy being by application under S 244 of C de of Civil Procedure. (L R 19 I A 16, 22 All 86, 22 All 108, 26 Cal 824 and 26 Cal 826 referred to) **Mathura Das v Lachman Ram.**

1902 A W N 43=24 All 239

Notes—Ref (1904) W N 61 26 All 147, 6 All 101, 447 F B. Fol W N (1907) 6, 4 A L J 142.

(32) Attachment released on the ground of tarwad property—Suit for cancellation of the order.

723—C P C S 47=(1882 s 244)—Bar

A sued a karnavan, as karnavan for a decree and attached tarwad property in execution The property was released from attachment on petition by defendants. A sued for the cancellation of the order releasing it from attachment *Held* that the suit was barred by s 244, C P C **Kamal Kutty v Ibray** **24 Mad 658**

Notes.—Ref 17 M L J 277 R I 33 Mad 125

(33) Compromise for larger amount than that claimed

724—C P C S 47 of 1908=S 244 of (1882.) *Held* that the parties to an action may enlarge by consent or compromise the original claim By consent of the parties and the leave of the Court an action may be amended to cover an increased claim A suggestion was thrown out that a Court having made a mistake in law may properly in an application for review reconsider its order. **Mohibullah v Imami 7 W N 19, 9 All 229.**

Notes—Ref 17 M L J 255, 30 Mad 421.

C P C (1903 S 47=(1882, S.244)-*Contd.*

(8) Separate suit barred *Contd.*

(34) Contract superseding decree

725—C P C S 47 1908=S 244, Separate suit

In the course of proceedings in execution of a decree by which a simple mortgage of immoveable property was enforced the judgment debtor made an application to the Court executing the decree, dated in April 1877 stating that the decree had been partially satisfied by the sale of a part of the mortgaged property, that the decree holder had remitted a portion of the decree; that the balance should be paid by a certain date and that a certain banker had given a note of hand for the payment of interest on the balance at a certain rate The judgment debtor then stated as follows "So long as the petitioner does not pay the money to the decree holder, *i, e*, during the term fixed above,—the banker shall pay interest to the decree holder, the decree-holder shall not have power to take out execution within the said term, but after the expiry thereof he shall be at liberty to realize his money together with interest from the petitioner and his property by executing the decree, excepting the property sold all the property mortgaged and attached under the decree shall continue so to be engaged in attachment, the decree holder's pleader has affixed his signature at the foot of this petition showing that he consents to it, the petitioner therefore prays that the case may be struck off as partially executed" The decree-holder subsequently sued the judgment debtor to recover the balance of the decree, claiming under the arrangement set forth in the petition of April 1877, as a contract superseding the decree *Held*, having regard to the terms of that petition, that no new contract superseding the decree was either intended or effected and the suit was consequently not maintainable (3 All 781 distinguished; 4 All 240 S A No 5 of 1882 Weekly Notes, All 1883, P, 93, and 6 All 16 followed) **Makund Ram v Makund Ram**

6 All, 228,

Notes—Ref 12 All 571.

(35) Compromise effected by fraud.

726—C P C S 47=S, 244—Separate suit—Practice-Power of Court to vacate any judgment or order procured by fraud.

(8) Separate suit barred—*Contd*

The plaintiff held two decrees against the defendant for Rs 5,490-1-6 and applied for execution. The defendant, by misrepresentation, induced the plaintiff to receive Rs 3,900 only in full satisfaction of those decrees and to withdraw the application. The plaintiff, on discovering the misrepresentation, brought this suit to recover the difference. *Held* that the suit was barred by s. 11 of Act XXIII of 1861 (which corresponds with s 244 of Act X of 1877), the question between the parties being a question relating to the execution of a decree. It is always competent to any Court to vacate any judgment or order, if it be proved that such judgment or order was obtained by manifest fraud; and in the case of orders made in execution s 11 of Act XXIII of 1861 excludes all other remedy. **Paranjpe v Kanade.**

6 Bom 148.

Notes:—Ap 11 Cal 376, 17 Cal 769 F B. Fol: 9 Bom 468 Ref: 19 Mad 230.

(36) Consent decree—Execution proceedings—Separate suit.

727.—C P C *S.* 47=(1882 s. 244).

A consent decree declared the defendant the absolute owner of properties in dispute, but granted a concession to the plaintiff that if he could purchase the property from the defendant at a certain rate by a certain specified date he should be at liberty to do so, but that if he failed to do so by that date the defendant was to remain an absolute owner. The plaintiff failed to do his part and later on filed a suit to have determined and declared his rights under the decree.

Held, (1) that the suit could not be treated as a suit for redemption, since from the date of the consent decree the relation of mortgagor and mortgagee no longer subsisted between the parties; (2) that the question between the parties was one covered by S 244 of the Civil Procedure Code and should therefore be decided in execution proceedings under the consent decree and not by a separate suit and (3) that it was not competent to the Court to entertain the suit and treat it as an application for execution.

Nowrojee v. Bapuji. **5 Bom L R 1036.**

Notes.-But on the third point See S. 47 of the New Code.

(8) Separate suit barred—*Contd.*

(37) Refund of purchase money.

728.-C P C S. 47 of 1908=S, 244—Separate suit-Adjudication of judgment-debtor as bankrupt and order not to deal with property.

A sale on the 4th March 1871, of certain property sold in execution of a decree obtained by *A* having been confirmed on the 5th May 1878 notice was on the 31st May received that the judgment-debtor had been adjudicated a bankrupt in London and an application was made to the Court to abstain from dealing with his property. All proceedings were thereupon stayed and on the 8th of July 1878 the purchaser applied to the Court for a refund by the present plaintiffs who were the administrators of *A* of his purchase money and on the 19th of the same month an order was made for such refund. The amount was refunded without protest by the plaintiffs, who then sued the purchaser and the original judgment debtor to recover the amount paid by them. *Held* that the suit would not lie, but that the question was one to be determined under s 244 of the Civil Procedure Code by the Court executing the decree.

Solano v Ahmeida. **10 C L R 573.**

(38) Refund of money wrongly realised under decree.

729.-C P C S 47=S 244 of 1882.—Separate suit—Civ Pro Code, 1877 s 244.

Moneys realized as due under a decree if unduly realised are recoverable by application to the Court executing the decree and not by separate suit. **Partab Singh v Beni Ram.**

2 All 61 F B.

Taj v Ganga Prashad. **2 Agra 45.**

Notes:—Dist: 5 All 94, 7 All 170 F B. Fol: 27 All 291.

(39) Refund of money paid out of Court.

730.—C P C S. 47 of (1908)=S. 244 of (1882)

Held, that a separate suit for refund of the money paid out of the Court, in satisfaction of a decree is inadmissible under the provisions of Section 6 Act VIII of 1859, and Section 11, Act XXIII of 1861. The question should have been raised and decided in the Miscellaneous Department, when execution was sued out, which not

(8) Separate suit barred-*Contd.*

having been done the suit was barred by the aforesaid sections. **Tag v Gunga Pershad. 2 Agra Rep 45.**

(40)—Co-defendants—Separate suit—Order to refund purchase money.

731.—C P C S. 47=S. 244 of 1882.

A judgment-debtor alleging that his right as occupancy tenant of certain land had been sold in execution of the decree, sued the decree-holder and the auction purchaser to set aside the sale as illegal under s.9 of the North Western Provinces Rent Act. The Court of first instance decreed the claim, and ordered the defendant decree holder to refund the purchase money. *Held* that, as between the defendant decree holder and the plaintiff, the question at issue was one arising between the parties to the suit in which the decree was passed and relating to the execution, discharge or satisfaction of the decree, and was therefore under s 244 of the Civil Procedure Code to be determined by the Court executing the decree and not by separate suit. 6 All 393, followed. *Held* also that, apart from this consideration it was beyond the lower Court's powers, to make an order directing the decree holder to refund the purchase money that being a matter between two co-defendants which was not raised and could not be decided in the present suit.

Ram Gopal v Khiali Ram. 6 All 448.

Notes.—Dist 7 All 641.

(41)—Failure to execute decree-Suit after omission to execute decree.

732.—C P C S. 47=S 244 of 1882.

Plaintiff's father purchased a house on the 11th June 1854 at a sale made under a decree against G D but was not put into possession of it; accordingly in 1866 he obtained a decree for possession which however was never executed. The defendant in 1870 obtained possession of the house by another sale made in execution of another decree against G D. The present suit was instituted by plaintiff in 1871. *Held*, that not only was the remedy on the cause of action, which accrued in 1854, and the decree of 1866 barred, but also that Act XXIII of 1861, s. 11, prevented the plaintiff from bringing a new suit

(8) Separate suit barred—*Contd.*

on the fresh cause of action accruing to him under the decree of 1866, as that section "took away from the parties to the suit the right to raise by a fresh suit any question as to their rights and liabilities under the decree." (5 Mad 375. followed). **Kisan Nandram v Anandaram Bachaji. 10 Bom H C R 433.**

Notes:—Ref: 6 Bom 7; 7 Bom 467; 26 Mad 300 F B.

(42) Suit for possession after failure of attempt to execute decree giving possession

733—C P C S. 47=*S.* 244 of 1882—Separate suit.

The ancestors of the plaintiff brought a suit in 1821 before the Registrar of the Adawlut Court to eject the defendant's grand-father from a piece of ground. The Registrar found that the defendant was a tenant under the plaintiff at a monthly rent, and the Court decreed that defendant should remain in possession so long as he should continue to pay the rent regularly, and that in default of payment the plaintiff should be placed in possession. An attempt to obtain possession in execution of that decree in 1861 failed, and the plaintiff brought a suit to recover possession with arrears of rent. *Held* that s 11 of Act XXIII of 1861 precluded the plaintiff from maintaining the suit. **Rungunsary v Shappani Asary. 5 Mad H C R 375.**

Notes—Fol: 10 B H C R 433; 22 Bom 267 Ref: 6 Bom 7.

(43) Suit for possession which might have been had under decree.

734—C P C—S. 47=S. 244 of 1882-Separate suit.

A suit will not lie for possession of land of which the plaintiff should have been, but was not put in substantial possession in execution of decree. His remedy is to further execute his decree. **Kisto Gobind Kur v Gunga Pershad Surmah 25 W R 372.**

Lolit Coomar Bose v Ishan Chunder Chuckerbutty. 10 C L R 258.

C P C (1908)-S.47=(1882,S 244 -*Contd.*

(8) Separate suit barred *Contd*

Notes—Fol 10 C L R 258 Ex 12 C 1 161 Con 10 Mad 53. Ref to C 1402, 11 Cal 93

(44) Payment of such sum.

735—C P C—S 47=S 244—Decree for possession of land on payment of a specific sum of money—Declaratory decree—Suit for possession of the land on payment of such sum.

C in 1867 obtained a decree for possession of a share in a village subject to the payment of Rs 185 In 1889 his heirs sued for possession of the share on payment of the sum They did not sue as if to redeem a mortgage existing prior to the passing of the decree They sued as if the decree was a mortgage, and the relief they claimed was to redeem it as such *Held* that the decree was not a declaratory decree but one capable of being executed. *Held*, also, that the suit was barred by the provisions of s 244 Civil Procedure Code **Farid Ahmad v Tawakkal** S C 238

Notes—Referred to in S C 256 Distinguished and not approved in I O C 203 effect of Settlement Court Decree for redemption

736—S. 47=S 244 of 1882—Separate suit—New cause of action.

A plaintiff who has obtained a decree declaring him entitled to the possession of immoveable property must, under s 11 of Act XXIII of 1861 proceed by execution of the said decree, and not otherwise, if he neglect to do so till he is time barred, he cannot, any the more on that account bring another suit for possession of the same property, whether founded on the old decree in his favour or on the continued occupation of the said property by the defendant. **Nasrudin v Venkatesh Prabhu** 5 Bom 389

737—C P C -S 47=S. 244 of 1882—Separate suit

In execution of a decree for the recovery of certain lands from the plaintiff within specified boundaries, the defendant took possession of land as being covered by the decree, the possession being given him by an officer of Court Thereafter the plaintiff preferred a complaint that the defendant had taken illegal possession, as the land was not covered by the decree, but the Court rejected

C P C (1908)-S.47=(1882,S.244)-*Cont d*

(8) Separate suit barred—*Contd.*

his application The plaintiff then brought a suit to recover possession of the lands, which he alleged had been wrongfully taken under the defendant's decree *Held* that the suit would not lie The matter was a question arising between the parties relating to the execution of the decree under s 11 Act XXIII of 1861, and should therefore have been the subject of an application to the Court which made the decree **Jogendro Narain Coomar v Surnomoyee** 12 B L R 203 note 14 W R 39.

See Kishen Scoundr Roy v Prosunnonath Chuttopadhyaya W R 1864, 208.

Notes—See 14 W R 39.

738—C P C S 47=(1882 S 244)-Bar—Decree-holder—Purchaser Application for delivery rejected—Suit for possession—Maintainability

A suit by the decree holder purchaser for possession of land against the judgment debtor after a previous application by him under s 318, P C for delivery of property has been rejected is barred, having been made more than 3 years after the confirmation of sale is barred by S 244 C P C (13 Mad 501 24 Mad 185 25 Mad 529, 27 Cal 34 followed). **Markanat v Palakal Raman** 13 M L J 237

(45) Suit for possession of property purchased not maintainable.

739—C P C S 47 O 21 r 95—(1882-Ss 244 318—Purchaser at auction—Representative of judgment debtor.

The plaintiffs purchased the property in dispute in execution of a decree Seven years latter, they applied for delivery of possession The application was dismissed as time barred They then brought the present suit for possession, *held*, that the purchaser under a sale in execution of a decree is a representative of the judgment-debtor and is precluded by the provisions of S, 244 of the Code, from instituting a suit for possession of the property purchased by him under the sale. **Kalian Singh v Thakur Das.** 3 A L J 234= A W N (1906), 87.

(46) Agreement between decree holder who is auction purchaser and judgment debtor not to take possession of property.

740—C P C S 47, O 21, r 95 (=Civ Pro Code, 1882, ss. 244, 318),

(8) Separate suit barred—*Contd*

In execution of a hypothecation decree, the decree-holder became the auction purchaser of the hypotheca He entered into an agreement with the defendants not to take possession of the property as he had been paid Rs 1,100 In spite of this, the auction purchaser applied under s 318, Civ Pro Code, for removal of obstruction and to be put in possession *Held* that the question as to the genuineness of the agreement could be gone into by the executing Court under s. 244, Civ Pro Code, and that consideration having been received by the decree holder, he had no right to get an order under s 318 in defiance of his own agreement. (13 Mad 504 Fol)

Baluswamy v Lakshmanan 8 M L J 193

(47) Decree-holder's taking possession of greater area than what was decreed Suit by judgment-debtor for possession.

741—C P C S 47=(1882 S 244)—Maintainability of—Execution

If a decree holder in a foreclosure suit take possession of a greater area of land than what is actually decreed to him the judgment-debtor can not bring a regular suit to recover possession of that land His only remedy is by an application under S. 244 of the Code.

Where the plaintiff came to know in 1892, that the defendant had fraudulently taken possession of land in excess of that decreed to him and brought a suit more than 3 years after that date, *held*, that the plaint could not be treated as an application for execution, the remedy of the plaintiff having been barred at the date of suit

Arjun Singh v Machchal Singh 3 A L J 601 =A W N (1906) 233

(48) Proceedings for delivery of possession of property purchased by decree holder

742—C P C S 47=(1882 S. 244)—Bar

Proceedings taken by a decree-holder purchaser to obtain possession of property purchased in execution of his decree are proceedings in execution and relate to it. Consequently no separate suit lies. (13 Mad 504, 24 Mad 185 and 27 Cal 34, 25 Mad 529 followed) However, the soundness of the ruling doubted **Kattayat Pathumayi v Raman Menon. 26 Mad 740= 13 M L J 237.**

(8) Separate suit barred—*Contd.*

Notes—Fol 28 Mad 87=14 M L J 475, 3 A L J 234=(1906) W N 87. 30 All 78=(1908) W N 12=5 A L J 20 Dist 31 All 82 F B, 6 A L J 71 F B Ref 5 A L J 285

(49) Suit by auction purchaser who was also decree holder for possession of immoveable property purchased at execution sale.

743—C P C S. 47=S 244—And section 318—Question for Court executing decree—Separate suit barred—Right of purchaser who has failed to apply for possession under Section 318 Civil Procedure Code, to sue for such possession.

In execution of a decree against the defendent, the present plaintiff attached the defendant's rights and interest under certain deeds of usufructuary mortgage, and at a subsequent sale became the purchaser thereof The auction sale, which took place in 1882 was never confirmed by the Court in which the execution proceedings were pending, nor was a certificate of sale granted till 1885, nor did the auction purchaser obtain possession of the mortgaged property, or ask for the assistance of the Court under Section 318 of the Code But shortly after obtaining his certificate of sale, he filed the present suit asking to be put into possession of the hypothecated land, and to have a clerical error in his certificate corrected.

Held, that the suit was barred by the provisions of Section 244 of the Civil Procedure Code (12 P R 1887, and 47 Ibid cited)

Semble—The suit was also not maintainable, as plaintiff had taken no action under Section 318 Civil Procedure Code, to recover possession of the property sold to him from his judgment debtor.

Bhaga Shah v Bura Shah. 53 P R 1888

(50) Possession in execution of decree after sale—Question arising between the parties of their representatives—Separate suit.

744—C P C S 47=S 244—Proceedings for the delivery of possession to the auction—purchaser are proceedings in execution of the decree. And when the representative of the judgment debtor resists an application for possession, alleging that portions of the property belong to him, that question comes under s. 244 and must be

(8) Separate suit barred – *Contd.*

decided by an application and not by a separate suit. **Madusudan Das v Gobinda Pria Chowdhrani. 27 Cal 34, 4 C W N 417.**

Notes:—Dist: 31 All 82 F B. Fol 26 Mad 740 ; 13 M L J 237 ; 14 M L J 474 ; 27 Cal 34 ; 28 Mad 87=14 M L J 475 ; 3 A L J 234=(1906) W N 87; 30 All 72=(1908) W N 12=5 A L J 30 ; 7 C L J 436 Ref: 31 Cal 737 ; 8 C W N 49 ; 10 A L J 71 F B: 6 C L J 719 ; 5 A L J 285.

(51) Suit to obtain possession by assignee of auction purchaser—Practice.

745—C P C S 47=(1882 s. 244)—Execution of decree—Sale of immoveable property—Purchased by decree-holder—Full Bench reference—Bench not constituted – Powers and duties of a Divisional Bench.

Where in execution of a simple money decree certain property was sold and purchased by the decree holder himself and where after the confirmation of the sale the decree-holder failed to obtain possession of the property purchased and it remained in the hands of the judgment-debtor, *held*, that a suit by an assignee of the decree holder for possession of the purchased land was barred by S. 244, Code of Civil Procedure (3 A L J 234, Fol.)

Semble—A division Bench of the High Court made a reference to the Full Bench, but the Chief Justice refused to constitute a bench to hear reference. *Held* that division Bench could re-hear the case. **Bhani Mal v Mokkhan Lal 5 A L J 285=A W N (1908), 122.**

(52) Sale not set aside-Auction purchser's right to recover possession by suit.

746—C P C S 47; O. 21, r. 90=(1882 Ss. 244, 311)—Execution-sale.

Where an *ex parte* decree was passed against certain defendants and a sale held in execution, and the application of the judgment-debtors under ss. 244 and 311, Act XIV of 1882, was rejected, *held* that it was not open to them to resist the auction-purchaser's claim for possession of the property sold **Mata Din v Gaya Din 6 A L J 799=6 M L T 99=3 Ind Cas 24=31 All 599.**

(8) Separate suit barred – *Contd.*

(53) Death of judgment-debtor pending execution proceedings—Questions arising between representatives of judgment-debtor & decree-holder.

747—C P C S. 47=(1882 s. 244)—Bar.

Where a judgment debtor dies after the passing of a decree and his legal representatives are brought on the record in execution proceedings to represent him in respect of the decree, questions which they raise as to property which they say does not belong to his assets in their hands, and, as such is not capable of being taken in execution, are questions which, under S. 244 of the Code of Civil Procedure, must be determined in the execution department and not by separate suit. (12 All 313 and 17 Cal 711 foll).

Kali Charn v Jewat Debu. 1905 A W N 180=28 All 51.

Notes: – Ref: 5 C L J 491 F B ; 11 C W N 593 F B; 44 Cal 642 F B.

(54) Application to execute decree against alleged representative of deceased judgment debtor.

748—C P C S 47=S. 244—Civil Procedure Code s. 234.

In the case of an application under s. 234 of the Code of Civil Procedure to execute a decree against person alleged to be the representative of a deceased judgment debtor, it is for the Court which passed the decree to decide whether the person, against whom execution is sought, is or is not such representative, but it is for the Court executing the decree to decide to what extent such person is liable as such representative. (13 Cal 254 Ref) **Seth Shaurji Nanabhai v Shanker Dat Dube. 17 All 431.**

Notes:—Appr: 28 Mad 466 F B=15 M L J 116.

(55) Claim by legal representative to property.

749—C P C S 47=Ss 244 of (1882)—Claim by legal representative to property as his own independently of deceased judgment debtor—Justertii—Civil Procedure Code, ss. 234, 278, 283,

Held by the Full Bench (Tyrrell, J dissent-

C P C (1908) S.47=(1882 S.244)-*Contd.*

(8) Separate suit barred -*Contd.*

ing).—Where a judgment-debtor dies after the passing of the decree, and his legal representatives are brought on the record in execution proceedings to represent him in respect of the decree, questions which they raise as to property which they say does not belong to his assets in their hands, and as such is not capable of being taken in execution, are questions which under s. 244 (c) of the Civil Procedure Code must be determined in the execution department, and not by separate suit. There is no distinction in this respect between the position of legal representatives added to the suit before, and those added after, the decree. Under the last paragraph of s. 234, the Court executing the decree may try and determine the question whether property in the legal representative's hands formed part of the deceased judgment-debtor's estate, and finds this fact for the purpose of bringing the property to sale in execution, and giving the auction-purchaser a good title under the sale ; and the Court's order is subject to appeal, but not to a separate suit under s. 283. Where the legal representative asserts that the property is his own, and has not come to him from the deceased judgment-debtor he cannot set up a *jus tertii*, so as to come in under s. 278 and the following sections of the Code. He can only do so where he opposes execution against any particular property on the ground that, although it is vested in him, it is vested in him not beneficially, by reason of his being the representative of the judgment-debtor, but as trustee or executor of some one else. In that case either party may have the question of *jus tertii* determined in a separate suit. (16 Cal 1 apprsved. 4 All 190. and 6 All 109, overruled. 8 All 626, distinguished). *Held* by Tyrrell, J., *contra*, that where the legal representative of a deceased party to the decree appears, not in his capacity of legal representative contesting a question arising between the parties and relating to the execution, discharge, or satisfaction of the decree, but in his personal character independent of the suit and the decree, and prefers a claim under s, 278 on the ground that the decree has no operation against certain property attached. for reasons personal to the objector and antagonistic to all the parties and their representatives as such the objector is not debarred from bringing a separate suit by the mere accident that he is a legal representative in the execution proceedings. **Seth Chand Mal v Durga Dei. 12 All 313.**

C P C (1908) S.47=(1882 S.244)-*Contd.*

(8) Separate suit barred—*Contd.*

Notes -Diss: 23 Bom 237 Fol: 23 Mad 195 F B; 13 All 290,28 All 51=(1905) W N 180; 3 A L 370=(1906) W N 157 ; 19 All 543; 21 All 335. Ref: 17 Mad 399; 20 Bom 385; 16 All 449 ; 19 All 480 ; 21 All 277; 23 All 263 ; 28 Bom 125 . 28 All 644=3 A L J 565 -(1906) W N 158 ; 11 C W N 593 F B · 34 Cal 612 F B ; 5 C L J 491 F B.

(56) Questions arising between the decree-holder & the representatives of the judgment-debtor.

750—C P C S. 47 of (1908)=S. 244 of (1882) Cl (c), Ss 278 and 283—

Per Ranade J. Where the representative of a judgment-debtor puts forward a personal claim to property which is attached as assets of the judgment-debtor in his hands, the investigation of the claim must be made in execution under the provisions of s. 244 of the Code of Civil Procedure but that, where he asserts that he holds the property in trust for or on behalf of or as manager of some third person or body of persons or a relation or a religious charity or institution the claim must be investigated under the provisions of ss. 278 to 283 and the order passed therein cannot be challenged by an appeal but must form the subject of a separte suit.

Per Parsons J—Whenever a question arises between the representative on the record (whether originally sued as such or added before or after decree) and the decree-holder as to whether property in the hands of the representative was of the assets of the deceased or not that question must be determined by order of the Court executing the decree under the provisions of S. 244.

On the merits, the Court, following the ruling in 10 Bom P 40, reversed the decree of the District Judge and restored that of Court of first instance. **Murigeya Guru Gulaya Veraktmath v Hayat Saheb. P J (1898) 137=23 Bom 237.**

Notes.—Fol: 6 C W N 63. Ref: 33 Mad 195 F B ; 31 Mad 125=18 M L J 21.

751.—C P C S47=S 244 of Civil Pro Code.

A decree for money was obtained by K against R, the Karnavan of the defendants, On the death of K the defendants were brought on file as representatives of K. Tarwad property

(8) Separate suit barred—*Contd.*

was attached and the defendants took an objection to the attachment which was thereupon raised. R sued asking for a declaration that the property released was liable to be sold *Held* that s 244 of Civil Procedure is a bar to a fresh suit. **Ravunni Menon v Kunju Nayar 10 Mad 117.**

Notes -Ap: 23 Mad 195 F B. Appl: 12 All 73. Ref: 17 Mad 399; 23 Bom 237.

(57) Suit by representative against purchaser—Separate suit.

752—C. P. C. S 47 of 1908=S. 244 of 1882. *Held*, that a suit by a quondam judgment-debtor against the purchaser of his occupancy tenure who was also his decree-holder, to set aside the sale is barred by the rule contained in s 244 (c) of the Code of Civil Procedure. (W. N. 1883, p. 218) overruled. **Basti Ram v Fattu. 8 All 146; 6 W N 37.**

Janki Singh v Ablakh Singh. 6 All 393; 4 W N 135.

Ramgopal v Khiali Ram. 6 All 448; 4 W N 159.

Notes.—Fol: 22 All 86; 108. Dist: 24 Cal 355. Ref: 26 Cal 727; 23 All 346: 9 C W N 972; 1904 W N 61; 26 All 447 F B.

(58) Purchaser of rights of Hindu widow-Representative.

753.—S 47=S.244-Judgment-debtor's transferee.

After the death of a childless Hindu widow, a lessee from her of property which had belonged to her husband obtained against her vendees of part of the same property, a decree for damages for wrongfully keeping him out of possession. The effect of the decision was to decree the claim against the estate of the widow, and to exempt from liability the judgment-debtors personally and the property which they had purchased. In execution of the decree the said property was sold and was purchased by the decree-holder: one of the judgment-debtors had died during the execution proceedings, and her son was duly impleaded as her representative, and he raised no objection to the attachment and sale. Subsequently his son sold his rights and interests in the property and his vendee sued the decree-holder to recover possession, on the ground that the decree being limited to the estate of the childless Hindu widow, the defendant as purchaser could not acquire by the sale any rights superior to those of the widow; that those rights had expired upon her death, and left nothing to be sold, and that on her death the property devolved upon the plaintiff's vendor and had thence passed to the plaintiff. *Held* that the plaintiff's vendor was a party to the suit within the meaning of s 244 (c) of the Code of Civil Procedure, and that he not having objected to the sale in execution of the decree; neither he nor the plaintiff could go behind that sale or claim the property upon any title which he might have asserted in the execution proceedings: and that the suit was barred by s. 244. (7 All 547 followed. 8 All 626 distinguished 9 All 605; 15 Cal 437 and 10 Mad 117 referred to). **Raghubar Dial v Hamid Jan 12 All 73; 10 W N 13.**

(8) Separate suit barred—*Contd.*

Notes.—Ref 16 All 449.

(59) Questions for Court executing decree—Representative.

754.—S 47=S. 244 Clause (c)

One H sued and obtained a money decree against the sons and widow of one S., deceased to be executed against the property of the said S. In execution of this decree, the decree-holder attached certain houses as the property of S., whereupon one of the judgment-debtors objected to the attachment of one house, claiming it as his sole property, acquired from his maternal grandfather. The objection having been allowed the present suit was brought by H, to set aside the order and declare the house liable to attachment.

Held, that the case fell within the decision of Privy Council in (11 B R L 149), and was not maintainable, inasmuch as the proper mode of seeking relief from the order impugned was by way of appeal.

The question which arose in execution of the plaintiff's decree was " a question arising between the parties to the suit in which the decree was passed, and relating to the execution of the decree," within the meaning of Section 244 clause (c) of the Civil Procedure Code, and did not cease to be such a question either because the objector was a party before decree as

C.P.C. (1908) S. 47=(1882, S. 244)-*Contd.*

(8) Separate suit barred—*Contd.*

the legal representative of a deceased debtor, or because the objector claimed release of the property as belonging to him in his personal and not in his representative capacity. (88 P R 1886 and 12 P R 1887 referred to.) **Kashi Ram v. Harnam Das 47 P R 1887.**

(60) Execution—Decree against sons as legal representatives of their father—Son's pious duty to pay father's debt—The question whether the property is self-acquired or ancestral in the hands of sons can be gone into in execution proceedings.

755.—C P C S 47=(1882 S 244)—Decree-Hindu Law—The question whether the property attached and sold in execution of the decree is self-acquired or ancestral in the hands of sons can be gone into in execution proceedings—Auction-purchaser's presence does not alter the character of proceedings.—

B sued V on a money claim. Whilst the suit was proceeding V died, and his sons were placed on the record as his legal representatives. The suit was decreed in B's favour. In execution of this decree the property in dispute was sold to N at a Court sale. N then sold the property to B. The plaintiffs, the assignees of V's sons, brought the suit against B to recover possession of the property on the ground that it was the self-acquisition of their assignors. The defence was that the decree in the previous suit and the purchase consequent upon it bound V's sons and that S 244 of the Civ Pro Code, 1882, was a bar. It was contended that S. 244 did not apply, because V's sons were parties to the decree in their representative, and not in their own personal capacity and as such were not bound to plead that the property was theirs; and that the question arising in the suit was not one between parties to the decree, because the action-purchaser was not a party thereto.

Held, (1) that the decree in the previous suit having been against the plaintiff's assignors as V's sons, it was a decree against them in respect of a debt of their father, which it was their pious duty to pay; and that when the assignors were brought on the record as their father's representatives, they were in their own as much as in their representative capacity. (20 Bom 385 appl.)

C P C (1908) S. 47=(1882, S. 244)-*Contd.*

(8) Separate suit barred—*Contd.*

(2) that the mere fact that the auction-purchaser was not a party to the previous decree did not prevent the applicability of S. 244, (19 Cal 683 foll.).

(3) that the question whether the property was ancestral or self-acquired, liable or not, in the hands of the sons to satisfy their father's debt under Hindu law, was one relating to the execution of the decree and could not be raised in a separate suit. **Kashinath Moreshwar Vaidya v Baji Pandurang Vaidya 11 Bom L R 699 =3 Ind Cas 763.**

756.—C P C S. 47 (244);—

S. 244 C P C (1882) is a bar to suit against the widow of deceased Hindu as the latter's representative for recovery of a decree debt from the separate property of the deceased in her possession, **Ramaswami Aiyar v Veerappa Chetti, 1904, 5 Ind Cas 362=20 M L J 309**

See Executor de son tort,

(61) Parties to the suit or their representatives.

757.—C P C S 47=(1882 S 244)—Questions relating to execution, discharge or satisfaction of the decree.

Certain lands were purchased, by the decree-holder in a suit, at Court sale in execution of a decree. His application under S. 318 for delivery of possession was dismissed. Subsequent applications made by the heirs of the decree-holder-purchaser, after his death, were also dismissed. Plaintiffs, the purchasers of the same lands from the heirs of the decree-holder-purchaser, sued the judgment-debtor for possession. *Held*, that the suit would not lie, regard being had to the provisions of S 244 C P C., that plaintiff's right to delivery of possession was purely one of execution, discharge or satisfaction of the decree and, that a person purchasing from the decree-holder-purchaser or his heirs is a representative, within the meaning of s. 244 (5 Mad 217; 12 Mad 454; 13 Mad 504; 24 Mad 185; 25; Mad 529; 26 Mad 740 and 27 Cal 34 Ref to; 26 Cal 250; 24 Cal 63 and 25 Mad 529 Refd.)

Sandhu Taragnar v Hussain Sahib 28 Mad 87=14 M L J 474.

(62) Attachment, removal of—Application—Suit to remove the attachment.

758.—C P C S 47=(1882 s 244).

(8) Separate suit barred—*Contd.*

In a suit brought by the respondents against the appellants as the heirs of V, the Court passed a decree against the estate of the deceased V The decree-holders in execution attached five fields as belonging to the deceased and as being in the possession of the appellants. The latter applied for the removal of the attachment with the result that the Court removed it as to two but rejected their application as to the other fields. The appellants then brought a regular suit to remove the attachment.

Held, that the question can only be decided by a proceeding under S. 244 of the Civil Procedure Code and not by a separate suit, as the appellants were parties to the previous suit. **Bhimrao v Aiyyappa. 6 Bom L R 697.**

(63) Assignee of debt—Assignment without considerations—Sham transactions—Fraud—Benami transaction.

759—C P C S. 47=(1882) S 444—Plea of.

An assignee of a debt suing the debtor cannot be defendant by a plea of the latter that the assignment is without consideration. This principle has no application where the assignment is impeached not merely on the ground of being *benami* but on the ground of being a sham transaction intended to defeat the provisions of an Act and prejudice the rights of the person so impeaching it. In such a case the transaction is substantially assailed on the ground of fraud. To cases like these the rule in (15 Bom 1 applied.). **Statu Vithuji v Dagdu Bhagu 9 Bom L R 462.**

(64) Surety of judgment debtor—Suit for exemption from liability—Maintainability.

760—C P C S. 47=(S 244 of 1882).

A suit by a person who has become a surety on behalf of a defendant during the pendency of a suit for a declaration that he is not liable to the decree-holder for a portion of the decree is not maintainable and is barred by s 244 C P C. **Linga Reddy v Hussain Reddy. 14 M L J 430=28 Mad 117.**

(65) Claims to attached property—Questions arising between the parties or other representatives.

761—C P C S. 47 of (1908)=S. 244—C P C Ss. 278—283.—

(8) Separate suit barred—*Contd.*

Held—an objection taken by a representative of the judgment-debtor in the course of execution of a decree that the property attached in execution is his own, and not held by him as such representative, is a matter cognizable under s. 244 and is not a proper subject for a separate suit by a party against whom an adverse order may have been passed under ss. 80 and 281 as provided by s. 283. **Punchanun Bindopadhya v Rabia Bibi. 17 Cal 711.**

Notes:—Ap: 17 All 245. Fol: 19 Bom 328; 28 All 51=[1905] W N 180; 23 Bom 237; 35 Cal 564=12 C W N 310=7 C L J 547. Ref: 8 C W N 353; 24 Cal 62 F B. 27 Cal 34; 6 C W N 63; 17 Mad 399; 23 Mad 195 F B; 29 Cal 696; 5 C W N 63; 663; 6 Bom L R 1043; 11 C W N 593 F B. 34 Cal 642 F B; 5 C L J 491 F B.

(66) Question as to whether property belongs to judgment-debtor or not-Grounds of objection for attachment in execution.

762—C P C S. 47=S. 244—Civil Pro. Code Ss. 278 to 283.

In execution proceedings between the parties to the suit or their representatives when the question is whether the property belongs to the judgment-debtor or his estate or not it is immaterial on what grounds the objection is taken against attaching the property. Such a question is one in execution and so s. 244 bars a separate suit. (2 Cal 327; L R 4 I A 66 followed).

Upendra Bhatta v Raugnath Bhatta. 17 Mad 399=3 M L J 229.

Notes:—Con: 23 Mad 195 F B.

(67) Claim to attached property.

763—C P C Ss. 47=S. 244—Civil Procedure Code,——Claim to attached property—Order in execution proceedings—Separate suit.

In execution of a decree passed against the plaintiff certain property in his possession was attached. Thereupon he laid claim to the property, on the ground that it was *service vatan*. This claim was rejected. The plaintiff then filed a regular suit for a declaration that the property was not liable to attachment and sale.

C P C (1908) S.47=(1882. S.244)-*Contd.*

(8) Separate suit barred—*Contd.*

Held, that the suit was barred under Sec. 244 of the Code of Civil Procedure The Court which originally rejected the plaintiff's claim in the execution proceedings had jurisdiction to investigate the claim under clause (c) of Sec. 244 of the Code. **Trambak Ramrao v Govinda P J 1894 p 148: 19 Bom 328.**

Notes:—Con: 22 Bom 475.

(68) Objection that property belongs to Tavazhi—Question in execution.

764—C P C S. 47=(1882 s. 244).

An objection by a defendant that immoveable property attached in execution of a decree is not the private property of the judgment-debtor but that of the tavazhi consisting of the defendant the judgment-debtor and others is one falling within s 244 C P C and an appeal will lie from the order of the Court of First instance. (24 Mad 361, followed.) **Rangan Patter v Lakshmi Neithiar 14 M L J 137.**

(69) Claim to attached property by representative of deceased judgment—debtor.

765—C P C S. 47, O. XXI, rr. 60, 61, 63 (= Civ. Pro. Code, 1882, ss. 244, 280. 281, 283)-Subject of determination only in execution and not by separate suit.

An objection taken by a person who has become the representative of the judgment-debtor in the course of the execution of a decree to the effect that the property attached in satisfaction thereof is his own property and not held by him as such representative, is a matter cognizable only under s. 244 and not the proper subject-matter of a separate suit by a party against whom an adverse order may have been passed under ss. 280 and 281 as provided by s. 283 of the Code. (17 Cal 711, 13 All 313, Fol.) **Vithoba Laxaman v Sheoram, 6 C P L R 4.**

(70) Resistence, to execution as being cultivators.

766—C P C S 47=s. 244 [c] of (1882)—Execution—Question relating to—Separate suit.

A suit having been brought to obtain possession of certain land, the defendants pleaded that they were ryots and that the decree only authorized the plaintiff to recover possession as proprietor. The objection was overruled and the Court made a decree, that the plaintiff in the suit was entitled to khas possession, and that they could be ejected. The unsuccessful party thereupon filed the present suit to set aside the order overrulling their objection.

Held, that the objection raised was a question between the parties relating to the execution of the decree, and that accordingly under section 244 (c) of the Civil Procedure Code a separate suit would not lie. **Najhan v. Mahamad Takikhan Alias Peer Bux Khan. 9 Cal 872 =12 C L R 571.**

(71) Resistence to remove buldings found on land for which decree is given.

767—C. P. C. S. 47=S. 244. of 1882.

Where in execution of a decree for land the plaintiff found that buildigs had been erected by the defendant on the land alleged by him to be comprised in the decree, and an application to the Court executing the decree was refused on the ground that the decree was silent as to the demolition of the buildings,—*Held* that his remedy was an appeal against that order, and not a fresh suit to get the buildings removed. **Radha Gobind Shaha v Brojender Cocmar Roy Chowdhry 7 W R 372.**

Notes.—Fol: 20 W R 415.

(72) Puisne Mortgagee's rights—Separate suit to enforce those rights barred.

768—C P. C S. 47=S. 244 of (1882). S. 74—Decree obtained by prior mortgagee against mortgagor—Payment by puisne mortgagee—Puisne mortgagee, rights acquired by, if enforcible in execution—Separate suit when lies.

A decree obtained by a prior mortgagee directed foreclosure in the event of the decretal amount not being paid into Court by the mortgagor within a specified time. The amount was paid by a puisne mortgagee who was a party in the suit and was taken out by the decree-holder: *Held*—That under sec. 74 of the Transfer of Property Act the puisne mortgagee acquired all the rights and powers of the prior mortgagee as such, but the rights so acquired were not such as could be

C P C (1908)-S.47=(1882, S.244)-*Contd.*

(8) Separate suit barred—*Contd.*

worked out in execution of the decree made in favour of the prior mortgagee, that decree having been discharged by the payment A separate suit to enforce those rights was not therefore barred by sec. 244 of the Civil Procedure Code. **Gopi Narayan Khanna v Babu Bansidhur 9 C W N 577=27 All 325=2 A L J 336=7 Bom L R 527=15 M L J 191=32 I A 123 P C**

Notes—Ref 29 Mad 491 Dist 32 Mad 485, 19 M L J 728

(73) Redemption-Prior mortgagee's rights to redeem in suit by puisne mortgagee

769—C P C S. 47=(O C S 244)

A prior mortgagee who is made a party to the suit by a puisne mortgagee can pay off the puisne mortgagee and save the property from sale He is entitled to have his rights determined in execution without being driven to a separate suit **Bhajohari Maiti v Gajendra Narain Maiti 37 Cal 282=14 C W N 672**

(74) Sale in contravention of S. 99, T P Act

770—C P C S 47=(1882 S 244)—Bar

If property is sold in contravention of S 99 T P A, and bought by a stranger, the proper course for the judgment debtor is to seek to set it aside in execution and not by a separate suit **Mathu v Karuppan 17 M L J 163**

(75) Sale in execution of a decree for rent—Landlord having a mortgage of portion.

771—C P C S, 47=(1882—S 244)—No suit lies—T P A S 99

S. 244, C P C, is applicable to an objection that a sale to a stranger in execution of a decree for rent by the landlord is void under S, 99, T P A, as the landlord was also a mortgagee of part of the holding. **Somi Singh v Behari Singh 33 Cal 283.**

Notes.—Ref 11 C W N 1011 F B, 6 C L J 320 F B, 35 Cal 61 F B Diss 30 All 146 =(1908) W N 49=5 A L J 121.

(76) Sale by mortgagee in execution of decree—Sale contrary to provisions of S 99, Transfer of Property Act.

772—C. P. C. S. 47 of 1908=S. 244 of 1882.

C P C (1908) S.47=(1882, S.244)-*Contd.*

(8) Separate suit barred—*Contd.*

S 244.—Transfer of Property Act, S. 99—Money decree in favour of a mortgagee-Execution of decree—Sale of mortgaged properties, validity of—Suit by judgment debtor to cancel the sale.

Obiter In spite of sale and purchase in execution of a money decree by the mortgagee, the mortgagors may sue to redeem the mortgaged properties on payment of the mortgage money and so much of the money due under the money-decree as was satisfied by the sale. (22 Bom 624, referred to, and approved)

The parties to an execution proceeding can raise the question of the validity of a Court-sale only in proceedings instituted under S. 244, C. P. C, and not in a separate suit.

But if the suit is instituted in the very Court in which execution proceedings should be taken, the Court may treat the plaint as an application under S 244, C P C and give relief accordingly. (22 Cal 483, approved)

When once the sale has been confirmed by the Court, and has become final, the sale cannot be set aside at the instance of the judgment debtor. 14 Mad 74, referred to.

A sale in contravention of the provisions of S 99 of the Transfer of Property Act is not void but only voidable as against those who have a right to redeem Notwithstanding such sale and confirmation, the mortgagors might not be precluded from suing to redeem the mortgaged property on payment of the amount given credit for by the mortgagee in respect of the sale. **Mayan Pathoothy v Pakuran 22 Mad 317=9 M L J 89.**

Notes—Ref. 11 C W N 1011 F B, 17 M L J 163, 35 Cal 61 F B, 32 Mad 425. Dist 30 Mad 313 Ap 23 Mad 377 Fol 22 All 121, 33 Cal 283 Diss 5 Bom L R 1036, 6 C L J 320 F B Appr: 27 All 517=2 A L J 210=1905 W N 80.

(77) Decree for redemption—Omission to execute-Maintainability to subsequent suit on the same mortgage.

773—C P C S. 47=Section 244—Civil Procedure Code Section 13-Transfer of Property Act Section 92.

C P C (1908) S.47=(1882, S.244)-*Contd.*

(8) Separate suit barred—*Contd.*

Where a suit for redemption has been instituted and a decree for redemption passed therein, but not executed, a subsequent suit is not maintainable for the redemption of the same mortgagee. (22 Bom 771 followed). **Vedapurutti v Vallabha Valia Raja. 25 Mad 390**

But See **24 Mad 44 noted under Transfer of Property Act section 92 that such a suit does lie.**

(78) Usufructuary mortgage—Mortgaged property taken on lease by mortgagor-Decree against mortga or for arrears of rent Sale of mortgaged property in execution of decree—Purchase by a third party.

774-C P C-S. 47 (1908)=S. 244 (1882)-Transfer of Property Act 1882, *S.* 99—Right of mortgagor to redeem,—C P C S. 244.

The plaintiff's father executed a usufructuary mortgage, and then took the mortgaged lands on lease from the mortgagees, they subsequently obtained a decree against him and the present plaintiffs for arrears of rent and brought the mortgaged lands to sale in execution of this decree, when they were purchased by a third party The plaintiffs now sued to redeem the said lands from the purchaser.

Held that the plaintiffs were not entitled to redeem the auction purchaser who was not the mortgagee and was no party to the suit, and that the suit must be dismissed. The sale in contravention of section 99, Transfer of Property Act was voidable only and not void, it was open to the present plaintiffs who were parties to the suit to set it aside in execution and as they had not done so, their present suit was barred by section 244, Civil Procedure Code (22 Mad 347, 22 Bom 624 and *23* Mad *377*, Ref 22 Mad 347 Ref.)

Muthu v Karuppan. 2 M L T 181= 17 M L J 163=30 Mad 313.

(79) Sale by mortgagee of property not mortgaged, validity of Where to be questioned.

775-C P C S. 47=(1882 s 244)-Execution proceedings—Suit.

Where a puisne mortgagee, who was not made a party to the suit of the prior mortgagee, instead of proceeding against the property sold in execution of the decree of the prior mortgagee, proceeded against other properties of the mortgagor and sold them.

Held that it was a matter to be complained of and (if wrong) remedied in execution proceedings and not by a separate suit. (*29* All 290 Ref). **Jogeshwar Narain v Lala Mooralidhar. 7 C L J 270.**

(80) Mortgage—Second suit.

776—C P C S 47 (*2*), O rr. 1, 2.

Mortgage—Second suit not maintainable for same cause. **8 A L J 599.**

(81) One of two joint decree-holders recovering the entire decree amount—Maintainability of suit against by decree-holder for his share.

777—C P C S. 47=(1882 S. 244).

Where one of two joint decree-holders receives the entire decree amount from the judgment-debtor and certifies to the Court the fact of such receipt, although such certificate does not absolve the judgment debtor from liability to the other decree-holder, yet the latter is not if he elects to adopt such a course, precluded from suing to recover his share from his joint decree-holder instead of proceeding against the judgment-debtor in execution. **Somasundaram Pillai v Krishnasawmy Naidu. 29 Mad 183.**

(82) Part satisfaction of decree not certified to the Court.

778—C P C S. 47=S 244 of 1882—Suit to recover money so paid after execution of entire decree—Civil Procedure Code, 1859, s. 206.

A, a judgment-debtor, paid to B, the decree-holder, a sum of money by way of compromise, in full satisfaction of the decree. B failed to certify this payment to the Court, and afterwards executed her decree for the full amount. In a suit by A against B for recovery of the amount previously paid out of Court in satisfaction of the decree,—*Held* that, notwithstanding s. 11 of Act XXIII of 1861, the suit was maintainable. **Gunamani Dasi v Prankishori Dasi. 5 B L R 223: 13 W R F B 69.**

Overruling Alunga Beebee v Gooroo Churn Roy 3 W R S C C Ref 3.

C P C (1908) S.47=(1882, S.244)-*Contd.*

(8) Separate suit barred—*Contd.*

Notes—See 13 W R, F B 69.

(83) Satisfaction reported—Dismissal-Mistake in calculation—Petition to re-open execution.

779—C P C S. 47=(1882 S, 244)-Bar—Execution.

Where the Court passed an order in an execution case stating that the case had been disposed of by reason of both sides having represented to the Court that the decree had been satisfied-*Held* that an application to allow the execution proceedings to be opened was maintainable under S. 244 C P C on the ground that the decree-holder had acted under a mistake of calculation in fixing the amount that was due (10 Cal 538 dist).

Nilratan Khasnobish v Ram Rutton Chatterji. **5 C W N 627.**

(84) Application to certify payment under S. 258 C P C.

780—C P C S. 47=S. 244 & S. 258.

A judgment-debtor applied to the Court executing the decree to call upon the decree-holder to certify the receipt of payment in part of the decretal amount under s. 258 of the Code of Civil Procedure. The Court dismissed the application on the ground that it was beyond time. The judgment-debtor brought a suit for cancellation of this order, for disallowance of the decree-holder's objection, and for a declaration that the alleged payment had been made and that the application for a certificate had been presented within time. *Held* that the question involved being one relating to the execution, satisfaction or discharge of the decree, within the meaning of s. 244 of the Code, could not be made the subject of a separate suit, and that the suit must therefore be dismissed, notwithstanding that the defendant's plea to this effect was made for the first time at the stage of second appeal; but that, in consequence of the defendant's delay in taking the plea, each party must pay his own costs. **Tulsha v Badri Das.** **9 W N 95.**

(85) Certifying part payment—Suit for declaration that the decree has been satisfied, S. 244, bar.

781—C P C S. 47, O XXI r 2=Ss. 244, 258—Small cause decree—Order under S. 258,

C P C (1908)-S.47=(1882,S.244)-*Contd.*

(8) Separate suit barred—*Contd.*

A Court executing a decree is competent to pass under S. 258, Civil Procedure Code, to pass an order that a decree has been only partly satisfied.

Such an order passed under S 258 is one relating to the execution, discharge or satisfaction of the decree, and a suit for a declaration that the decree has been fully satisfied and for an injunction to restrain the decree-holder from executing it is barred under S. 244.

Semble:—An order passed under S, 244 and S. 258, Civil Procedure Code, in execution of a decree of a Small Cause Court, is appealable.

Karuppa Pillai v Athamsa Rowthen. **5 M L J 146.**

(86) Sale in excess of decree—Suit to impeach sale—Non-maintainability—Matter relating to execution.

782—C P C S. 47—Execution.

The question whether the actual execution of a decree is in excess of the decree itself is one relating to execution within the meaning of s. 244, Civ Pro Code, 1882. (6 M H C 293, 22 Cal 483 and 27 All 485, Ref). Therefore the question that a sale in execution of a mortgage-decree was invalid, on the ground that it was not warranted by the terms of the decree, cannot be raised in a separate suit. **Gunniah Venkatachalapathy Aiyen v Perumal Aiyen** **10 M L T 527=1912, 1 M W N 44.**

(87) Order in execution of decree-Surplus of sale—proceeds.

783—C P C S. 47 of (1908)=S. 244 of (1882)—S P executed four mortgages of a certain mouzah.

The first mortgagee sold the mouzah in execution of his decree. The third mortgagee in execution of his decree sold the same to defendant No. 2, who under S. 295 applied in execution of the first-mortgage's decree for the payment of the surplus sale proceeds and obtained an order for payment to him.

The present plaintiff, as a purchaser of the equity of redemption of S P brought a suit to set aside the order and to recover the surplus sale proceeds from defendant No. 2,

(8) Separate suit barred—*Contd.*

Held—That the order under S. 295 in favour of defendant No.2 was one coming under cl.(c) S. 244 and that the present suit was not maintainable. 24 Cal 62 referred to.

Held that the fact of sale proceeds being realised in execution proceedings of the decree not of the third but of the first mortgagee made no difference, inasmuch as the two execution cases were amalgamated and disposed of simultaneously.

Hurdwar Singh v Bhawani Pershad. 2 C W N 429.

(88) Money paid in excess under decree,

784—C P C S. 47 of 1908=S. 244 of 1882—Decree reduced on appeal—Separate suit.

A judgment-creditor having caused certain property of his judgment-debtor to be sold in execution, the proceeds realized did not amount to the full judgment-debt. Afterwards the judgment-debt was reduced in appeal to a sum far below the amount realized in execution, and the judgment-debtor brought a suit to recover the excess moneys. *Held*, with reference to Act XXIII of 1861, s. 11, that the suit did not lie, but that the Court which charged with the execution of the decree had full jurisdiction to determine the question and order a refund.

Mothoora Pershad Singh v Shambhoo Geer 19 W R 413.

Notes:—Dist: 22 Cal 501.

(89) Interest on money taken out of Court in execution of decree-Separate suit.

785—C P C S 47=Ss 244, 583.

Held that interest on money taken out of Court in execution of a decree is recoverable with the principal in execution proceedings under Section 583, Civil Procednre Code, and that Section 244 of the Code, is a bar to a separate suit for the recovery thereof.

The rulings of the Courts cited and discussed.

Shadi Lal v Mehtab Chand. 82 P R 1896.

(90) Decree subsequently reversed or modified.

786—S. 47=S. 244 of 1882.

When money has been taken in execution of a decree which is subsequently reversed or modified, no fresh suit will lie for its recovery; the matter must be enquired into by the Court which passed the decree as a question arising between the parties relating to the execution of such decree.

Saligram Singh v Gobind Sahai. 4 B L R Ap 64.

Nursing Chunder Sein v Bidya Dhuree Dossee. 2 W R 275.

Jadoo Nath Gossain v Nobo Kishen Chatterjee. 4 W R 66.

(91).—Not merely a declaratory decree—Remedy by way of execution and not by separate suit.

787.—C P C S. 47=S. 244 of 1882.

M H and others obtained a decree in 1882, in accordance with an award directing "that MS, defendant, and after her, her representatives, should pay without any objection from the beginning of 1289 *Fasli* Rs 15 annually to *MH* and others." Subsequently *MH* and others applied for execution of this decree seeking to recover the arrears of the annuity for 1291 and 1292 *Fasli*. *MS* objected that these arrears were not recoverable in execution of the decree but a fresh suit should be brought. The objection being allowed by the Court executing the decree, M H and others brought the present suit for the arrears in question and interest. The suit has now been resisted on the ground that the suit was barred by s. 244, Code of Civil Procedure. *Held* that the decree of 1882 was not a mere declaratory decree and the plaintiff's only remedy was by way of execution and not by a separate suit. (W N 1886, p.248) followed. Though the plea comes with the worst possible grace from the mouth of the defendant, the Court was bound to give effect to it as it affected jurisdiction. The Court however intended that the Subordinate Judge, who refused execution, will, when moved by way of review, reconsider his order and will relieve the present plaintiffs from the difficulties into which they have been led by the defendant. **Sughra v. Muhammad Husain 3 W N 230.**

(92) Suit by reversioner.

788.—C P C S. 47.=S. 244 of 1882

A died leaving some property burdened with a mortgage a widow and some reversioners.

(8) Separate suit barred—*Contd.*

B the widow's brother-in-law alleging that he had brought the decree obtained by the mortgagee on his mortgage-bond, attached the property left by A in execution of his decree. The reversioners thereupon alleging that the mortgage debt had been paid by the widow who was in collusion with her brother-in-law brought this suit to have it declared that the mortgage debt had been paid and the property therefore could not be attached. *Held* that as they can set up this plea in the execution department they cannot sue for a declaratory decree under s. 42. **Jhari Singh v Ganga Kumar. 5 W N 215.**

(93) Execution proceadings-Regular suit-Mistake—New plaint not inconsistent with original case.

789.—C P C Ss. 47,11—

If the execution proceedings are still going on it is not material whether the dissatisfied party applies expressly under S. 47 Civ Pro Code or purports to bring a regular suit, provided the Court is the same. This was held under the old Code, and now cl (2) of s 47 makes express provision for mistakes of the kind.

To admit of an application under S 47 the decree must be capable of execution and must be still in course of execution.

If an application has been made under S. 47 and disposed of, the decision is *res judicata* and on that ground a subsequent regular suit will be barred.

A suit was decreed by the original Court, but was dismissed summarily by the lower appellate Court on the ground that it was barred by S. 47 Civ Pro Code, and that plaintiff set up a new case in an amended plaint *Held* that the order was bad, as it was not shown that the new plaint was inconsistent with the original case, or that the suit ought to be dismissed on any ground. (U B R (1904—1906), 11, Civ Pro Code 36; U B R (1897-1901), 11,249 Ref. 10 Cal 538, 9 B L R 1020 Ref.) **Nga Po Tun v. Mi Thet Pon. U B R (1910), 4th Qr p 66=10 Ind Cas 991.**

(94) Suit to enforce liability imposed by decree of Civil Court in mofussil.

790.—C P C S. 47=S. 244 of 1882.

A suit does not lie to enforce a liability specifically imposed by the decree of a Civil Court in the mofussil, the right of suit in such case being taken away by s. 11 of Act XXIII of 1861. **Sanjeeviyah v. Nanjiyah. 4 Mad H C R 453.**

(95) Second suit for restitution of conjugal rights—Decree in former suit not executed.

791.—C P C S. 47=S. 244 of 1882.-Husband and wife-Decree-Decree not executed-Subsequent voluntary cohabitation followed again by desertion—Satisfaction of decree-Second suit for restitution of conjugal rights-Res judicata-Cause of action-Civil Procedure Code Act XIV of 1882, Secs. 13 and 244.

Plaintiff obtained a decree against his wife for restitution of conjugal rights in 1885 which was never executed. In 1887, however she returned to his house, and stayed with him for two months. She afterwards deserted him again. Thereupon the plaintiff filed a second suit for restitution of conjugal rights.

Held —that the suit was not barred either under Sec 13 or 244 of the Code of Civil Procedure Act XIV of 1882. A second withdrawal from cohabitation constitutes a fresh cause of action. **Keshavlal Girdharlal v Bai Parvati, P J 1893, p 152; 18 Bom. 327.**

(96) Execution transferred to Collector-Private sale Subsequent sale held by Collector—Remedy of purchasers at private sale.

792.—C P C Ss. 47,68,70.71=(1882-Ss. 244,320) —Bar-Execution of decree.

Execution of a decree for sale of ancestral property was transferred under the provisions of S. 320 C P C to the Collector. Whilst the execution proceedings were pending before the Collector the judgment-debtor privately sold the property, and the purchasers paid over the price to the decree-holder, and such payment was certified to the Civil Court which passed the decree. The decree-holder, however, took no steps to withdraw the execution proceedings from the hands of the Collector and accordingly the Collector in due course sold the property. *Held* that under such circumstances the remedy of the first purchasers, i. e. the purchasers by private sale, was by application under S. 244 C P C and not

(8) Separate suit barred—*Concld.*

by suit and that such application lay to the Civil Court and not to the Collector, (24 All 339 ref to.) **Sadho Chaudhri v Abhenandan Prasad. 1903 A W N 203=26 All 101.**

Notes:—Ref 27 All 298=[1903] W N 235.

(97) Suit for administration in respect of barred decree.

793—C P C S. 47—Mortgage decree-Application for execution by sale-Ss. 227 ; 230 C P Code and S. 69 and 99 T P Act—Limitation Act sch II Arts 122, 179 and 180.

A mortgage decree was obtained against the defendant's husband in a suit on a mortgage executed by the latter on the 29th September 1882. On the 27th July an order to transfer it to the High Court was made. In 1886 April the mortgagee made an application to the High Court for the execution of the mortgaged properties and an order for attachment was made. The mortgagee died in April 1892 and on the 20th August 1894 the plaintiff applied to the High Court for an order absolute for sale of the mortgaged property under s. 89 T P Act. On 5th January the application was refused on the ground that the lands were outside the territorial jurisdiction of the High Court. The plaintiff brought the present suit, suing the administration of the mortgagor's estate and asked for the sale of such of the properties as may be found subject to such mortgage. *Held*—that the suit was not maintainable by reason of the provisions of ss 230 and 244 C P Code, the questions arising in the suit being such as should have been determined in execution of the decree and not by a separate suit.

Jogemaya Dassi v Thackomoni Dassi. 24 Cal 473.

Notes—Ref: 25 Cal 580 , 26 Cal 166 , 17 M L J 441 ; 35 Cal 1100 . 31 Mad 24 , 10 C L J 336 ; 25 Cal 580. Appr: 28 Mad 224. Fol: 12 C W N 614.

(9) RES JUDICATA.

(1) Assessment of execution of decree —Res judicata.

794.—C P C S. 47=1882 s. 244.

The assessment of mesne profits though done by the executing Court is not a procedure in execution of a decree as it results in the final decree. Section 244 would not therefore apply.

(9) Resjudicata—*Contd.*

The principle of *res judicata* applies to question decided in execution proceedings. The binding force of such a judgment depends upon general principles of law. **Ssrat Chandra Roy v. Khalil Mondal. 11 C L J 501.**

(2) Plaintiff's father sued as trustee-Suit dismissed—Second suit by plaintiff barred.

795—C P C S 47=1882 S. 244.

The decision in a previous suit dismissing it under sec 244 C P C is a bar to the second suit in respect of the same property. **Ramapayya Aitha v Melanta. 8 M L T 221=7 Ind Cas 184**

(3) General principles of—Re-opening questions already decided.

796—C P C S. 47 of (1908)=S 244 of (1882). Where a question has been tried and determined under S 244 Civil Procedure Code, it cannot be re-opened under S.276 merely because the assignee from the judgment debtor has been made a party. It is *res judicata*. The decision is binding not because of S 13, Civil Procedure Code, but under general principles of law. (6 All 269, Fol.).

Umesh Chandra Singh v Madhu Sudan Khamkat. 9 C L J 356=4 Ind Cas 119.

(4) Order under S. 244-Final between parties.

797—C P C S. 47, O. 21 rr. 22, 23, 90=(1882 Ss 244, 248, 249, 311)—

Where the first application for execution was barred, but the judgment-debtor did not appear and object, and a second application was made and notice was issued to the judgment-debtor who did not appear, and his property was sold in execution

Held, that the order in the second application that attachment and sale proclamation should issue, was an order under S.244 that, the judgment-debtor not having appealed against it, it became final between the parties and that the sale was good. (10 C W N 209; 8 C L J 193; 6 All

C P C (1908) S.47=(1882, S 244) *Contd*

(9) Resjudicata—*Contd.*

269 (P C); 11 I A 37; 8 Cal 51 (P C) 11 C L R 113; 8 I A 123 Ref.) **Fazar Banu v Uzir Ali Mian. 1 Ind Cas 284.**

(5) Finality of decision of executing Court as to property being non-ancestral.

798—C P C S. 47 ; O 21 rr. 66, 70, 90 Ss. 68, 70, 71=(1882 Ss. 244, 287, 311, 320).

After a decision by the Court executing a decree, with due notice to the judgment-debtor, that certain immoveable property was non-ancestral, the latter is not competent to re-open the question and ask to have the sale set aside on the ground that the property was ancestral and the sale ought to have been held by the Collector. A question of jurisdiction cannot be raised in an application under S. 311 of the Code of Civil Procedure. **Bihari Singh v Muhut Singh 3 A L J 140=1906 W N 3=28 All 273.**

(6) Decree not in accordance with Act—Money not paid within time—Subesquent suit of redemption not barred.

799-C P C S. 47 (1908)=Civil Procedure Code, Ss. 244, 13—Resjudicata.

The plaintiff brought a suit for redemption of a usufructuary mortgage, and obtained a decree for redemption, conditional on his paying a certain sum within a time specified in the decree. This decree, however, instead of going on to direct that in default of paying by the due date the property should be sold. directed that if payment was not made within the time fixed, the 'judgment should be deemed to be non—existent.' The plaintiff did not pay the decretal amount within the time fixed but some years afterwards, brought a second suit for redemption. *Held*, that this second suit was not under the circumstances barred, either by reason of anything contained in the Transfer of Property Act 1882, or by S. 13 or S. 244 of the Code of Civil Procedure. (19 All 202 overruled: 6 I A 404.) **Sitaram v Madho Lal. 1901 A W N 194.**

(7) Questions for the Court executing a decree—Defendant's plea by way of a separate suit.

800—C P C S. 47 of (1908)=S. 244 of (1882) —An issue arising out of the execution of a decree is not raised and determined under S. 244 C P Code. S. 244 does not prevent the defendant from raising that issue in a separate subsequent suit. (24 Cal 355 followed). **Nil Kamal Mukerjee v Jahnai Chowdhurani. 26 Cal 946.**

Notes—Fol: 7 C W N 607. Ref: 19 M L J 1.

(8) Question as to what was sold at execution sale—Inherent power of Court to certify mistake—Question of mistake.

801—C P C Ss. 47, 151—Execution of decree —Question relating to execution.

The question of what was sold at an execution sale is a question relating to the execution of the decree and no decision as to the validity of the decree or as to the validity of the sale held under the decree on the ground of fraud can possibly operate as *res judicata* in a question of mistake which occurred in the execution proceeding itself. The Court has full jurisdiction under s. 151 of the Code to rectify it. **Ekadashi Das v Chandra Mohan Shaha. 7 Ind Cas 91.**

(9) Administrator, suit by——Decree—Satisfaction—Sanction of the Court.

802—C P C S. 47 of (1908)—Indian Succession Act (X of 1865), Sec. 282.

The defendant brought a suit in 1888 against the then administrator of the deceased's estate and obtained a decree. In satisfaction of the decree, the administrator executed a sale deed of some property belonging to the deceased with the sanction of the Court obtained under S. 257-A, of the Code of Civil Procedure. The management of the estate then passed into the hands of another administratrix, who brought a suit in 1901 to set aside the decree and sale thereunder :—

Held, (1) that the decree obtained and the execution had against the former administrator in whom the aggregate of rights and obligations of the deceased were vested as the legal representative of the estate were binding upon his successor as long as that decree and sale consequent upon it were not the result of fraud or collusion.

(2) in answer to the contention that the only execution of the decree allowed by law was that authorised by S. 282 of the Indian Succession

C P C (1908) S.47=(1882 S 244)-*Contd.*

(9) Resjudicata—*Contd.*

Act, 1865, that whatever might have been the proper way of executing such a decree as a matter of fact it was executed rightly or wrongly under S.257-A of the Civil Procedure Code: according to Ss. 244 and 13 of the Code such execution bound the parties to the decree and all persons claiming under them; and the question was therefore res-judicata. **Bai Meherbai v Maganchand 6 Bom L R 853=29 Bom 96.**

Notes—Expl. 32 Bom 381=10 Bom L R 519. Ref: 31 Bom 73; 8 Bom L R 885.

(10) Consideration for the bond—Resjudicata.

803-C P C S. 47 of (1908)=S. 244 (1882).

The objection, viz, that there was no consideration for the bond on which the decree was passed, is one that relates not to the execution, discharge or satisfaction of the decree but to a matter which the decree itself has made res judicata between the parties and their representatives and therefore it cannot be taken in execution by the judgment-debtor, much less can it be by his representatives. **Chanda Bibi v Mahamad. 1889 P J 371.**

(11) Cause of action & relief in two suits different-No resjudicata.

804.—C P C S. 47=Ss. 260, 13—Res judicata.

A and C obtained a decree against B directing B to build a house in a certain manner. A and C then sued B for an order to remove the house erected by B on the ground that it had been built contrary to the decree. *Held*. that the question in the second suit was not one relating to the execution of the former decree under s. 244 (c), as the question under and the relief granted by the former decree viz., the plaintiff's right to prevent the defendant from building and an order to the defendant not to build in a particular manner were not the same as the question under and the relief asked for by the second suit, viz, the plaintiff's right to remove the building erected by the defendant and an order to the defendant to remove the building already built and in default, removal of it by the Court's officers; and that though A and C should have proceeded under s. 260 of the Code the suit could be maintained. *Held*, further, that the claim in the second suit was not resjudicata as the cause of action and the relief in the two suits were both different. **Bai Jadav v Chunilal. 1890 P J 72.**

C P C (1908) S.47=(1882 S.244)-*Contd*

(9) Resjudicata- *Contd.*

(12) Finding of a Court cannot be disputed by the parties in the execution of decree.

805-C P C S. 47 of (1908)=S. 244 (1882).

The finding of a Court on which a decree is based, whether arrived at on evidence or on admissions, cannot be disputed by the parties in the execution of the decree. **Ganesh v Gurunath. 1896 P J 520.**

(13) Execution of decree—Procedure—Resjudicata-Ch VII of the Code does not apply to execution proceedings.

806—C P C S. 47 of 1908=1882 s. 244.

In case of dismissal for default the decree-holder should file a fresh application for execution.(15 All 84; 18 Bom 429; 9 P R 1903=70 P L R 1903, Ref to.).

Orders passed in execution-department even if invalid, operate as res judicata if passed after notice. **Dulo Ram v Pala Mal. 139 P L R 1905.**

807.—C P C Ss. 47, 49,—Execution proceedings—Res judicata.—

A party who allows an order for execution to be passed where he had an opportunity to contest the validity of that order, cannot subsequently re-open the whole matter in controversy. But this principle does not apply where there was no adjudication by reason of the failure of the decree-holder to prosecute the execution proceedings. **Mon Mohon v Dwarka Nath 7 Ind Cas 55=12 C L J 312.**

(14) Res judicata—Mortgage sale—Auction sale pending appeal against decree by mortgagee—Subsequent order directing auction purchaser to be placed in possession.

808.—C P C S 47 (1908)—Modification of decree in appeal—Giving 6 months for redemption.—

C P C (1908) S.47=(1882 S.244)-*Contd.*

(9) Resjudicata—*Contd.*

A decree for sale of mortgaged property was passed in 1900 for a sum less than the amonnt claimed. The mortgagee appealed against the dismissal of a portion of his claim. An order absolute for sale was made in 1902. The properties were sold in 1903 and purchased by the decree-holders. The mortgagees purchasers applied to be put in possession which was refused by the Subordinate Judge and an appeal was preferred therefrom; and on 18-4-04 the High Court allowed the appeal by the mortgagees-purchasers against the order refusing to place them in possession; but before the date the High Court on 27th January 1904 allowed the main appeal of the appellants mortgagees directing the respondents mortgagors to pay the whole amount adjudged within 6 months and in case of default directing the property to be sold. This decree and its form was not apparently brought to the notice of the High Court on 18-4-04 when it disposed of the appeal of their purchase. The respondents (mortgagors) now claimed restoration of possession by setting aside the sale. *Held*, that the order dated 18-4-04 was not null and void and that the mortgagees were entitled to be in possession, the more so as there had been no offer to redeem by rhe respondents.

Ram Golam Sahu v Barsati Singh 13 C W N 321; 9 C L J 158 6 A L J 30; 11 Bom L R 214; 19 M L J 178; 36 Cal 336; 36 I A 27 P C.

(15) Representative of a party—Auction purchaser—Order in summary inquiry

809-810.—C P C S 47=S 244—"Party"

A purchaser at a Court-sale is not a party, or the representative of a party, within the meaning of s. 244 of the Code of Civil Procedure (Act XIV of 1882). He is, therefore, not bound by any order in the miscellaneous inquiry under s. 280, 281, or 282 of the Code. Nor is he bound by the specifications contained in the proclamation of sale of the claims of intervenors. Certain property was attached in execution of a decree. The defendants intervened, and objected to the attachment on the ground that they held the property on permanent tenancy. Their objection was allowed, and the Court made an order, directing the property to be sold, subject to the defendants' rights. In the proclamation of sale

C P C (1908) S 47=(1882 S.244)-*Contd.*

(9) Resjudicata—*Concld.*

however, it was stated that the Court did not guarantee the title of the intervenors. The plaintiff purchased the property at the Conrt sale. He then sued to eject the defendants. The defendants pleaded that the plaintiff had purchased, subject to their rights as permanent tenants. Both the lower Courts rejected the plaintiff's claim on the ground that he was bound by the order in the miscellaneous inquiry, which had become conclusive by reason of his having omitted to sue within one year from the date of the order. *Held*, reversing the lower Court's decision, that the order in the miscellaneous inquiry was not binding on the plaintiff as an auction-purchaser. **Vishvanath Chardu Naik v Subraya Shivapa Shetti 15 Bom 290.**

Notes.—Ref 16 Bom 1.

(10) ESTOPPEL.

(1) Previous application barred—Notice on judgment-debtor.

811.—C P C S 47=(1882) C P C S 244.

A judgment-debtor is not estopped from contending that a previous application for execution was barred by limitation merely because notice had been served on him and he did not appear to contest the proceedings. **Umed Ali v. Abdul Karim. 8 C L J 193.**

(2) Persons wrongly impleaded as defendants not estopped

812—C P C S. 47; O 21 r 58=(1882 Ss 244, 278)—

Some persons, who were wrongly impleaded as defendants in execution proceedings, did not prefer any claim to plaintiff's attachment and sale of property therein.

Held, that they were not estopped, by the said circumstance, from making a claim in any subsequent suit or proceedings. **Akkamad Mohideen v Sowmya Narayana Aiyengar. 8 Ind Cas 161.**

(3) Party alleged to have been wrongly substituted in execution proceedings.

813.—C P C S 47=S 244 of 1882.

A an executrix of the estate of her husband executed a mortgage bond for necessary purposes. She then adopted B. A mortgage suit was brought against A and the

C P C (1908) S.47=(1832,S.244)-*Contd*

(10) Estoppel —*Contd*

suit was compromised, and the amount was to be paid by instalments. Default was made in payment and the decree-holder applied for execution and obtained partial satisfaction; meanwhile A's property was taken into possession by the Court of Wards and the decree-holder died. After N a minor was substituted for the decree-holder and B for A. Present application for execution was made by the sub-manager of N. It was contended by the defendants that assuming that B's estate is liable, the liabelity could not be enforced in execution because the order of substitution as regards B is a mere nullity and that the appeal could not lie under S 244 C P C. *Held*, Court had power to make a substitution of this kind and B is rightly substituted. (16 Cal 40; L R 15 I A 195 ref to.) *Held* also that B was precluded by the previous proceedings from questioning the order of substitution. (8 Cal 51; L R 8 I A 123; 6 All 269; L R 11 I A 37 referred to; 5 Cal 86 distinguished).

Norendra Nath Pahari v. Bhupendra Narain Roy 23 Cal 374.

Notes.—Ap 23 Bom 723. Dist 25 Mad 431; 35 Cal 1060=8 C L J 193. Ref 31 Mad 464 Fol 23 All 199 F B; 7 C W N 594; 8 C W N 470.

(4) Estoppel—Application to have the sale held and application to set the sale aside.

814.—C P C S 47; O 21 rr 83, 90=(1883 Ss. 244, 305, 311)—

In an application by the judgment-debtor under S 305, C P C., he stated that a sale proclamation had been issued, and he offered to have the sale held, without the service of a fresh sale proclamation, if time was given to enable him to raise money to pay the judgment debt. The application was refused and the sale took place. He then made an opplication for setting aside the sale on the grouud of irregularity:

Held, that there was no relinquishment of his right to question the validity of the sale, as the terms offered were accepted neither by the Court nor by the decree-holder, and that the application was, therefore, maintainable—(2 C L J 584, 25 W R 34 Dist, 6 C L J 62, 9 C L J 251; 2 Ind Cas 338; 36 Cal 422 Ref). **Enamudin Jamadar v Abdul Jaffer Daftri 5 Ind Cas 489.**

C P C (1908) S.47=(1882,S.244)-*Contd*

(10) Estoppel.—*Contd.*

(5) Simple money-decree against father-Objection to execution on sons—Estoppel.

815.—C P C S. 47=(1882 S. 244)

Held that the defendants were not entitled to plead S 244 of the Code as bar to a subsequent suit instituted on the strength of their former plea; and it matters nothing that the suit as framed was not exactly the suit suggested by the plea of the defendants. **Jagannadha Row v Kurmayya 17 M L J 314.**

(6) Appeal—Claim—Debutter property—Right of suit.

816.—C P C S 47; O 21 rr 58, 63=(1882 Ss. 244, 278, 283,)

In execution of a decree obtained by the defendants against the plaintiff's father, the plaintiff as legal representative of his father preferred a claim to a property attached on the ground that it was not the personal property of his father but that it was *debutter* property; the claim being disallowed, he preferred an appeal which was dismissed upon the defendant's objection that it was an order, not under S. 244 of the Code but upon an application under S. 278.

Held, that in a regular suit by the plaintiff for declaration that the property is *debutter*, defendant is estopped from raising the question that it was barred by S 244 of the Code. **Hara Dhan Kalia v Purna Chundra Mondal. 11 C W N 145.**

(7) Fraud—Sale in violation of section 99 of T P Act— objection that no suit lay when application put in objection raised that a suit lay.

817—C. P. C. S. 47=(1882 S 244 cl (c)).

Clause (c) of S. 244 of the Code covers a case, where it is sought to set aside a sale held in execution of decree on the ground of fraud or as having been held in violation of s. 99 of the Transfer of Property Act. A regular suit does not lie to set aside a sale upon these grounds.

Per Aikman, J., that, where the appellant had successfully resisted a suit to set aside a sale on the ground that suit was not the proper remedy but that the matter should be tried in execution, he should not be allowed to go behind that and

C P C (1908) S.47=(1882, S.244)-*Contd*

(10) Estoppel.—*Concld.*

object in the execution department, that an application under s. 244 of the Code, did not lie, but that a suit should be brought (30 Ch Dist. 57 Ref).

Gaya Prasad Misri v Randharsing 8 A L J 456=A W N (1906) 206=28 All 681.

Notes—Appr: 6 C L J 320 F B. Ref: 11 C W N 1011 F B; 35 Cal 61 F B.

(8) Right to show that previous proceeding and compromise were in fraud of applicant's right.

818—C P C S. 47=(1882 S. 244).—

In an application for setting aside a sale purported to have been signed by the appellant and her brothers. A compromise petition purporting to have been signed by all of them was presented. Subsequently the appellant presented a similar application.

Held, that she is entitled in this application to show that she had no part in the former proceeding, that the compromise was obtained behind her back and in fraud of her rights, and that it was not binding upon her, without having the compromise set aside either on review or in a regular suit. (27 Cal 11=3 C W N 660 Ref.)

Sreematy Asaban Banu v Ananda Chandra Dutt. 3 Ind Cas 116=14 C W N 823

(9) Decree—Execution-Order under s 244 C P for transfer of execution—Confirmation of order in appral—Application by decree-holder.

819—C P C S. 47, O. XXI, r. 62 (=ss. 244, 282 Civ. Pro.Code, 1882).—Application by decree-holder to Court of first instance for execution.—

Where an order by a Court made under S. 244 of the Civ. Pro Code, 1882, transferring a decree for execution to the Collector (the property attached by the decree-holder being ancestral estate), was confirmed in appeal, and the case came again before the Court of first instance for execution, *held*, it was not competent to the latter Court to alter the order which it had previously made into an order made under s. 282. Such an order is *ultra vires* and illegal.

Bunyad Ali v Jagannath. A W N 1885, 270.

C P C (1908) S.47=(1882, S.244)-*Contd.*

C P C (1908) s. 47—Recovery of mesne profits for period between decree of High Court in appeal—Decree in review.

See C P C (1908) s.144 cl. (1) Case No. (1372).
(1906) A W N 171.

C P C S. 47—Application to set aside—Dismissal for non-appearance—Maintainable or not.

See C P C O 9 r 9. Case No. 1798.
2 Ind Cas 156.

C P C (1908) s. 47—Claim for mesne profits and interest by true representatives—Title of the judgement-debtor.

See C P C (1908) s. 144 cl. 1. Case No.(1373).
11 Bom L R 1200 P C.

C P C (1908) s. 47—Party entitled to any benefit by way of restitution or otherwise.

See C P C (1908) s. 144. Case No (1374).
25 All 441.

C P C s. 47—Restitution due in virtue of the modification in appeal of the decree of a rent Court—Procedure.

See C P C (1908) s. 144. Case No. (1375).
26 All 149.

C P C s. 47—Restitution of property—Execution of decree.

See C P C (1908) s 144 cl (1).Case No (1376)
35 Cal 265.

C P C s. 47—Right of restitution enforceable only against parties to the suit and not against third parties.

See C P C (1908) s. 144 cl. 1. Case No (1377).
33 Cal 857.

—C P C (1908) s. 47—

See C P C (1908) s. 135. Case No. (1325).
20 M L J 136.

C P C (1908) s. 47—

See C P C (1908) s. 115. Case No.(1384).
32 Cal 572.

C P C (1908) s. 47—Decree-Execution—Application by another decree-holder for rateable distribution—Execution proceedings transferred to the Collector—Sale of property by Collector—

C P C (1908) S.47=(1882 S 244)-*Contd.*

Refusal to set aside the sale—Appeal—Confirmed sale can be set aside.

See C P C (1908) s. 68. Case No. (1053).

31 Bom 207.

C P C (1908) s. 47—Sale not affected by the grant of a sale certificate to the auction purchaser.

See C P C (1908) s. 65. Case No. (1031).

9 C L J 464.

C P C s. 47 (1908)—Applicability of provisions of s. 253 to realization of security under s. 336—Order directing security to be realized—Decree appeal.

See C P C (1908) s. 55. Case No. (974).

13 M L J 484.

C P C s. 47 (1908)—Hindu Law—Decree against father—Execution against son—Separate suit.

See C P C (1908) s. 50. Case No. (945).

6 C W N 223

C P C s. 47 (1908)—Question whether property attached is deceased judgment-debtor's.

See C P C (1908) s. 50. Case No. (944)

26 Mad 501.

C P C s. 47 of (1908)—Appeal from orders-Order by execution Court for imprisonment of judgment-debtor—Appeal—Revision.

See C P C (1908) s. 55. Case No. (975).

69 P R (1895).

C P C S. 47—Effect of setting aside an exparte decree.

See C P C O 9 r. 13 Case No. 1922.

5 C L J 328.

C P C (1908) s. 47.—

See C P C (1908) s. 64. Case No. (1017).

28 Cal 492.

C P C (1908) s. 47—Date of decree for mesne profits—Date of ascertainment—Date of decree.

C P C (1908) S.47=(1882 S.244)-*Concld*

See C P C (1908) s. 48. Case No. (882).

6 C L J 462.

C P C s. 47—Non-certification is no bar to a suit for damages.

See C P C O 21 r. 2. Case No. 2,299.

15 C L J 88.

C P C s. 47—Uncertified payment or adjustment.

See C P C O 21 r. 2. Case No 2280.

5 A L J 475.

C P C s. 47—Uncertified payment or adjustment.

See C P C O 21 r. 2. Case No. 2256.

12 C W N 485.

C P C (1908) s. 47—Special Cases under O 2 r 2 Expl. (a)-Suits for mesne profits and possession.

See C P C (1908) O 2 r 2. Case No. (1548).

5 M L T 294.

C P C (1908) s. 47—Modes of paying money under decree.

See C P C (1908) O 21 r. 1. Case No. (2183).

10 P L R 27.

C P C s. 47—Contest between benami transferee and real transferee as to the right to execute decree.

See C P C (1908) O 21 r. 16. Case No. (2371).

21 Mad 388.

C P C s. 47—Power of Court to stay execution, discretionary and not obligatory.

See C P C (1908) O 21 r 16. Case No. (2363).

28 Mad 357.

C P C s. 47—

See C P C O 21 r 15. Case No. 2358.

2 M L T 307.

C. P. C. (1908) S. 48 = C P C (1882) S. 230.

Limit of time for Execution.

Notes—C P C (1908) s.48=(1882) s 230. This section corresponds with paras 3 and 4 of section 230 of the C P Code of 1882, with several modifications and changes—Cl (b) of sub-section (2) is new.

1 **Application of the section (820-823)**

2 **Decree sought to be executed commencement of the period of limitation (824-827)**

3 **Decree for the payment of money (828-833)**

4 **Granting of an application for the execution of decree (834—844)**

5 **Where decree or order is for periodical payments of money or for delivery of property at a certain date (845-851)**

6 **Period of limitation under this section and step in aid of execution (852—887)**

7 **Where the judgment-debtor has by fraud or force prevented execution (888—902)**

8 **This section does not affect the operation of Art 180 of Limitation Act (903—906)**

9 **Miscellaneous Cases (907—917)**

---

[1] Application of the Section.

1 Application of the section 820

2 Application of section—Retrospective effect—Statutes construction of 821

3 Construction 822

4 Hypothecation decree—Construction of document 823

5 S. 230 did not apply to a decree under S. 88 of Act IV of 1882 823 A

6 S. 230 'After passing of the code'—Meaning of 823B and 823C.

7 S. 230 provides for an application and S. 235 specifies the form and contents 823 D

C P C (1908) S.48(=(1882 S.230)-*Contd*

[2] Decree sought to be executed—Commencement of the period of limitation.

1 The previous application from which the twelve years are to be reckoned must be an application under the very section 824

2 Date of the passing of the Code—Date of its coming into force 825

3 The time runs from appellate decree—S. 115 826—827B.

4 Modifying decree when limitation begins to run 827 C.

5 Limitation not to be computed—The date of the application 827 D.

[3] Decree for the payment of money

1 Mortgage decree—Decree for payment of money—Payment out of Court 828

2 Decree for payment of money—Decree for sale of hypothecated property in a suit on a mortgage 829

3 Decree—Conditional on payment of money—No payment—Execution—Application filed after three years from the date of decree 830

4 Decree for sale of hypothecated property which also made the defendant personally liable in case of insufficiency—Mortgage decree 831-832

5 Decree for payment of money Mortgage decree ordering preliminary payment—Limitation 833

[4] Granting of an application for the execution of decree.

1 Execution of decree 834

2 Passing of the Act—Meaning of the expression "Granted" in s. 230. 835—836

3 Twelve years old decree—Meaning of "Granted" 837

4 Twelve years old decree—Application when "Granted" within the above section 838

5 Meaning of "Granted" and "Law in force", in the section 839

C P C (1908) S.48=(1882,S.230)-*Contd.*

6 "Execution of decree"—"Law in force" 840

7 Application for execution of decree—Limitation—Subsequent application to execute the same decree—"Granted" meaning of 841

8 Application to transfer decree for execution—"Granting" application, meaning of—Issue of process 842

9 Order passed more than twelve years from decree on application passed within time 843

10 Application to wrong Court—"Granted" 844

[5] Where decree or order is for periodical payments of money for delivery of property at a certain date.

1 Order directing payment of money at a certain date—Decree payable by instalments—Execution of decree 845

2 Annual or monthly payments—Decree directing payment at a certain date 846

3 Limitation—Execution of decree 847

4 Delivery of property—Certain date—Construction of decree 848

5 Execution of decree—Certain date 849

6 Finality of order made in execution of proceedings—Decree payable by instalments 850-851

[6] Period of limitation in this section and step in-aid of execution.

1 Execution of decree—Limitation 852

2 Decree—Execution—Decree more than twelve years old—Limitation 853

3 Execution of decree—Decree more than twelve years old—Arrangement between parties in execution for payment of judgment-debt by instalment—Validity of such arrangement 853A

4 Disability of minor—Application for execution presented more than twelve years after date of decree 854

5 Limitation—Execution of twelve years' old decree 855—855B

6 Application for execution not made under the Civ. Pro. Code, 1882. 856

7 Former application for execution under Act VIII of 1859. 857

8 Former application for execution under Act X of 1877—Execution of decree—

C P C (1908) S.48=(1882,S 230)-*Contd.*

Twelve years old decree—Statutes, construction of—Retrospective effect of 858

9 Execution of decree 859

10 Application not made under s. 230—Proceeding not barred 860

11 Prohibits a subsequent application for execution, only applies where the previous application has been made under that section 861

12 Second application for execution of decree—Failure to satisfy decree on first application 862

13 Second application—Preceding application not granted under s. 230 863

14 Subsequent application—Previous one not judicially treated—Not barred 864

15 Another application for execution 865

16 Subsequent application—Application to revive one previously made 866

17 Subsequent application to take step-in-aid of 867-867C

18 Sale postponed on application—Subsequent application struck off—Application for revival of the subsequent application bar 868

19 Application by representative of deceased decree-holder—Absence of certificate—Subsequent application 869

20 Revival of barred decrees—Twelve years old decree 870.

21 Previous darkhast cannot be rejected, because there is a latter one, when they are for different reliefs and not inconsistent with one another 871

22 Execution of decree—Subsequent application to execute the same decree—Application for execution previously struck off re-instated—Construction of the previous application 872

23 Striking off decree as fully satisfied—Effect of—Application for execution after twelve years barred 873

24 Effect of striking of execution proceedings—Procedure 874

25 Execution application—Effect of striking off—Attachment subsisting, removal of 875

26 Striking off the application for execution—Order for, not warranted by law. 87

27 Application for attachment—Order after twelve years for the same—Interlocutory decree, not barred 877

28 Unvarified petition for execution—Return for amendment—No saving for the period of limitation of twelve years 878

29 Decree capable of execution 879

30 Effect of, on matters closed before it came into force 880

31 Mortgage decree after twelve years 881

32 Date of decree—Decree for mesne profits—Date of ascertainment 882

33 Application to execute decree-Attachment of property - Transmission of decree of Baroda Court to British Court—Application to execute decree by attaching other property in British India 883

34 Transfer of application for arrangement of parties by Collectors to the Subordinate Judge—Arrangement incapable of execution 884

35 Agreement under s 257A—Sanction—Limitation—Resjudicata—Mistake of Law 885

36 Execution proceedings—Limitation 886

37 Due deligence-Act X of 1877 887

[7] Where the judgment-debtor has by fraud or force prevented execution.

1 Execution of decree—Fraud construed in a broad sense—Evasion of warrant amounts to fraud—Whether fraud of one judgment debtor keeps the decree alive after twelve years only against himself 888

2 Evading service of warrants—Staying execution—Fraud 889

3 "Fraud or decree"—Evasion of arrest raising false objection—Decree not barred after twelve years 890

4 Fraud, interpretation of—Judgment-debtor's objection to validity of sale proving unsuccessful—If fraud proved—Decree-holder's power to add to period of limitation 891

5 Obstruction to execution of decree—Fraud 892

6 Execution—"Fraud" meaning of—Limitation 893

7 Decree prevention of execution of by fraud 894

8 Execution of decree prevented by "Fraud, or force" of judgment-debtor—Period of limitation. 895

9 Fraud of judgment-debtor preventing execution-Fraud meaning of—Application for warrant of—Arrest, an application for attachment of immovable property, different from each other. 896

10 Judgment-debtor preventing by fraud Execution of decree—Execution proceeding—Limitation 897

11 Preventing execution of decree by force or fraud—Limitation 898

12 Execution—Limitation—Fraud on the part of judgment debtor—Continuation of proceedings within twelve years from the date of decree 899

13 Money decree—Application to execute after expiry of twelve years—Fraudulent conduct of judgment-debtor. declaring execution—Frivolous application 900.

14 Execution of decree—due deligence exercised by decree-holder in—Judgment—debtor, fraud and stratagem of-Limitation, extension of. 901

15 Limitation— Fraud— Execution of decree 902

[8] This section does not effect the operation of Art 180 of Limitation Act of 1877.

1 Effect of execution—Decree of High Court—Revival—Limitation—Limitation Act, Art 180 903—904.

2 Execution of decree—Limitation Act 1877, Sch II, Art, 179 905

3 Civil Procedure Code Sec 230— Execution of decree 906

[9] Miscellaneous Cases.

1 Law in force immediately before passing of the Code—Execution of decree 907.

2 Application barred before Act XIV of 1882 came into force 908.

3 Limitation—Twelve years' rule prior to that Code—Civ Pro Code Act X of 1877 909—910

4 Application for execution—Limitation Act XV of 1877. Sch II Art 179. 911.

5 Due deligence in execution—Execution of decree 912

6 Transfer of decree—Due deligence 913

7 Decree of Presidency Small Cause Court—Execution application presented to City Civil Court—S 48 not applicable 914

8 Decree ordering the defendant not to let rain water fall on the plaintiff's land 915

9 Execution-Minor-Extension of time 916

10 Appeal by some of the defendents against portion of decree—Appeal dismissed—Limitation for executing remaining portion of decree 917

11 Execution against property-Amendment ordered—Fresh application—Resjudicata 917A

—S 48 of (1908) See also cases under C P C O 21 r 10.

—C P C (1908) S 48—See cases under O 21 r 21.

—C P C (1908) S 48—Decree directing performance of puja and giving of honors according to usage—Nature of the decree—Whether Executable. See C P C (1908), S 92 Case No (1143) **2 M L T 94.**

—C P C S 48 of (1908)—Application to be made to Court holding assets prior to their realization. See C P C (1908) S 73. Case No (1060) (e) L B R 1900—1902 Vol I. 121.

C P C (1908) S 48. O21 rr 10, 21=(1882) S. 230 & 231 (1859, S 207)

See cases under.

1 Execution of Decree—Application for Execution, and Powers of Courts.

2 Execution of Decree—Joint Decree, Execution of and Liability under.

3 Limitation Act 1877 arts 178 and 179 (1871 s. 167; 1858 s 20 Joint Decrees.

4 Limitation Act, 1877, art 180.

1 APPLICATION OF THE SECTION.

(1) Application of the section.

820—C P C—S. 48. O. XXI rr.10, 21.=S.230 S. 230 does not apply to decrees made by the High Courts. **Mayabhai v Tribhuvandas. 6 Bom., 258.**

Notes—Ap: 20 Cal 551: 7 Mad 540. Fol: 36 Cal 543=9 C L J 271.

(2) Application of section-Representative effect—Statutes Construction of.

821—C P C—S. 48=S. 230 of 1882 s. 48—Decree for sale upon mortgage passed before 1908—No curtailment of right to execute—Mortgage decree.

The right to enforce the execution of a decree is a substantive right. That right cannot be lost without an express provision of law to that effect.

A decree for sale of mortgaged property was passed while Act XIV of 1882 was in force. Twelve years expired, but the decree was not satisfied. In the meantime Act V of 1908 was passed, S. 48 of which was made applicable to all decrees. *Held* that the decree passed before the passing of that Act could be executed more than twelve years after the date it was passed. No statute shall be so construed as to have a retrospective operation, unless such a construction appears very clearly in the terms of the Act, or arises by necessary and distinct implication. Statutes are to be construed as operating on only cases or facts which come into existence after they are passed. **Kounsilla v Ishri Singh. 7 A L J 420=6 Ind Cas 188=32 All 499.**

See also Cases under:—

(1) Execution of decrees.
(2) Mortgage (Mortgage decrees).
(3) Limitation Act Art 179.

Notes.—Ref: 37 Cal. 796=6 Ind. Cas.537=15 C W N 337=12 C L J 328; 7 A L J 1070.

(3) Construction.

822—C P C—S. 48 (1908)=S. 230 of 1882.

Decree for payment of money and in default for sale of property—Construction.

9 A L J 79.

(1) Application of the section.—*Contd.*

(4) Hypothecation decree—Construction of document.

823—C P C—S. 48, O.XXI rr.10,21 of 1908= s. 230.

A decree making a sum of money payable by instalments,and containing hypothecation of some property for the due performance of the decree with a condition of accelleration in certain events, is not a simple decree for the payment of money within the meaning of s 230 of the Code of Civil Procedure. **Pahalwan Singh v Narain Das 20 W N 131, 22 All 401.**

823B—C P C—O. 21, rr. 10, 21, s. 48 (=s 230, Civ.Pro Code,1882)—Execution of decree--Decree under s. 88 of Act I I of 1882, purporting also to grant relief under s. 90.

Held, that s. 230 of the Civ.Pro.Code,did not apply to a decree, which purported to be made under s. 88 of Act I V of 1882, but which in addi tion to the relief provided for by that section,granted also the relief provided for by s. 90 of the said Act. **Jogul Kishore v Cheda Lal. A W N 1893 184.**

Notes.—Ref. 25 All. 541, 28 All 771, F B=3 A. L. J. 585; 2 A. W. N. 1906, 237=1 M. L. T. 247.

823C—C P C—(1908)—O. 21, rr. 10, 21, s. 48 (=Civ. Pro. Code, 1877, s. 230)—"After the passing of the Code."

Held that the expression "after the passing of the Code" in s. 230, Civ Pro Code,1877,means the date the Code was passed, that is to say, the date the bill became law and received the assent of the Governor-General, and not the date the Act came into force. **Jugal Kishore v Lamania Begam A W N 1881, 58**

See also **Tulshi Ram v Chotey Lal, A W N 1881, 113.**

Notes—Ref; A W N 1881, 74.

823D -C P C--(1908), O. 21, rr. 10, 21. s. 48 (=Civ. Pro. Code, 1877, s. 230)--"Passing of the Act."

The worts "the passing of the Act" in s. 230, mean the day on which the Act received the assent of the Governor-General and not when the Act came into force. **Radha Kishun. v Budha Singh, A W N 1882, 2.**

(1) Application of the section.—*Conc'd,*

823E--C P C--O 21 r 10.—O. 21, rr. 10, 21, s. 48, O. 21, r. 11 (2), s. 73, O. 38, r. 12 (=ss. 230, 235. 295.490, Civ. Pro. Code, 1882)--Application for rateable distribution-Not conforming to requirements of s. 235--Whether amounts to execution —Application under s. 295--Attachment before judgment under s. 490--whether Presupposes an application for execution--Effect of the words "shall not be necessary to re-attach" in s. 490.

A mere application for rateable distribution, which does not comply with the requirements of s. 235 in form or substance, cannot be treated as the sort of application falling within the scope of s. 295. (11 C. L. J. 69, Rel. on.) S. 230 provides for an application for execution and s. 235 specifies the form and contents of that application. S. 490, which gives validity and effect to the attachment before judgment even after decree for certain purposes, does not give rise to the implication that that attachment was made on a constructive application for execution of a decree that had not been passed.(31 Mad 502, Not Fol; 12 Bom 400, 33 Cal 639,Ref.).The section does not make the application to execute the decree a second application to execute it, because it says re-attachment is unnecessary. The subsisting attachment before judgment has its use in invalidating alienation by the judgment-debtor and dispensing with the need of a further attachment before sale, without necessitating the fiction, after a decree is passed that there was a pre-existing application for execution. **A L A R Arunachallam Chettiar v P.S K Haji Sheikh Meera Rowther. 8 M L T 226=7 Ind Cas 856,**

2 DECREE OUGHT TO BE EXECUTED —COMMENCEMENT OF THE PERIOD OF LIMITATION.

(1) Previous application from which the 12 years are to be reckoned must be an application under the very Section.

824—S. 48; O. 21 rr 10, 21 (1908)=S. 230 of (1882).

The previous application from which the twelve years are to be reckoned must be an application under the very Section and not the corresponding sections, of the earlier Codes. If such previous applications were made under the old

C P C (1908) S.48=(1882 S.230)-*Contd*

(2) Decree ought to be executed Commencement of the period of limitation—*Contd.*

Codes the general law of limitation will have to be applied. **Martand v Amritrau. 1891, P J., 269.**

(2) Date of the passing of the Code—Date of its coming into force.

825—S. 48 O XXI rr. 10, 21 of 1908=S. 230.

The date referred to in the last paragraph of s. 230 of the Civil Procedure Code (Act X of 1877) as the date of "the passing of" that Act held to be the 30th March 1877, the date when that Act received the assent of the Governor General, and not the 1st October 1877, the date of the coming into force of that Act. **Damodar Das Hari Das v Uttamchand Saviachand, 7 Bom 214**

(3) The time runs from appellate decree —S 115.

826—C. P. C. Ss. 48, 115.

Whether dismissal on the ground of limitation constitutes a ground for interference in revision.

Where an execution petition was filed by the decree-holder more than 12 years from the date of the original decree, but within 12 years of the date of the appellate decree confirming the same, and the District Munsif dismissed the petition as barred by limitation under S. 48 of Act V of 1908, *held*:

(1) That the petition was within time, as limitation runs from the date of the appellate decree.

(2.) That the District Munsif having held that his jurisdiction was ousted by limitation, he failed to exercise a jurisdiction vested in him by law within the meaning of S. 115, Civ. Pro. Code. **Narasaya Hedge v Yitla Prabhu 1911 2 M W N 239=10 M L T 281=21 M L J 1020.**

827A—C. P. C. S. 48=(1882) S. 230, O 21 rr 10, 21.-Decree on appeal-Original decree modified —C. P. C, S. 230—Limitation.

Where the appellate Court modifies the original decree it is the decree of the appellate Court that can be executed: and limitation runs from the date of the appellate decree.

So the period of twelve years, prescribed by S. 230 of the C. P. C., must be counted from the date

II C.C 119

C P C (1908) S.48=(1882,S 230)-*Contd.*

(2) Decree ought to be executed Commencement of the period of limitation—*Contd.*

of the decree passed on appeal. (25 Cal. 594 Fol:) **Mahomed Mehdi Bella v Mohini Kanta Saha Chowdhry. 34 Cal 874=7 C L J 305.**

See also 26 Mad 91 F B.

827B—C. P. C. O. 21 rr. 10, 21, S. 48=(1882 230) Abatement of appeal—Calculation of time.

An appellant died while his appeal was pending in the High Court. The High Court made an order to the effect that the appeal had abated and that the respondent was entitled to his costs.

Held that the order was in effect an order confirming the decree of the lower Court, and the decree-holder was entitled to the benefit to twelve years' limitation calculated from the decree of the appellate Court. (23 All.124, Dist. 34 Cal 874, Fol.) **Mahammad Razi v Karbalai Bibi 32 All 136=5 Ind Cas 473.**

(4) Modifying decree—When limitation begins to run.

827C—C P. C (1908) O 21, rr. 10, 21, s 48 -Order modifying decree in accordance with agreement of parties—Payment of money or delivery of property directed by order—When limitation provided by the section begins to run. **Limitation Act, 1908, S 22 4 P W R 1909=5 P L R 1909 =1 Ind Cas 48.**

(5) Limitation not to be computed-The date of the application.

827D—C. P. C. 1908 s. 48 O. 21, rr. 10, 21, (=Civ. Pro. Code. 1877, s 230)—Execution of decree—Limitation.

A decree-holder applied for the execution of his decree on the 6th December, 1877. The application was struck off "for default of prosecution" on the 18th January, 1878. On the 5th December 1878, he again applied for execution of the decree. On the 12th December, 1878, this application was rejected, with reference to the provisions of s. 230, C. P. Code 1877, as they stood before they were amended by Act XII of 1879, on the ground that, on the last preceding application of the 6th December, 1877, the applicant had not used due diligence. On the 4th May, 1881, the decree-holder again applied for execution. *Held*, that the last application was barred by limitation as time could not be computed from the date of the 5th December, 1878. **Kirat v Pahlad. A W N 1882, 97.**

C P C (1908) S. 48=(1882,S 230)-*Contd.*

8. DECREE FOR THE PAYMENT OF MONEY.

(1) Mortgage decree—Decree for payment of money—Payment out of Court.

828—C. P. C. O. 21, rr 2, 10, 21, Ss. 48; 73=(1882—Ss. 258, 230, 295).

S. 258, C. P. C., applies to a decree directing the sale of mortgaged property and containing a direction for the recovery personally from the mortgagor and from his other property of what may remain undischarged by the sale proceeds of the mortgaged property. (24 Mad. 421 overruled). S. 258, C. P. C., applies even to a decree which only contains a direction as to sale of mortgaged property. (11 Cal. 718 approved.) 'A decree for money' and 'a decree for payment of money' as used in Ss. 230 and 295, C. P. C. include a mortgage decree directing the sale of mortgaged property. (30 Mad. 107 and C. M. A. No. 4 of 1908 Ref: and approved). A receipt by a mortgagee in possession of the usufruct, though 'a payment' within the meaning of S. 22 of the Indian Limitation Act, cannot come within the words 'money payable under a decree' as used in S 258, C. P. C. **Vaidhinadasawmy Iyer v Somasundram Pillai. 15 M L J 126=28 Mad 473; F B.**

(2) Decree for payment of money- Decree for sale of hypothecated property in a suit on a mortgage

829—C P. C. S. 48 O. XXI rr. 10, 21 of 1908=S. 230.

A decree for sale of hypothecated property made in a suit for sale upon a mortgage bond is not a "decree for the payment of money" within the meaning of s 230 of Act XIV of 1882. (16 All 259, distinguished.) **Ram Charan Bhagat v Sheobarat Rai 16 All 418.**

Notes—Ref: 25 All 541; 28 All 771 F B=1 M L T 247=3 A L J 585=(1906) W N 237. Diss: 20 Mad 107. Fol: 25 Cal 580; 27 Cal 285.

829A—C. P. C. O. 21 rr. 10, 21. S. 48=(1882 s. 230).

Decree for sale of hypothecated property—Decree for money.

A decree for sale of hypothecated property is not a money decree within the meaning of s, 230, C. P. C.,—16 All. 418; 27 Cal. 285, foll; 1893 A.

C P C (1908) S.48=(1882,S.230)-*Contd.*

(3) Decree for the payment of money-*Contd.*

W. N 184. **Jadunath Prasad v Jagmohan Das. 25 All 541=1903 A W N 98.**

Notes:—Diss: 31 Cal 792, 121 P. L. R. 1908. Ref: 3 A. L. J. 585=A. W. N. 1906, 237 =1 M. L. T. 247= 28 All 771.

(3) Decree—Conditional on payment of money—No payment—execution—Application filed after three years from the date of decree.

830—S 48, O 21 rr 10, 21=C P C S. 230 (1882).

Limitation—Where a decree directed the defendant to surrender the land to plaintiff on his paying a certain sum for improvements and an application was made more than three years from the date of the decree it was held it was time barred (26 Mad 780, fol: 24 All 300 not fol:) **Ramappaya v Charda Bhatta. 8 M L T 251.**

(4) Decree for sale of hypothecated property, which also made the defendant personally liable in case of insufficiency-Mortgage decree.

831.—C P C S 48, O XXI rr 10, 21 of 1908=S 230 of 1882.

A decree directing the realization of the decretal amount from the hypothecated property and making the defendant also personally liable in case the hypothecated property prove insufficient is a 'Mortgage decree' and not a money decree. (16 All 418 followed ; 11 Cal 718 distinguished ; 24 Cal 473 referred to).

Fazil Howladar v Krishna Bundhu Roy 25 Cal 580=2 C W N 118.

Notes :—Fol 27 Cal 285. Ref; 26 Cal 166 ; 31 Cal 792 ; 31 Bom 308 ; 9 Bom L R 409.

832.—C P C S 48, O XXI rr 10, 21 of 1908=S 230.

Decree for the sale of the mortgaged property making the defendant personally liable in case of insufficiency. Limitation Act Sch II Art 179 cl 4—Step in aid of execution—Application for time—Application to review the order striking off the execution,

(3) Decree for the payment of money-*Contd.*

A decree directed the realisation of the decretal amount from the sale of the mortgaged property at first and then from the persons and other property of the defendant. This decree is a mortgage--decree and not a money decree within the meaning of S. 230 C P Code. (16 Cal 418) 25 Cal 580 referred to and followed ; 20 Mad 107 dissented from; 14 W R 209 ; 12 B L R 315 note 24 W R 305 distinguished.) **Kartik Nath Pandey v. Jugger Nath Ram Mawari. 27 Cal 285.**

Notes—Ref: 25 All 541 Diss: 28 Mad 224. Ref 10 C W N 209: 3 C L J 240 35 Cal 1060=8 C L J 193. Dist: 31 Cal 792.

(5) Decree for payment of money-Mortgaged decree ordering preliminary payment—Limitation.

833—C P C S 48 (1908) O 21, rr. 10, 21; S. 48=(1882—S.230)-- Limitation.

A decree directing payment of money by defendant to plaintiff, and in default the sale of the mortgaged properties is a decree for the payment of money within the meaning of S. 230. (20 Mad. 107 foll.; 27 Cal 285 diss. from.) An application for attachment of the mortgaged properties in execution of such decree, though within 12 years, is ineffective and infructuous and is consequently no application for execution and subsequent application for sale after 12 years far from being a continuance of the application for attachment is the real application for execution and, therefore, barred.—(24 Cal. 473 ref to.)

Abdulla Sahib v Doctor Oosman Sahib. 28 Mad 224.

(6) Decree against representative limited to immoveable property of deceased debtor.

833A— C P C O. 21, rr. 10, 21 and s. 48 (=Civ. Pro. Code, 1882, s. 230)——Limitation—Decree for payment of money—Decree against representative limited to immoveable property of deceased debtor.

The mere fact that a decree, passed against the representative of a deceased person as such, is limited as regards the liability of the judgment-debtor to the immoveable property of the deceased, which may come into the hands of the representative will not make such a decree other than a decree for payment of money within the meaning of s 230 of the Code of Civil Procedure. (A W N 1893, 184 and 16 All 418 Ref.)

Janki Prasad v Sheogopal, A W N 1893, 114.

(7) Compromise under Sec. 257 A—New decree-Order subsequent to decree.

833B—C P C O 21 rr 10, 21, S.48 = (1882 S. 230)—Agreement under section 257 A—Sanction —Limitation—Res judicata—Mistake of Law.

Held, that an order sanctioning a compromise under sec. 257-A is neither a new decree nor an order subsequent to decree directing payment of money within the meaning of sec 230 (b) Civil Procedure Code. (18 M. L. J. 359 Ref:).

Held, further that a decision come to on a mistake of law will not operate *res Judicata* in subsequent proceedings. (30 Mad 461; 30 Mad 504 Ref:). **Palaniappa Chettiar v Raja Visvanatha. 4 M L T 233= 18 M L J 548.**

4. GRANTING AN APPLICATION FOR THE EXECUTION OF DECREE.

(1) Execution of decree.

834—C P C S 48, O 21 rr 10, 21 of 1908= S. 230 of 1882.

An application for execution of a decree, which was more than twelve years old, having been made on the 18th August 1880 under s. 230 of the Code of Civil Procedure, an order was made for the attachment of the moveable property of the judgment-debtor. No moveable property having been found, the Court was asked to attach his immoveable property, but refusing to do so, struck off the proceedings. The application for execution having been renewed on the 13th September 1880, it was held that the former application for execution must be treated as having been granted within the meaning of s. 230 of the Code, and consequently that the further application was barred under that section, the decree being more than twelve years old.

Afrannessa Chowdhrani v Sharafutullah Chwodhry 9 C L R 321.

(4) Granting an application for the execution of decree—*Contd.*

(2) Passing of the Act-Meaning of the expression 'granted' in S. 230.

835—C P C S. 48, O 21 rr 10, 21 (1908)=S. 230 —Execution of Decree—"Granted"-Meaning of.

A decree having been passed on the 9th May 1865, and confirmed on appeal on the 29th December 1865, an application was made for execution in September 1877, before Act X of 1877 came into force. A subsequent application made on the 31st January 1880, having been rejected as informal, another application was made on the 11th September 1880.

Held, that the last mentioned application was not barred by section 230 of Act X of 1877, inasmuch as the application of the 31st January 1880, although made under section 230 of that Act, had not been granted, so as to render a subsequent application within the terms of the section.

Semble:—The execution 'granted' in the third paragraph of Section 230 is equivalent to the expression 'admitted' used in Section 245 of the Civil Procedure Code. **Dewan Ali v Sorosibala Dabee. 8 Cal 297=10 C L R 111.**

Notes:—Ref: 16 Cal 744.

836—C P C S. 48, O. 21 rr 10, 21 of 1908=S. 230—Granted.

Under s. 230 of the Code of Civil Procedure, after a decree is twelve years old, there is a prohibition against its being executed more than once *i. e.*, an application for execution should not be granted if a previous application has been allowed under the provisions of that section. The mere filing of a petition with the result that the application contained in it is subsequently struck off, is not, "granting" an application within the meaning of s. 230 of the Code, and ss. 245, 248 and 249 show that there is a broad distinction between admitting an application for the purpose of issuing notice to the other side and of hearing the objections that may be urged, and a decision of the Court as provided in s. 249. In 1865 a decree was passed for a sum of money payable by yearly instalments for a period of sixteen years. Down to March, 1877, various amounts were paid on account of the decree. In that month an application was made for execution of the decree the result being an arrangement for liquidation of the amount then due, which was confirmed by the Court. A second application for execution was made on the 9th March, 1881, the decree then being more than twelve years old. All that was done with reference to this application was that notice to appear was issued to the judgment-debtor's representatives, and subsequently a petition was filed notifying that an arrangement had been effected under which a certain sum had been paid by one of the said representatives in satisfaction of the claim against him, and that the other had agreed to pay the balance by yearly instalments. Upon this the application for execution was struck off on the 5th March, 1883, another application for execution was made, notice to appear was issued, and after this notice a petition was put in intimating that an arrangement had been come to, and praying that execution might be postponed, whereupon the application was struck off. Again on the 31st March, 1884, the decree-holder applied once more for execution of the decree. *Held* that neither the previous application of the 9th March, 1881, nor that of the 5th March, 1883, could properly be said to have been "granted" within the meaning of s. 230 of the Code of Civil Procedure, and, under these circumstances, the decree, though twelve years old and upwards, was not barred by that section and the application for execution should be allowed. **Paraga Kuar v Bhagwan Din. 8 All 301, 6 W N 97.**

(4) Granting an application for the execution of decree—*Contd.*

Notes-Ap: 8 All 536. Dist: 15 All 198. Ref: 12 All 571; 18 All 482 F B.

(4) Twelve years old decree-Meaning of "granted."

***837**—C P C S. 48, O 21 rr 10, 21 of 1908=S. 230 of 1882.

A decree passed in April 1872 was kept alive by various applications for execution up to 1883. In February and December of that year two such applications were made, but the proceedings on both occasions terminated in the applications being struck off without any money being realized under the decree. In November 1884, the decree-holder again applied for execution, the application being the first made after the decree had become twelve years old, and being made within three years from the passing of the Civil Procedure Code,

C P C (1908)-S.48=(1882,S.230)-*Contd*

(4) Granting an application for the execution of decree—*Contd.*

1882. *Held* that the application must be entertained in accordance with the ruling of the Full Bench in 6 All 1895 Weekly Notes. All 1885 p 193 dissented from. 8 All 419, referred to. *Per* Mahmood, J., that the previous execution-proceedings, initiated by the applications of February and December 1883, having terminated in those applications being struck off, it could not be said that the applications were "granted" within the meaning of s. 230 of the Civil Procedure Code. (8 All 301. referred to.) **Ramadhar v Ram Dayal. 8 All 536.**

Notes—Ref: 12 All 571; 15 All 198.

837A—C P C S. 48 O. 21 rr 10, 21 (=Civ Pro Code, 1882, s. 230)—Decree twelve years old—"Granted"—Limitation Act (XV of 1877), s. 14—Execution of decree in Court not having jurisdiction.

An application for the execution of a decree shall be deemed to have been "*granted*" within the meaning of s. 230 of the Civ Pro Code, when the Court executing such decree has attached land on the application of ths decree-holder and applied to the Revenue authorities for sanction of sale. Where previous to the promulgation of 9 P R 1901=1 P L R 1901 execution proceedings were held in a Court Subordinate to the District Court, not having jurisdiction in the matter, by order of the District Judge, held that the decree-holders were entitled to the benefit of s. 14, Limitation Act. **Bahadur Khan v Sadho Singh. 132 P L R 1904=76 P R 1904.**

(4) Twelve years old decree—Application when "granted" within the above section.

838—C P C S. 48; O 21, rr 10, 21=S. 230—Money payable at a "certain date"—Each of several assignees of portions of a decree not entitled to execution separately.

On an application filed in August 1886, for execution of a decree passed in April 1874, it appeared that the previous application by the present applicant, who was an assignee of a part of the decree, was made under Section 230 of the Civil Procedure Code of 1882, in October 1883, the object of which was to obtain an order for the distribution of a sum of Rs. 150 which was said to be in the hands of the Nazir, and to have a notice issued to the judgment-debtor to appear and show

C P C (1908)-S.48=(1882,S.230)-*Contd*

(4) Granting an application for the execution of decree—*Contd.*

cause why the decree should not be executed against him This notice (under Section 248) was issued, and eventually the case was heard in the presence of the parties, and the Court having directed the rateable distribution of the Rs. 150 in the hands of the Nazir, left the decree-holders to make any application for further proceedings to recover the balance which they might be advised to take and as no such proceedings were taken, the Court subsequently ordered the case to be consigned to the record-room.

Held, that the application of October 1883 must under the above circumstances be taken to have been "granted" within the meaning of Section 230 of the Civil Procedure Code.

The decree in the above case directed the money due under it to be paid annually in two instalments at a specified rate "each harvest," referring apparently to the Fasli harvests of rabi and kharif.

Held, that money payable as above could not be said to be payable "at a certain date" within the meaning of clause (*b*) of Section 230 of the Civil Procedure Code, and that therefore applying clause (*a*) of the same section, the present application for execution was barred.

It is a grave irregularity in an executing Court to permit several assignees of parts of a single and indivisible decree to execute that decree as to their shares independently of each other. **Sher Ali v Deoki Nandan. 19 P R 1889.**

Notes—Ref: 76 P R 1904=132 P L R 1904.

838A—C P C S 48, O 21, rr 10, 21=(1882 S. 230)-Execution of decree, application for, on the last day of twelve years succeeding the date of the decree—C P C S. 230.—Limitation Act,

The applicant obtained a decree against the respondent on the 11th April, 1895. He made several applications for execution from time to time. The last application was dated the 11th April, 1907, being the last day of twelve years succeeding the date of the decree. *Held*, that the application could not be granted. (6 Mad 359, not Fol; 18 All 482 (489) and 21 All 155, Ref.).

Deoki Nandan v Saiyed Nazir Hasan. 11 O C 57.

(4) Granting an application for the execution of decree—*Contd.*

(5) Meaning of "granted" and 'law in force" in the section.

839—C P C S. 48; O 21, rr 10, 21=S. 1230—Twelve years old decree—Civil Procedure Code (Act XIV of 1882), Section 230.

An application by a decree-holder on which the judgment-debtor was arrested and brought up to Court, though he was subsequently released, *held* to have been "granted" within the meaning of Section 230 of the Civil Procedure Code, 1882, such application having been made the basis of proceedings in execution.

Held further, that the words "law in force" in the concluding paragraph of the same section mean not only the Limitation Act but also the Civil Procedure Code of 1877. **Misri v Tulsi Ram. 54 P R 1887.**

Notes—Ref: 76 P R 1904=132 P L R 1904.

(6) Execution of decree—**"Law in force".**

840—C P C S 48 O XXI rr 10, 21 of 1908 =S. 230, Act X of 1877—Act XIV of 1882.

The holder of a decree applied for execution under s. 230 of Act X of 1877, and the application was granted. Within three years after the passing of Act XIV of 1882, by which Act X of 1877 was repealed, he applied, for the first time, under s. 230 of former Act, for execution of the decree. At the time this application was made more than twelve years had elapsed from the date of the decree. *Held* by Straight, Brodhurst, and Tyrell, J.J., that the application might be granted, it being the first made under s.230 of Act XIV of 1882, and the first made after the expiration of twelve years from the date of the decree and not being barred by the last paragraph of s. 230 of that Act read in conjunction with the 3rd paragraph of s. 230 of Act X of 1877, the "law in force" mentioned in the last paragraph of s. 230 of Act XIV of 1882 referring to the Law of Limitation in force at the time the Act was passed and not to the third paragraph of s. 230 of Act X of 1877. *Held* by Stuart, C J, and Oldfield J., that the application should not be granted the effect of the last paragraph of s. 230 of Act XIV of 1882 being to bar any proceedings to enforce a decree under that Act which would have been barred under s. 230 of Act X of 1877, if taken thereunder, on the

(4) Granting an application for the execution of decree—*Contd.*

ground that the period of twelve years had elapsed from the dates specified in that section.

Musharaf Begam v Ghalib Ali. 6 All 189. 4 W N 22.

Jokhu Ram v Ramdin. 8 All 149. 6 W N 162.

Ramdhar v Ramdayal. 8 All 536. 6 W N 168.

Notes—Diss: 12 Cal 559; Not Fol: 11 Bom 524. Fol: 8 All 419;536; (Minority of F B) 9 Mad 454. Dist: 6 All 388; 8 All 536.

(7) Application for execution of decree—Limitation—Subsequent application to execute the same decree—"Granted" meaning of.

841—C P C—S. 48, O 21, rr 10, 21 of 1908= S. 230 of 1882.

The "subsequent application to execute the same decree" mentioned in s. 230 of the Code of Civil Procedure means a substantive application for execution in the form prescribed by S. 235 of the Code. Hence where an application for execution in accordance with s. 235 of the Code has been made within the period of limitation prescribed by s. 230 and has been granted, that is, execution has been ordered in accordance with the prayer of the decree holder's application: the right of the decree holder to obtain execution will not necessarily be defeated if, by a reason of objections on the part of the judgment-debtor or action taken by the Court or other cause for which the decree holder is not responsible, final completion, of the proceedings in execution initiated by the application under s. 235 above referred to cannot be obtained within the period limited by s. 230. Further applications of the decree-holder to the Court executing the decree to go on from the point where the execution proceedings had been arrested and complete execution of his decree would be applications merely ancillary to the substantive application under s. 235 and would not be obnoxious to the bar of s. 230. (W N 1893, p. 124 overruled.) **Rahim Ali Khan v Phul Chand. 18 All 482, 6 W N 142.**

Notes—Fol: 2 A L J 276. Ref: 30 All 499= (1908) W N 39=5 A L J 616; (1908) W N 227.

C P C (1908) S.48=(1882,S.230)-*Contd*

(4) Granting an application for the execution of decree—*Contd.*

(8) Application to transfer decree for execution-"Granting" application, meaning of-Issue of process.

842.—C P C S 48, O, 21 rr 10, 21 of 1908= S 230 of 1882.

An application to the Court making the decree for a certificate to transfer the execution of the decree to another Court is not an application for the execution of the decree within the meaning of S 230 C P Code. The granting of application under that section includes the issue of process for execution of the decree.

Nilomoney Singh Deo v Biresur Banerjee 16 Cal 744.

Notes.—Fol : 22 Cal 921. Ref : 8 C W N 575. Dist: 20 Cal 29 ; 22 Cal 375.

(9) Order passed more than 12 years from decree on application passed within time.

843.—C P C S 48, O 21 rr 10, 21 of 1908= S 230 of 1882,

The terms of s 230 of the Code of Civil Procedure, which provide that no subsequent application to execute the same decree shall be granted after the expiry of twelve years from the date of the decree, do not render invalid an order passed after twelve years from the date of a decree, granting an application for execution made before the twelve years' term had expired.

Senra Disai Venra Jagath Virarama Dikker Vijaya Setharayar v Annasami Ayyar. 6 Mad, 359.

Notes : Ref : 18 All 482 F B.

(10) Application to wrong Court "Granted"

844.—C P C S 48, O 21 rr 10, 21 = S 230 (1882) —(Act X of 1877).

On the 18th November, 1879, within three years from the passing of Act X of 1877, A who held a decree against B dated 16th July, 1860, applied under s. 230 of that Act for its execution. But the application was made to the wrong Court, to the Munsif of Ghazipur, instead of Ballia. He was consequently referred to the latter Court, to which he applied on the 15th May 1880. *Held* that the proceedings taken before the Munsif of Ghazipur were good and valid for the purposes of limitation and that application was not granted, the 3rd para of s. 230 of the Code of Civil Procedure did not apply. **Maharaja Radha Prasad Singh v Indras Kuar. 2 W N 91.**

C P C (1908) S.48=(1882,S.230)-*Cont*

(4) Granting an application for the execution of decree-*Concld.*

5. WHERE DECREE OR ORDER IS FOR PERIODICAL PAYMENTS OF MONEY OR FOR DELIVERY OF PROPERTY AT A CERTAIN DATE.

(1) Order directing payment of money at a certain date—Decree payable by instruments - Execution of decree.

845—C P C S 48, O 21 rr 10, 21 of 1908= S 230 of 1882.

The parties to a decree presented a petition to the Court executing the decree, stating that it had been agreed between them that the amount of the decree should be paid by ten monthly instalments of Rs 500 each. The Court made an order directing that such petition should be filed. *Held* that this order did not amount to one directing payment of money to be made at a certain date, which would give a fresh period of limitation under sec. 230 (b) of the Civil Procedure Code. **Bal Chand v. Raghunath Das. 4 All, 155.**

Notes :—Ap 16 Cal 16.

(2) Annual or monthly payments—Decree directing payment at a certain date.

846.—C P C S 48. O 21, rr 10, 21=S. 230 of 1882.

Decrees for annual or monthly payments fall within and are governed by the provisions of Section 230 (b), Civil Procedure Code, 1882. 22 P R 1905=57 P L R 1905 ; 12 P R 1902= 15 P L R 1902, 2 P R 1899 Rev.

Nawabzada Muhammad Kamar-ud-Din Khan v Piari Lal. 13 P R, 1892, F B.

(3) Limitation—Execution of decree.

847.—C P C S 48, O XX1 rr 10, 21 of 1908= S 230 of 1882.

A judgment-debtor was arrested in execution

C P C (1908) S.48=(1882 S.230)-*Contd*

(5) Where decree or order is for periodical payments of money or for delivery of property at a certain date—*Contd.*

of a decree. He applied and requested for fifteen days' time to pay the decretal amount. The decree-holder consented and the Court made the order 'Let the petition be filed' *Held*—this order did not amount to one directing the payment of money to be made at a certain date. (4 All 155 followed). **Jogobundhoo Das v Hori Rawoot. 16 Cal 16.**

(4) Delivery of property—Certain date—Construction of decree.

848.—C P C S 48 ; O 21, rr 10, 21=S 230.

The decree in this case bore date the 18th August 1873, and was to the following effect : " Decree for Rs 6000 principal and interest, and Rs 315 costs, with further interest at 0-8 per cent, per month, that is, from date of decree to date of realization, be made in favour of plaintiff against defendant. Mauza Raseen, which is under attachment by the Government in lieu of Rasadi debts be made over to plaintiff after release from attachment, *mudai ko bad rajuzasht supurd kia jawe* ".

The decree-holder made applications for execution, from time to time, so as to keep alive the right of execution so far as it is effected by Article 179, Schedule II, Limitation Act. It was contended that the present application made on the 6th December 1887 was barred under Section 230, Civil Procedure Code, as a previous application for execution had been made and granted and that 12 years had elapsed from the date of the decree. It was also contended that the decree did not direct the delivery of property and that if it did, no *certain* date was fixed for delivery.

Held, that the decree was for delivery of property. Section 230 is not restricted to a delivery of the property to the decree-holder as his own property, and does not exclude a delivery of property as mortgaged property

Held, also, that a *certain* date had been fixed for delivery, as the date could be sufficiently ascertained by reference to a contingent event—*i. e*, the release from attachment. *In certum est quod certum reddipotest.*. **Muhammad Akbar Khan v Dwarka Das. 159 P R 1889**

C P C (1908) S.48=(1882,S.230)-*Contd.*

(5) Where decree or order is for periodical payments of money or for delivery of property at a certain date—*Contd.*

(5) Execution of decree—Certain date.

849—C P C S. 48; O. 21, rr. 10, 21=S. 230 of 1882.

The decree in this case provided that Rs.8,000 was due to the decree-holder: that Rs. 400 should be paid annually on account of interest on this sum, and that in case of default for 2 years, the decree-holder would be competent to recover Rs. 8,000 with interest.

Held, that the decree did not direct payment of Rs 8,000 to be made at "a certain date," within the meaning of Section 230 of the Civil Procedure Code. **Nihal Chand v. Safdar Hussain 199 P R 1890.**

(6) Finality of order made in execution proceedings—Decree payable by instalments.

850—C P C—S. 48. O, XXI rr.10, 21 of 1908 =S. 230 of 1882.

In 1868 a decree was obtained for Rs1.100, which provided that the amount should be paid in instalments, the first instalment being Rs200, to be paid at the end of the first year, and that the other instalments should be Rs100 at the end of each subsequent year, and that in the event of failure to carry this out, and 2½ months after the falling due of the instalment, the whole amount should be exigible in a lump sum with interest at 8 annas per cent.per mensem. In 1877 the decree-holder applied for execution of the decree, asserting that Rs 600 had been paid up to that time by five instalments, one of Rs 200 and four of Rs 100 each,and that default had been made in payment of the fifth instalment of Rs 100, and he asked to recover the whole amount due on the decree. No order was passed on this application, and eventually the case was struck off In 1880 the decree-holder again applied for execution of the decree, upon the same grounds as those upon which the previous application was based. Notice was issued and served, and a warrant issued for the arrest of the judgment-debtor, but eventually the case was struck off. In 1883 the decree holder on the same grounds made another application for execution. It was contended by the judgment-debtor that execution was barred by s. 230 of the Civil Procedure Code, inasmuch as no instalments had been paid, and even if they had been paid, they could

(5) Where decree or order is for periodical payments of money for delivery of property at a certain date—*Concld.*

not be recognized, not having been certified. *Held* that the proper time from which to reckon the limitation of twelve years was the fifth year from the date of the bond, the whole claim from the beginning and the order passed in 1880 having gone upon that basis, that the Court could not go behind that order, and that consequently the decree-holder was within time and might take out execution. **Kanji Mal v Kanhia Lal. 7 All., 373.**

851—C P C S. 48, O. 21 rr 10, 21, 11 (2)= Ss. 230 and 235—Application for execution made within twelve years—Right to continue proceedings after expiry of twelve years—Limitation.

If an application for execution of a decree is made in accordance with S 235 of the Code, within twelve years provided for by S. 230 of the Code, and granted, the decree-holder may continue the proceedings even after the expiry of the twelve years; the mere fact, that the proceedings terminate after the expiry of the twelve years, will not render the application one barred by limitation. **Bishan Singh v Ganga Ram. 27 P R 1905= 79 P L R 1905.**

6 PERIOD OF LIMITATION UNDER THIS SECTION AND STEP-IN-AID OF EXECUTION.

(1) Execution of decree—Limitation.

852—C P C—S.48.O.21 rr 10,21(1908)=S.230 (1882)—"Application to execute a decree".

The term "application to execute a decree" in the third paragraph of s 230 of the Code of Civil Procedure means any application to execute a decree. It is not confined to the last application preceding the expiry of the period of twelve years from either of the points of time mentioned in cl. (*a*) or cl. (*b*) of the same paragraph of the section above mentioned. (8 All. 301 disitnguished. 8 All., 536 referred to.) **Tileshar Rai v Parbati 15 All 198, 13 W N 93.**

Notes:—Ap: 18 All 482 F B; 28 Cal 122. Dist: 24 All 282. Ref: 3 C W N 80; 14 C W N 114.

(6) Period of limitation under this section and step-in-aid of execution—*Contd.*

(2) Decree-Execution-Decree more than 12 years old—Limitation.

853—C P C S. 48. O. XXI, rr 10, 21 of 1908 =S. 230 of 1882.

An application for execution of a decree obtained against the judgment-debtor in 1870 was presented by the applicant on the 26th January 1885. Several previous applications for execution had been made, and the last two, *viz.*, on the 29th July 1881 and 29th June 1882, had been granted. The judgment-debtor was arrested and brought before the Court. He contended that execution of the decree was barred. Both the lower Courts were of opinion that the decree was not barred, and allowed execution to issue. On appeal by the judgment-debtor to the High Court—*Held* that the application for execution was too late. As there had been an application made and granted on the 29th July 1881 under the Code of 1877, and twelve years from the date of the decree would have elapsed before June 1885, the application in question was barred, and was not saved by the concluding clause of s. 230 of the Code (Act XIV of 1882). **Motichand v Krishnarav Ganesh. 11 Bom., 524.**

Notes.—Dist: 15 All. 198.

(3) Execution of decree-Decree more than 12 years old-Arrangement between parties in execution for payment of judgment-debt by instalments—Validity of such arrangement.

853A—C P C—S. 48; O. 21, rr. 10,21.=S.230

The decree of which execution was sought was passed on the 11th May 1869. From 1869 to 1878, applications for execution were regularly made at intervals of less than three years. On the 20th August 1878, the decree-holder applied for execution. Notice was issued to the judgment-debtor, who, on the 14th October 1878, proposed an arrangement for payment of the amount of the decree by instalments which was agreed to by the decree-holder and the case struck off. The decree-holder applied for execution under this arrangement on the 9th May 1881, 22nd April 1884, and finally on the 7th August 1886 On notice having been served on him of this last application, the

C P C (1908) S.48=(1882,S.230)-*Contd.*

(6) Period of limitation under this section and step-in-aid of execution—*Contd.*

judgment-debtor appeared and contended that the decree could no longer be executed being more than 12 years old, and one application having been made and granted in 1884 (Section 230, Civil Procedure Code). He further contended that the arrangement made in 1878 was null and void, having been made without jurisdiction, inasmuch as a provision similar to that contained in Section 57 A, did not exist in Act X of 1877, and further that no decree could be altered by consent of parties except by the Court which passed the decree, and then only within six months of the date of the decree, which was not the case here.

Held, that the judgment-debtor could not be allowed to challenge the validity of an arrangement which was brought about by his own action in 1878. Where a Court has a general jurisdiction over the subject-matter of a claim, parties should be held to an agreement made by them that the questions between them should be heard and determined by proceedings contrary to the ordinary *cursus curiæ*: and consequently the decree of 1869, as modified by consent of parties in 1878 was still capable of execution. (15 B L R 383; 21 W R 310, and L R 5 P C 516, referred to.)

Nawab Zada Muhammad Akbar Khan v. Dya Nath. 200 P R 1889.

Notes.—89 P R 1894

853. B.— C P C S. 48 O 21 rr. 10 21 (= Civ Pro Code 1877, s. 230) —Execution of decree —Limitation.—

In 1878 in execution of a decree passed in the year 1859, an arrangement was made whereby the decree-holder allowed the judgment-debtors to pay the decree by instalments, and on this arrangement being certified to the Court, the property of the judgment-debtors, then under attachment, was released, but it was not carried out by an order under s. 210, Civ Pro Code. *Held* that the decree could be executed as more than 12 years had elapsed from the passing of the decree. **Radhey Lal v Nathu. A W N (1882), 5.**

(4) Disability of minor—Application for Execution presented more than 12 years after date of decree.

854.—C P C S. 48; O 21 rr. 10, 21=(1882) S. 230—Limitation Act (XV of 1877), Section 7.

C P C (1908) S 48=(1882,S.230)-*Contd.*

(6) Period of limitation under this section and step-in-aid of execution—*Contd.*

Held, that the enactment in Section 230 of the Civil Procedure Code 1882, limiting the period during which execution shall be granted of a decree once put in actual execution is one made for the benefit of the judgment-debtor to protect him from being subject, without limit in point of time to execution proceedings, and as the said section is in absolute and unqualified terms, as regards persons a minor decree-holder is not exempted from its operation by Section 7 of the Limitation Act 1877. (16 Bom 536, not followed.) **Jhanda v Mohan Lal. 128 P. R: 1894.**

Notes:—Ref 76 P R 1904=132 P L R 1904.

(5) Limitation—Execution of twelve years' old decree.

855.—C P C S 48, O 21. rr.10, 21=(1882 s. 230),

Held, that where an application to execute a decree for the payment of money or delivery of other property has been made within the period of limitation prescribed by Section 230 Civil Procedure Code, and granted, and there has been no unreasonable delay in its prosecution by the decree-holder the latter's right to continue execution will not be barred under the third paragraph of that section if the final completion of the proceedings initiated by such an application cannot be obtained within the period limited by that section, (19 P R 1889, 27 P R 1888, 109 P R 1889, 9 P R 1891, 54 P R 1887, 128 P R 1894, 7 Cal 556, 6 Mad 359, 40 P R 1898, 10 Cal 416, 19 Bom 261, 5 Mad 141, 18 All 482 F B referred to). **Bahadur Khan v Sadhosingh. 76 P R 1904.**

855A—C P C S. 48 O. 21 rr. 10, 21—Execution of decree—Limitation.

A Court executing a decree while rejecting an application for execution, is not competent to order that a fresh application may be made within a certain time when it would be barred under law.

To entitle a decree holder to the benefit of S. 230 C P C 1882 it is not enough to prove fraud at some time during the twelve years' period, if the

C P C (1908) S.48=(1882. S.230)-*Contd.*

(6) Period of limitation under this section and step in aid of execution—*Contd.*

decree-holder had at a later period, facility for executing the decree. **Rai Chand v Jhande Khan.** **75 P L R 1909.**

855B.—C P C s. 48 O 21 rr. 10, 21 (=s. 230 Civ Pro Code 1882)-Decree passed under Civ Pro Code (Act VIII of 1859)-Twelve years' old decree-Execution-Applicability to such decrees.

The proviso to s. 230 of Act XIV of 1882, allowing a further period of three years to enable decree-holders to execute their decrees, applies to those decrees which would be barred on the date of the Code (Act XIV of 1882) coming into force and does not apply to those decrees which were not barred by the twelve years' rule and which could have been executed on the Code coming into force by reason of the fact that the period of twelve years had not expired from the date mentioned in s. 230 of the Civ Pro. Code, 1882. **Tufail Ahmad v Sadho Saran Singh,** **A W N 1885, 193.**

Notes—Diss 8 All 419.

(6) Application for execution not made under the Civil Procedure Code 1882.

856.—C P C S. 48, O 21 rr. 10, 21 of 1908=S. 230-Decree-Application for execution-Limitation.

On the 1st June 1880, several decree-holders applied to the Subordinate Civil Court of Parner for execution of their decrees. They had taken out execution several times, previously, the date of their last preceding applications being 1st June 1877. The Subordinate Judge was of opinion that the applications were barred under the last clause of s. 230 of the Civil Procedure Code Act X of 1877. On his referring the cases to the High Court,-*Held* that the applications were not barred, inasmuch as the previous applications for execution had not been made under s. 230 of Act X of 1877, that Act not being then in force,

Anandrav Chimuji v Thakar Chand, **5 Bom 245,**

Notes:—Fol 9 C L R 297.

(7) Former application for execution under Act VIII of 1859.

857.—C P C S. 48 O XXI rr. 10, 21 of 1908=S. 230.

C P C (1908) S.48=(1882, S.230)-*Contd*

(6) Period of limitation under this section and step-in-aid of execution—*Contd.*

An application under Act VIII of 1859 for execution of a decree was rejected by the District Judge on the ground that the judgment-creditor had withdrawn from the former application. This order was reversed on appeal, and the case was sent back for disposal on its merits. The Judge then held that Act X of 1877, which had just come into force applied and on the ground that the decree-holder had failed to get execution upon his former application dismissed the petition. The Judge referred the case to the High Court upon the question whether he was under the circumstances, at liberty to grant the application. *Held* that he was. The application should have been dealt with under the law which was in force at the time execution was sought. The effect of the provisions of s 230 of Act X of 1877 considered. **Byraddi Subbareddi v Dassuppa Raju,** **1 Mad 403.**

Notes:—Dist 6 Cal 504,

(8) Former application for execution under Act X of 1877—Execution of decree—Twelve years' old decree—Statutes, construction of-Retrospective effect of.

858—C P C S 48, O 21 rr 10, 21 of 1908=S.230—Construction—Retrospective effect.

Per Mahmood. J.—The rule of construction being that a limited meaning can only be given to general words in a statute where the statute itself justifies such limitation, the words "any decree" in the proviso to s. 230 must not be construed as confined to such decrees as would be barred on the date of the Code coming into force, inasmuch as no reason for so restricting the meaning of those words can be found in the Code or is suggested by the legislative policy upon which clauses such as the proviso in question are based. This policy is to prevent a sudden disturbance of existing rights in consequence of new legislation; but it is beyond its object and scope to revive rights or remedies which have already expired before the new Act comes into operation and although the Legislature may revive such rights or remedies, it can only do so by express words to that effect. **Jokhu Ram v Ram Din.** **8 All 419.**

Notes:—Ref: 8 All 536.

C P C (1908) S.48=(1882, S.230)-*Contd*

(6) Period of limitation under this section and step in-aid of execution—*Contd.*

(9) Execution of decree.

859.-C P C S.48, O 21 rr 10, 21 of 1908=S 230

Held that the words "the last preceding application" in the third clause of s. 230 of Act X of 1877 mean an application under that section and not an application under Act VIII of 1859.

Ram Kishen v. Sedhu 2 All 275.

Notes.—Dist: 6 Cal 504.

(10) Application not made under proceedings not barred.

860.—C P C S 48, O 21 rr 10, 21 of 1908=S 230.

On the 3rd June 1879, an application was made for execution of a decree passed in 1836, & upon that application certain property was attached. On the 23rd October following, the proceedings were struck off, an order, however, being made at the same time that the attachment should continue On the 31st December 1880, the decree-holder applied that the property under attachment should be sold. The last preceding application for execution previous to the 3rd June 1879 was made on the 8th August 1877. It was objected that the proceedings upon the applications of the 31st December 1880 and 3rd June 1879 were barred under s 230 of the Code of Civil Procedure *Held* that these proceedings were not barred, inasmuch as the previous application had not been made under s. 230 of the Code. (5 Bom 246 followed). *Held*, also, that the application of 3rd December 1880 could not be treated as a fresh application for execution within the meaning of the third paragraph of the section referred to **Panaul Huq v. Kishen Mun Dabee 9 C L R 297.**

Notes.—Ref 18 All 482 F B.

(11) Prohibits a subsequent application for execution—Only applies where the previous application has been made under that section

861.—S 48 O 21 rr 10, 21 of 1908=S 230.

Limitation Act XV of 1877, schedule II Art 180-Revivor Civil-Procedure Code Act X of 1877 sections 230, 245 and 248—Act VIII of 1859, Sections 215 and 216—Scire Facias.

C P C (1908) S.48=(1882, S.230)-*Contd.*

(6) Period of limitation under this section and step-in-aid of execution—*Contd.*

A decree having been obtained in 1864, the first application for execution was made under section 215 of Act VIII of 1859 on the 18th September 1869, when an order was made for a writ of attachment to issue against the person of the judgment-debtor. On the 15th September 1880 another application was made, under section 230 of the new Civil Procedure Code, Act X of 1877, for execution.

Held, that the order under section 215 of Act VIII, which must be assumed to have been on notice, had the effect of reviving the judgment within the meaning of Article 180, schedule II, of Act XV, of 1877, and the application was not barred.

An order for execution under the Code of Civil Procedure made after notice has, on the original side of the High Court, the same effect of reviving a judgment as a scire facia had.

Section 230 of Act X of 1877 only appliee where the previous application for execution was actually made under that section.

Ashootosh Dutt v Doorga Churn Chatterjee 6 Cal, 504=8 C L R 23.

Notes.—Disc 30 Cal 979. Fol: 36 Cal 543=9 C L J 271, 24 Cal 244. Doub: 17 Cal 491 22 Cal 921. Ref: 20 Cal 531; 7 Mad 540, 30 Cal 949, 7 C W N 793.

(12) Second application for execution of decree Failure to satisfy decree on first application.

862.—S. 48, O 21 rr 10 21 of 1908=S 230 of 1882.

A decree was passed more than 12 years before the Civil Procedure Code 1877 came into force. The judgment-creditors applied for the attachment sale of the property of the judgment-debtors previous to the date of which the three years allowed for such execution under s 230 would have expired. After the three years had elapsed they made a second application that property other than that specified in the first application be attached and sold and that property specified in the first application might be re-based. *Held*, execution of the decree was bound by limitation. Per Prinsep J:-Under s. 230 the Legislature intends that a decree holder seeking to

C P C (1908) S 48=(1882 S.230)-*Contd.*

(6) Period of limitation under this section and step in-aid of execution—*Contd.*

execute a decree passed more then 12 years before should have one opportunity to execute that decree and that if he fails to satisfy it on that application any further application becomes barred. **Shreenath Gooho v Yusoof Khan 7 Cal 556=7 Cal 748=9 C L R 334.**

Notes.—Ap: 6 All 189 F B Ref: 8 All 419. Doub: 14 Cal 14.

(13) Second application-Proceeding application not granted under S 230.

863.—C P C S 48, O 21, rr 10, 21=S 230—Issue of notice to debtor.—

Where an application to execute a decree of 1862 was made under s 230 of the Code of Civil Procedure 1877, on the 14th of December 1877, and a notice was issued to the judgment-debtor under s. 248, but no further steps were taken,—*Held* that a subsequent application made within three years from that date was not affected by the twelve years' rule as the last preceding application had not been granted within the meaning of s. 230. **Chengaya v Appasami Ayyar 6 Mad 172.**

Notes: —Dist 15 All 198

863A—C P C O 21, rr 10, 21, s 48 (=Civ Pro Code 1877, s 230)—Limitation—Execution of decree.—

A was the holder of a decree for possession of immoveable property and for the payment of mesne profits and costs, dated the 6th February, 1864. He made an application to enforce it in respect of the payment of mesne profits and costs on the 29th November, 1877 She made a similar application on the 17th January, 1881, *held* that the last application was barred under s. 230, Civ Pro Code. **Rahsi v. Sheobalak Tiwari A W N, 1882, 111**

(14) Subsequent application—Previous one not judicially treated—Not barred.

864.—C P C S 48; O 21, rr 10, 21=(1882) S. 230

An application made in May, 1883, for execution of a decree passed in July 1871, was struck off the file without any order either granting or

C P C (1908)-S.48=(1882 S.230)-*Contd.*

(6) Period of limitation under this section and step-in-aid of execution—*Contd.*

refusing it. In September 1883, another application for execution was granted by the Court but on a petition *admisericordiam* by the judgment-debtor who promised to pay the judgment-debt, the Court, with the decree-holder's consent, allowed a delay of two months. In January 1885, the debt remaining unpaid, the decree-holder again applied for execution. *Held* that this application not being a second application for execution made since the expiration of twelve years from the date of the decree but only an application by way of revivor of the application of September, 1883, which had been suspended was not barred by s. 230 of the Code of Civil Procedure. *Held* also that the application of September, 1883, could not be considered bad in law because the previous application of May, 1883, had received no judicial treatment at the hands of the Court executing the decree. (10 All 71. ref to). **Muhammad Ismail v. Sukh Ram. 8 W N 295.**

864A.—C P C S 48, O 21, rr 10, 21. (=C P C, 1882 s 230)—Execution of decree—Limitation—Application twelve years from date of decree, previous application for execution having been granted.—

A decree holder obtained a decree for money on the 30th of July, 1877. Application was made in may, 1878, under the terms of s. 230 of the Civ Pro Code, for execution of this decree by sale of three houses belonging to judgment-debtor. Under that application, two out of the three houses were sold. The sale of the third house was postponed on the application of a party. On the 15th of December, 1878, the application of May 1878, was "struck off." On the 11th of November, 1889, the decree-holder applied in terms to revive the application of May, 1878, and to bring to sale the remaining house. *Held* that s 230 of the Civ Pro Code, applied to the circumstances as above set forth and was a bar to the further execution of the decree. **The Delhi and London Bank Ld v Major B L Reilly. A W N 1893 124.**

Notes—Overruled, 18 All 482=A W N 1896 142, F B.

(6) Period of limitation under this section and step in-aid of execution—*Contd.*

864B—C P C S. 48 O 21 r 10 O 21 rr 10, 21 (=s. 230, Civ. Pro. Code 1882)—Subsequent application for execution.

The holder of a decree dated June 1873 made an application for execution in March 1884, asking that the decree be sent for execution to the District Court, with a certificate of non-satisfaction. The application was granted in July 1884, and the decree and the certificate under s. 224 of the Code were given to the applicant, who filed the same in the Court of the District Judge in November 1885, and the Judge, under the authority of s. 236, Civ. Pro. Code, directed the decree to be forwarded for execution to the Court of the Subordinate Judge The applicant then filed the application asking the Subordinate Judge to execute the decree. This last application was made in November 1885. *Held* that the last execution application was not barred by limitation though it was dated more than twelve years from the date of the decree, inasmuch as it was not a fresh application for execution, but only one asking the Court to give effect to that of March 1884 which was still pending, and as it was nothing more than asking the Courts to give directions in accordance with the order of March 1884. **Ram Sahai v Nanni A W N 1886, 137.**

(15) Another application for execution.

865-C P C S.48, O 21 rr 10,21=(1882) S. 230.

When the court to which a Small Cause Court sends its decree for execution is unable to execute the decree because immoveable property belonging to the judgment-debtors is not to be found within the jurisdiction, the proper course for the decree-holder is to make another application under section 230 for the attachment of such moveables of the judgment-debtor as are within the court's jurisdiction. **Motilal v Balkrishna (1879) Select Case Part X No 37.**

(16) "Subsequent application"—Application to receive one previously made.

866—C P C. S 48 O 21 rr 10. 21=(1883) Para 3 S 230.

The decree-holder applied for execution on the 6th February, 1882, but on the application of the judgment-debtor the Court postponed the execution in order to enable the judgment-debtor

(6) Period of limitation under this section and step in-aid of execution—*Contd.*

to raise money. On 7th April, 1883, the money not having been paid they again applied for postponement of the execution. This was refused and on the 7th July, 1883, the decree-holder made his present application *Held* that this application was linked to that of 6th February, 1882, and therefore not liable to the bar attaching to a subsequent application in the sense of para (3) of s 230 of the Code of Civil Procedure. **Bhagwanti Prasad v The Collector of Basti. 5 W N 269.**

866A—C P C S. 48, O 21, rr. 10, 21, (=s. 230, Civil Procedure. Code, 1882)—Decree—Application for execution—"Subsequent application."

A decree-holder made an application for execution of his decree on 6-2-1879, which was rejected for default of prosecution. A subsequent application made on 6-2-1882 was granted. Afterwards, on the application of the debtor, execution proceedings were postponed by order of Court made on 7-4-1882 to enable the debtor to satisfy the decree. The latter applied for further time on 7-4-1883, which was refused on 7-5-1883. Thereupon, the decree-holder applied to the Court on 7-7-1883 praying that the execution of his decree may be proceeded with *Held* that this application (of 7-7-1883) was linked to that of 6-2-1882, and therefore not liable to the bar attaching to a "subsequent application" in the sense of para. 3 of s. 230, Civ. Pro. Code, 1882. **Bhagwanti Prasad v The Collector of Basti, A W N 1885. 269.**

(17) Subsequent application to take step-in-aid of.

867—C P C S.48; O 21 rr 10, 21=S 230 (1882) C P C—S. 235—Limitation Act 1877 2nd Schedule Article 179 (iv).

The decree, of which execution was sought, was passed on the 15 th July 1880, and an application for execution by attachment and sale of moveable property was made on the 27th October 1882, but as no moveable property could be found the proceedings were infructuous and terminated. Subsequently, on the 18th October 1883, on a fresh application for execution, the judgment-

C P C (1908) S. 48=(1882, S. 230)-*Contd.*

(6) Period of limitation under this section and step-in-aid of execution—*Contd.*

debtor was arrested and imprisoned, and a small sum of money was realised by sale of a document. On the 29th January 1884 an application was made for execution by attachment and sale of immoveable property of the judgment-debtor. The executing Court dealt with this application as one for a farm of the property, but the error was amended by the Divisional Court on appeal, and proceedings were protracted until, on the 31st October 1891, the Commissioner of the Division refused to sanction sale of the property. On the 31st October 1892, the decree-holder filed an application, setting forth the refusal of the Commissioner to sanction the said sale and his own fruitless endeavours to realise his decree, and praying that the land be sold or a receiver appointed under Section 503 of the Civil Procedure Code. An order for the appointment of a receiver having been made, the judgment-debtor appealed to the Chief Court, and it was contended on his behalf that execution of the decree was barred under the provisions of Section 230 of the Code, and Article 179 (iv) of the 2nd Schedule to the Limitation Act, 1877. It was urged that the application of 1892 was "a subsequent application', within the meaning of the said section of the Code.

Held, that the said application was merely a petition to the Court seized of and already executing, the decree on the application of 1884, to take a step in aid of the execution on that application, and was, therefore, not barred under Section 230 of the Code, which does not apply to applications or petitions asking the Court to give effect of previous petitions still pending.

Held further, that inasmuch as proceedings in execution had been pending ever since 1884, execution was not barred by reason of "steps in aid of execution" not having been taken every three years. **Budhe Khan v Bir Bal 40 P R 1898.**

Notes—Ref: 76 P R 1904=132 P L R 1904

867A—C. P. C. O. 21, rr. 10, 21 S. 48=Civil Procedure Code (Act XIV of 1882) S. 230—Execution of decree—Order on execution petition proceedings closed'—Subsequent application within twelve years of that date—Limitation.

C P C (1908) S. 48=(1882, S. 230)-*Contd.*

(6) Period of limitation under this section and step in-aid of execution - *Contd.*

A mortgage decree against defendants and in favour of the plaintiff was passed on 6th December 1892. After a series of applications for execution, the Court passed the follwing order on 26th October (1905)."1st defendant's heirs not brought on the record. Proceeding closed." Plaintiff presented his next application on 3 rd April 1907. The Munsif dismissed it on the ground that it was barred by limitation under the penultimate clause of section 230 Civil Procedure Code (Act XIV of 1882). The District Judge reversed it on appeal. *Held*, that as the last preceding application was filed within 12 years from the date of decree and that was not dismissed, the order' proceedings closed' not amounting to dismissal, the present application was not barred. **Tadapalli Bappaiya v Putti Kottaya. 6 M L T 333.**

867B C P C O. 21, rr. 10, 21; S. 48=(1882-S. 230)-' Decree for payment of money'-Mortgaged decree ordering primarily payment—Limitation.

A decree directing payment of money by defendant to plaintiff, and in dafault the sale of the mortgrged properties is a decree for the payment of money within the meaning of S. 230. (20 Mad. 107 foll.; 27 Cal. 285 diss. from). An application for attachment of the mortgaged properties in execution of such decree, though within 12 years, is ineffective and infructuous and is consequently no application for execution and subsequent application for sale after 12 years far from being a continuance of the application for attachment is the real application for execution and, therefore, barred. (24 Cal. 473 ref to). **Abdulla Sahib v Doctor Oosman Sahib. 28 Mad 224.**

867C—C. P. C. O. 21, rr. 10, 21, S 48=(1882 S. 230)-Judgment-debtor evading arrest—False objections to execution—Decree whether barred after 12 years.

When a judgment-debtor keeps out of the way when warrants are issued for his arrest, and puts in false objections in bad faith and thereby dishonestly evades payment of money justly due, he is not entitled to the benefit of S. 230, C. P. C., = O. XXI, r. 10 The judgment-debtor in this case always evaded arrest and more than once objected to execution being taken out, but his objections

C P C (1908) S 48=(1882, S 230)-*Contd.*

(6) Period of limitation under this section and step in-aid of execution—*Contd.*

failed. The application for execution was presented more than 12 years after the date of the decree. but within 3 years of the last application. *Held*, that the execution of the decree was not barred by S. 230, C. P. C. **Beni Prasad v Kashi Nath. 6 A L J 401=2 Ind. Cas. 222.**

(18) Sale post-poned on application-Subsequent application struck off—Application for revival of the subsequent application, bar.

868—C P. C. S 48. O. 21 rr. 10, 21 (1908)=(1882) S. 230.

A decree-holder obtained a decree for money on the 30th of July, 1877. Application was made in May, 1878, under the terms of s. 230 of the Code of Civil Procedure for execution of this decree by sale of three houses belonging to the judgment-debtor. Under that application two out of the three houses were sold. The sale of the third house was postponed on the application of a party. On the 15th of December, 1878, the application of May, 1878, was "struck off"; on the 11th of November, 1889, the decree-holder applied in terms to revive the application of May, 1878, and to bring to sale the remaining house. *Held* that s. 230 of the Code of Civil Procedure applied to the circumstances as above set forth and was a bar to the further execution of the decree

The Delhi and London Bank Limited v Major B L Reilly. 13 W N 124.

(19) Application by representative of deceased decree-holder—Absence of certificate—Subsequent application.

869—C. P. C. S. 48; O 21, rr. 10, 21=Execution of decree—1882, Section 230.

Held, that an application by the legal representative of a deceased decree-holder for execution of the decree is none the less an application "in accordance with law." because when it was preferred the applicant had not obtained a certificate as required by Act VII of 1889, Section 4, that section merely directing that a Court shall not "*proceed*" upon the application till the production of the certificate, but not preventing the reception of such application.

Certain subsequent applications *held*, not barred under Section 230 of the Civil Procedure Code, as being applications, not to execute the decree, but to carry on the proceedings initiated by the first application **Kundan Lal v Mussammat Makhni 27 P R 1894.**

(20) Revival of barred decrees—Twelve years' old decree.

870—C. P. C. S. 48. O. 21 rr. 10, 21 (1908)=1882 S. 230. Act X of 1877 (Civil Procedure Code),

Where an application was made under s. 230 of the Civil Procedure Code, 1877, as amended by Act XII of 1879, for execution of a decree more than twelve years old, and the application was granted,—*Held* that a subsequent application for execution of the decree, under s. 230 of the Civil Procedure Code, 1882, should have been refused, since the decree had been once allowed the benefit of the three years' grace under the last paragraph of s. 230 of the Code of 1877, and then became dead or unexecutable *Held* that there is nothing in the Code of 1882 to justify the conclusion that it was intended to revive decree which had become dead before it became law and that here the decree-holders' right having already become dead before the enactment of the present Code, the passing of that Code could not bring that right into existence again. (6 All, 189, distinguished). **Bhawani Das v Daulat Ram 6 All 388.**

Notes.—Dist: 8 All 419.

(21) Previous darkhast cannot be rejected because there is a later one when they are for different reliefs and not inconsistent with one another.

871—C P C S. 48; O. 21, rr. 10, 21=S. 230 of 1882.

A previous darkhast cannot be rejected because there is a later one when they are for different reliefs and not inconsistent with one another **Girdharlal v Thakore Sadaji. 1892, P J 9.**

871 A—C P C O 21 rr. 10, 21, s.48 O 21, rr 11 (2), 17 (=ss.230, 235, 245, Civ Pro Code 1882)—Execution of decree——Defective application, amendment of.

In this case a decree was passed on the 29th October, 1888. After several applications for execution were granted, the last written application for execu-

C P C (1908) S. 48=(1882, S. 230)-*Contd.*

(6) Period of limitation in this section and step-in-aid of execution—*Contd.*

tion was presented on the 27th February, 1900, in which it was prayed "that the judgment-debtor be summoned and be ordered to pay the money due." On the 21st March 1901, an oral application for attachment of the judgment-debtor's houses and ornaments was made. *Held*, that the application was barrrd by s. 230 of the C P Code, having been made more than 12 years after the decree was passed. *Held*, also, that the application, presented on the 27th February, 1900, was defective, as it did not comply with the requirements of s. 235 of the C. P. Code. *Held*, further, that an amendment could not be allowed under s. 245 of an application which, when complete, would, even if dating from its original presentation, be barred by s. 230, **Kanhaya Lal v. Maya Mal. 112 P R 1902.**

(22) Execution of decree—Subsequent application to execute the same decree—Application for execution previously struck off re-instated—Continuation of the previous application.

872—C P C S. 48, O. 21 rr. 10, 21, 11 [2] = C P C 1882 Ss. 230, 235—Limitation.

A subsequent application to execute the same decree mentioned in s. 230 of the Code means a substantive application for execution in the form prescribed by s. 235 of the Code.

Hence, where an application for execution in accordance with s. 235 of the Code has been made within the period of limitation prescribed by s. 230 and has been granted, that is, execution has been ordered in accordance with the prayer of the decree-holder's application, the right of the decree-holder to obtain execution will not necessarily be defeated, if, by reason of objections on the part of the judgment-debtor or action taken by the Court or other cause for which the decree-holder is not responsible, final completion of the proceedings in execution initiated by the application under s. 235 cannot be obtained within the

C P C (1908) S. 48=(1882, S. 230)-*Contd.*

(6) Period of limitation in this section and step-in-aid of execution—*Contd.*

period limited by s. 230. (18 All 482 fol.)

Ram Sarup v Dasrath Tiwari 8 A L J 412 F B=9 Ind Cas 817=33 All 517.

(23) Striking off decree as fully satisfied, effect of-Application for execution after twelve years barred.

873—C P C S. 48; O 21 rr 10, 21 (1908)= (1882) S. 230.

The respondents, the holders of a decree against the appellants dated the 18th November, 1868, of which they had obtained execution under s. 230 of the Code of Civil Procedure made the present application for execution after the expiry of 12 years from the date of the decree. It appeared that in 1879, in the course of execution proceedings, the parties had entered into a compromise whereby the decree was to be paid by instalments and the decree-holder was empowered to realize the amount when default was made in payment of an instalment. This arrangement was notified to the Court which regarding the decree as fully satisfied made an order striking off the execution proceedings. *Held* that the application was barred by s. 230 for the order of the Court did not fall within s. 230 (b).

Sahodra Kuar v Manohar Das. 3 W N 147.

(24) Effect of striking off execution proceedings—Procedure.

874.—C P C S 48 O, XXI rr 10, 21 of 1908 =S 230 of 1882.

A decree was obtained in 1858. Applications to execute it were made in 1862, 1866, 1876 the last of which was struck off. Again an application was made in 1879. It was sent to S for execu-

C P C (1908) S. 48=(1882, S 230)-*Contd.*

(6) Period of limitation in this section and step-in-aid of execution—*Contd.*

tion where it was struck off on the ground that it was more than 12 years old in 1880. The application was re-admitted in April 1881. Again an application of transfer to D Court was made in June 1881. It was granted but, no steps being taken to execute it, the application was struck off by D Court in August 1881. In March 1882 (the judgment-debtor having died in the meanwhile) an application was made to D Court to restore the proceedings for execution against the representative of the judgment-debtor. Notices were served but it was again struck off for default. Again it was taken on file and execution granted. *Held*, that the execution of the decree was not barred by section 230 C P Code.

Biswa Sonan Chunder Gossyamy v Binanda Chunder Dibingar Adhikar Gossyamy. 10 Cal 416.

Notes :—Ap : 18 All 482 F B ; 3 M L J 298 Fol. 21 Mad 261. Ref : 15 All 84 F B.

(25) Execution application, effect of striking off—Attachment, subsisting removal of.

875.—C P C S 48, O 21 r 11=S 230 of (1882).

The striking off an application for execution does not in itself necessarily remove a subsisting attachment.

Whether an application for execution is only ancillary to the previous application or is a fresh application depends on the circumstances of every case.

Execution proceedings should not be allowed to be dragged on beyond twelve years merely because it suits the convenience of the decree-holders. If a decree-holder desires to allow a longer period he may enter into a fresh contract. (18 All 482 ; 18 All 49 ; 8 O C 152 Ref.)

Mahadeo Prasad v Hyder Mehdi. 8 Ind Cas 727.

Notes :—Fol ; 32 Mad 336.

C P C (1908) S. 48=(1882, S. 230)-*Contd.*

(6) Period of limitation in this section and step-in aid of execution—*Contd.*

(26) Striking off the application for execution—Order for, not warranted by law.

876.—C P C S 48, O 21 rr 10, 21 (1908)= (1882) S 230.

R N and others obtained a simple money decree against R S and another on the 24th of February, 1881. On the 2nd of May 1892 previous applications for execution having been unsuccessful, the decree-holders made an application for execution in consequence of which certain property of the judgment debtors was attached. That application was subsequently struck off by the Court, the attachment being maintained. On the 7th March, 1893, a further application for execution was made. *Held*, that whether application of the 7th March, 1893, was or was not merely a continuation of the former application of the 2nd of May, 1892, execution of the decree was barred by the rule prescribed by s. 230 of the Code of Civil Procedure. *Held* also that an order on an application for execution striking off the application but maintaining attachment effected in pursuance thereof was an order not warranted by law. **Ram Newaz v Ram Charan. 18 All 49=15 W N 155.**

Notes :—Ref : 18 All 482 F B, 3 A L J 654 Diss : 11 C W N 16. ; 5 C L J 80.

(27) Application for attachment—Order after 12 years for the same—Interlocutory decree not barred

877.—C P C S 48, O 21 rr 10, 21 (1908)= S 230 of 1882.

A decree for possession and wasilat having been made in 1854, it was, by an order in January 1881, directed upon the report of an Ameen that the decree-holder should recover a particular sum for wasilat. On the 14th March 1881 the decree-holder filed a petition praying that certain properties of the debtor might be attached and sold and the proceeds applied in payment of the wasilat. *Held* that, under sec 230 of Act X of 1877, the application of 14th March 1881 was not barred. The decree of 1854 so far as the wasilat was concerned, might be taken to be merely interlocutory, and did not become final until January 1881. **Baroda Sundari Dabia v Furgusson 11 C L R 17.**

C P C (1908) S.48=(1882, S.230)-*Contd.*

(6) Period of limitation under this section and step in-aid of execution—*Contd.*

Notes :—Fol; 10 Cal 50 ; 416; Ref : 19 Cal 132 F B : 15 All 84 F B.

877 A—C P C S. 48—O. 21 rr.10, 21—(1882 S. 230) —Attachment—Application for sale—Continuation of attachment—Limitation.

S. 230 of the C. P, C. (Act XIV of 1882) only bars a fresh application after the expiry of 12 years. An application for sale is only continuance of the prior application for attachment. (31 Mad 71; 3 M. L T. 328; 18 M. L. J. 46; 12 M. L. J. 24 Ref). **Suraja Venkata v Nanduri Venkata. 8 M L T 367.=7 Ind Cas 707.**

(28) Unverified petition for execution—Return for amendment—No saving for the period of limitation of 12 years.

878—C P C S 48—O. 21. rr. 10. 21. O. 21 r 17=(1882 —Ss. 240, 245.)—

An unverified petition may be returned for amendment under S. 245, C. P C, but the fact that it is so returned and represented after being amended does not prevent the operation of the limitation of twelve years under S. 230, C. P. C. Where therefore, on the last day of the twelve years' period an unverified application was made for execution by one who did not produce his power of attorney and the petition was returned for amendment under S. 245 and was amended within the time allowed by Court, and when re-presented was more than twelve years after the date of decree. *Held*, that the execution application was barred by limitation.

Thathachariar v Venkatesa Tawker. 12 M L J 435=26 Mad 101.

(29) Decree capable of execution.

879—C P C 1908 S. 48—Decree—Execution—Limitation—

Before the bar created by S. 48 of the Code of 1908 can apply, it must be shown that the decree was in all its parts ripe for execution on the date from which the twelve years' period of limitation is computed.

The execution and application contemplated by S. 48 relate to a decree which is executable at that date in respect of the application made and

C P C (1908) S.48=(1882, S.230)-*Contd.*

(6) Period of limitation under this section and step-in-aid of execution—*Contd.*

execution sought, and the "order for execution" contemplated by the provisions of the section refers to an order which the Court could have made and enforced in obedience to the terms of the decree **Narhar Raghunath Naphad v. Krishnaji Govind Nadgavandi, 14 Bom. L. R. 381.**

(30) Effect of, on matters closed before it came into force.

880—C P C S. 48; O 21, rr. 10, 21= S. 230 of 1882.

A decree obtained on 15th January 1870 had been followed by an application for execution which was granted on 9th July 1880 and therefore under S 230 of Act X of 1877, no fresh application to execute the decree could have been made. A fresh application for execution being made after 1st of June 1882 when Act XIV of 1882 came into operation, the District Judge thought that the application was governed by S 230 of Act XIV. of 1882 and could be entertained. *Held* reversing the order of the Judge that, though Act XIV of 1882 repealed Act X. of 1877, it cannot on general principles, be taken to affect matters which had been closed before it came into force.

Tajubibi v. Sobhagya 1885, P. J., 173.

(31) Mortgage of mortgage decree after 12 years.

881—C P C S. 48=S. 230 of 1882.

Where a person took a mortgage of a mortgage decree after 12 years from the date of the decree which was under execution at the time, the mortgagee of the decree is entitled to the benefit of the execution and S. 230, C P C (1882) is no bar to a suit by the mortgagee to recover the mortgage amount due to him from money realized by the mortgagor (decree-holder).

Venkataramana Aiyar v Esumsa Rowthen. (1909) 20 M L J 330.

(32) "Date of decree"—Decree for mesne profits—Date of ascertainment.—

882-C P C Ss. 48=Ss.(230 (a) 211, 212, 244, 546)

The period of 12 years mentioned in S. 230

C P C(1908) S.48=(1882. S.230)-*Contd.*

(6) Period of limitation under this section and step-in-aid of execution—*Contd.*

C P C runs from the date when a valid decree for mesne profits has been made and not from the date of the decree by which the liability to pay mesne profits was originally declared (19 Cal 132; 24 Cal 173 foll; 28 Cal 242 dist) **Harongee Narain Singh v Ramprosad Singh. 1907) 6 C L J 462.**

(33) Application to execute decree-Attachment of property—Transmission of decree of Baroda Court to British Court—Application to execute decree by attaching other property in British India.

883—C P C S. 48, O 21 rr 10, 21 O 21 r 11 (2) O 21 r. 17—Civil Procedure Code (Act XIV of 1882) ss. 230, 235 (i) and (j) 245—Petition for execution of an order awarding mesne profits—Petition for execution of two orders as against separate sets of defendants—Order of Court to furnish lists of defendants against whom execution was sought—Limitation—Computation of limitation period—Date of application to execute—Order on the petition

An order awarding mesne profits in execution proceedings was made on 10th April 1894. The application to execute the order was presented on 10th April 1906. The application came on for hearing after repeated adjournments on 10th November 1906. On objection being taken that the application was barred as it came for disposal more than 12 years after the date of the order.

Held, that the application was in time as it was *presented* within 12 years from the date of the order sought to be executed. (6 Mad 359 Fol).

Petitioner having filed an application to execute two orders awarding mesne profits, one dated 10th April 1894 against all defendants, and another dated 30th March, 1895, against only 20 of them, the first Court returned the petition for the filing of lists of the defendants distinguishing their liability. When the petition was represented with the directions complied with it was more than 12 years from the date of the orders. The lower appellate Court held that the petition was defective and not being in proper form at the date of presentation was barred.

Held, that the petition was not defective and was not barred. **Sivaswamy Aiyar v Sivalingam Pillay. 7 M L T 353=5 Ind Cas 474.**

C P C (1908) S.48=(1882. S.230)-*Contd*

(6) Period of limitation under this section and step-in-aid of execution—*Contd.*

(34) Transfer of application for agreement of purchases by Collector to the subordinate Judge—Order by the Subordinate Judge Agreement incapable of execution.

884—C P C S. 48, O 21 rr. 10, 21 (1908)= (1882) s. 230.

A decree of the Subordinate Judge, dated the 27th June, 1881, having been transferred to the Collector for execution, the parties to it submitted to the Collector an agreement for the satisfaction of the decree by instalments. The Collector approved the agreement and sent it to the Court which passed the decree. On receipt thereof the Court made the following order on the 31st July, 1885:—"Having been received to day let it be forwarded to the District Court to be put up with the record." On the 4th August, the District Judge ordered that that document was to be sent to the record-keeper to be filed with the record of the execution proceeding. On the 16th June, 1888, an application was made for execution of the decree by giving effect to the terms of the agreement. *Held* that the order of the Subordinate Judge above quoted was not such an order as was contemplated by s. 257 (a) of the Code of Civil Procedure and was incapable of validating the agreement for the payment of the decree by instalments and that since the Court executing the decree was not capable of sanctioning such an agreement, execution of the decree was barred by limitation.

Mirza Zahur Muhammed v Chedi Lal 11 W N 12.

(35) Agreement under section 257A—Sanction—Limitation—Res judicata—Mistake of law.

885—C P C S. 48—O 21, rr. 10, 21 (1882 Section 230)—

Held, that an order sanctioning a compromise under sec. 257 A is neither a new decree nor an order subsequent to decree directing payment of money within the meaning of sec 230 (b) Civil Procedure Code. (14 M L J 359 Ref:).

Held, further that a decision come to on a mistake of law will not operate as *res judicata*

C P C (1908) S. 48=(1882, S. 230)-*Contd.*

(6) Period of limitation in this section and step in-aid of execution—*Contd.*

in subsequent proceedings. (30 Mad 461; 30 Mad 504 Ref:) **Palaniappa Chettiar v Raja Viswa natha. 4 M L T 233=18 M L J 548**

(36) Execution proceedings—Limitation.

886—C P C S. 48, O 21 rr. 10, 21 of 1908= S. 230 of 1882.

An application was made on the 19th March 1886, for execution of a decree dated the 9th September 1873. In the interval viz in October 1879 process was issued on the application of the decree-holder for the arrest of the judgment-debtor who was accordingly produced in custody before the Court. No further execution was proceeded with. *Held* that an application made in 1886 was time barred according to s 230 of the Code of Civil Procedure.

Patumma v Muse Beari. 11 Mad 132.

(37) Due diligence—Act X of 1877.

887—C P C S. 48 O. 21 rr. 10, 21=[1882] s. 230

A who held a decree against B applied for its execution on the 6th December, 1877. It was struck off "for default of prosecution" on the 18th January, 1878. On the 5th December, 1878, he again applied for execution of the decree It was rejected on the 12th December, 1878, with reference to s. 230, Code of Civil Procedure, as it stood before it was amended by Act XII of 1879, on the ground that he had not used due diligence in respect of the first application. On the 4th May, 1881 A again applied for execution. *Held* that it was time-barred. **Kirat v Pahlad 2 W N 97.**

887A—C P C S. 48, O. 21, rr. 10, 21=(1882 S. 230).—

Money decree-Application to execute after expiry of twelve years-Fraudulent conduct of judgment-debtor delaying execution—Frivolous application under S. 108, C P C.—Discretion of Court.

Where, pending execution of a money decree, the judgment-debtor made a frivolous application to set it aside under s. 108 C P C with a view to delay the execution proceedings

C P C (1908) S.48=(1882,S.230)-*Contd*

(6) Period of limitation in this section and step in-aid of execution—*Concld.*

Held, that the conduct of the judgment-debtor was fraudulent, within the meaning of the final clause of S. 230, Civil Procedure Code.

The Court to which an application to execute a money decree is made, more than twelve years after the date of the decree, should exercise a sound discretion in deciding whether the execution should proceed or not. If the Court should find, on evidence, that the decree-holder had been diligent in proceeding with the execution, from the date that the decree was passed and that the judgment-debtor's conduct was such that it caused unnecessary delay in levying execution, he or she having acted fraudulently or used force, the Court ought to allow execution.

Rai Sham Kissen v Damar Kumari Debi. 11 C W N 440.

887B—C. P. C. s. 48, O. 21, rr. 10, 21, O. 21, r. 11 (2) (=ss 230 and 235, Civ. Pro. Code, 1882) —Application for execution made within twelve years—Right to continue proceedings after expiry of twelve years—Limitation.

If an application for execution of a decree is made in accordance with s. 235 of the Code, within twelve years provided for by s. 230 of the Code, and granted, the decree-holder may continue the proceedings even after the expiry of the twelve years; the mere fact, that the proceedings terminate after the expiry of the twelve years, will not render the application one barred by limitation. (18 All 482, 21 All 155, Ref). **Bishan Singh v Ganga Ram 27 P R 1905=79 P L R 1905.**

Notes:—Diss, 17 P. R. 1910.

7. WHERE THE JUDGMENT—DEBTOR HAS BY FRAUD OR FORCE PREVENTED EXECUTION

(1) Execution of decree-Fraud construed in a broad sense-Evasion of warrant amounts to fraud—Whether fraud of one judgment-debtor keeps the decree alive after twelve years only against himself or against all.

888—C P C S. 48=S. 230 of 1882.

C P C (1908) S. 48=(1882, S. 230)-*Contd*

(7) Where the judgment-debtor has by fraud or force prevented execution-*Contd*

The expression 'fraud' in s. 48 of the Code of 1908 should be construed in a broad sense, and a deliberate evasion of the process of the Court with intention to defeat the execution of the decree would amount to "fraud." If the judgment-debtor, by fraud or force, at some time prevented the execution, it is not necessary for the decree-holder to show that the judgment-debtor, guilty of fraud, had means to pay the decree-amount or that the decree holder exercised continuous diligence and would have realised the fruits of his decree but for such fraud or force. (6 Mad 365, Dist; 8 M L J 203, *Cons*; 22 Mad 330, *Appr.*; 8 A L J 1020, Ref.) *Quære*:—Whether the Court has a discretion to allow or refuse execution after twelve years, even where fraud has been proved? (11 C W N 441, *Doubted*). *Per Sundara Aiyar, J.*—Where there are more judgment-debtors than one, the fraud of any particular judgment-debtor would give the decree-holder further time for execution only as against him under s. 48 (2). *Per Phillips, J*:—S. 48 is not intended to enlarge the time for execution only against the judgment-debtor who is guilty of fraud, but allows execution against all the judgment-debtors, even though only one of them has been guilty of fraud or force **Abdul Khadir v Ajiyur Ahammad Shaiwa Ravuthar (1911) 2 M W N 434=10 M L T 413.**

888A—C P C S. 48, rr. 10, 21, (=Civ. Pro. Code, 1882, s. 230)—Fraud.

In order to bring a case within the proviso to s. 230, Civ. Pro. Code, two things have to be proved:—(1) that the judgment-debtor used stratagems designed to prevent the execution of the decree, and (2) that the execution of the decree was by such means prevented. It is obviously not enough to prove fraud at some time during the 12 years' period, because it is quite consistent with such fraud that the decree-holder may, at latter period, have had full facility for executing his decree It must be proved that the non execution of the decree was brought about by the fraud complained of. Assuming that an application made before the expiration of the 12 years' period may, notwithstanding the provision contained in s 230, Civ. Pro. Code, be granted after the lapse of 12 years from the date of the decree, there is no reason for holding that a decree-holder can, on account of the pending of a prior application for warrant of arrest, be allowed, after the lapse of the 12 years, to make another application for the attachment of immoveable property. **Sesachalam Chetti v Rajam Chetty. 8 M L J 203.**

Notes:—Appr. 75 P L R 1903=113 P W R 1909.

(2) Evading service of warrants—Staying execution-Fraud.

889—C. P C. S. 48, O. XXI rr. 10, 21 of 1908 =S. 230 of 1882.

A judgment-debtor, who, though able to pay his judgment-debt, dishonestly evades payment for more than twelve years by eluding service of warrants and making applications to the Court (which had the effect for the time of staying execution), is guilty of fraud within the meaning of s 230 of the Code of Civil Procedure. **Pattakara Annamalai Goundan v Rangasami Chetti. 6 Mad 365.**

Notes—Foll. 9 Bom 318. Ref: 22 Mad 320; 6 A. L. J 401; 32 Mad 443.

(3) "Fraud or force"-Evasion of arrest raising false objection—Decree not barred after 12 years.

890—C. P. C. S. 48, Cl. 2 (a)=(S. 230, 3rd and 4th Paras).

When a judgment-debtor keeps out of the way when warrants are issued for his arrest and puts in false objections in bad faith and thereby dishonestly evades payment of money justly due he is not entitled to the benefit of S 230, C. P. C. The judgment-debtor in this case always evaded arrest and more than once objected to execution being taken out but his objections failed. The application for execution was presented more than 12 years after the date of the decree but within 3 years of the last application. *Held*, that the execution of the decree was not barred by S. 230 C. P. C. **Beni Prasad v Khashi Nath 6 A L J 401.**

C P C (1908) S.48=(1882, S. 230)-*Contd*

(7) Where the judgment-debtor has by fraud or force prevented execution—*Contd*

(4) Fraud interpretation of—Judgment debtor's objection to validity of sale proving unsuccessful—Fraud proved-Decree -holder's power to add to period of limitation.

891—C. P. C. 1908, S. 48—"Date of decree"—Order by appellate Court.

S. 48, sub-S. (2), cl. (a), Civ. Pro. Code, requires not only that there should be fraud on the part of the judgment-debtors, but also that the fraud should be of such a character as to prevent the decree-holder from executing the decree.

The term "fraud" in S. 48 should be interpreted in a wider sense than that in which it is generally used in English Law.

The conduct of a judgment-debtor cannot be deemed fraudulent, simply because his objection to the validity of the sale of his property in execution, ultimately proves unsuccessful, and that objection cannot stand in the way of further execution of the decree.

In the course of execution proceedings in connection with a certain decree, an appellate Court directed that the judgment-debtor should pay a certain amount every month in satisfaction of the decree:

Held, that, it was not the intention of the appellate Court to supersede the original decree and that the order merely determined the mode of payment for the satisfaction of the decree, and that if cl. (h) of sub-S. (1) of S 48 of the Code be not applicable to the case, the decree-holder cannot execute the decree after 12 years from the date of the original decree, though the application for execution is made within 12 years of the appellate Court's order aforesaid.

A decree-holder cannot, by binding himself not to execute a decree for a certain period, add to the time which the law allows him to execute it. (8 M L J 203, Rel. upon. 6 Mad 365, Fol. 13 W R (F. B) 44, Ref.) **Ragunath Prosad v Kashi Prosad. 13 Ind. Cas. 88=15 C L J 678.**

(5)—Obstruction to execution of decree —Fraud.

892.-C P C S. 48, O 21 rr. 10, 21 (1908)=S. 230 1882).

C P C (1908) S.48=(1882,S.230)-*Contd.*

(7) Where the judgment-debtor has by fraud or force prevented execution—*Contd*

The respondent to plaintiff in a small cause suit in 1867, obtained a decree against the husband of the petitioner, since deceased. The decree was kept alive till 13th December 1876, when the decree-holder brought a suit to set aside certain alienations made by the judgment-debtor and alleged to be fictitious and fraudulent. Having succeeded in the suit and in rendering the property alienated available for attachment under his decree, the respondent again applied for execution in 1879, but not against the property fictitiously alienated. Lastly, the respondent applied on September 28th, 1880—more than twelve years after decree -for execution against certain immoveable property of the judgment-debtor, other than the property fictitiously alienated, in the petitioner's possession. *Held* that, having regard to the fraud of the judgment-debtor, the application was not barred by s. 230 of the Code of Civil Procedure.

Visalatchi Ammal v Sivasankara Taker. 4 Mad 292.

(6) Execution-"Fraud" meaning of-Limitation.

893.-C P C S. 48, O 21 rr. 10 21=S. 230, of 1882.

Locking up the outer door of a house and so evading execution of a decree is "fraud" within the meaning of the term in S. 230, Civil Procedure Code, and the period of 12 years provided by that section for execution of decrees will run afresh from the date of such fraud (9 Mad 365, and 9 Bom 318, relied on). **Venkiah v. Ragavacharlu. 20 Mad 320=9 M L J. 28.**

(7) Decree, Prevention of execution of, by fraud,

894—C P C s. 48 O 21 rr. 10, 21 of (1908)=(1882) s. 230.—

Evasion of execution by a dishonest stratagem such as barring the door of a house to prevent the entry of the plaintiff, may amount to prevention of execution by fraud within the meaning of sec. 230 of the Civil Procedure Code. **Bhagu Jhetha v Malek Bawasaheb Ajambhai. P J (1885) 44=9 Bom 318.**

Notes:—Ref: 22 Mad 320.

(7) Where the judgment-debtor has by fraud or force prevented execution- *Contd.*

(8) Execution of decree prevented by "fraud or force" of judgment debtor-Period of limitation.

895.-C P C S. 48 O 21, rr. 10, 21 of 1908= S. 230, of 1882.

Where a judgment-debtor knowing that a warrant of attachment had been issued against his moveable property, locked up his house and so prevented the moveable property therein from being attached,-*Held* that his action amounted to "fraud" within the meaning of s. 230 of the Code of Civil Procedure. In order to obtain the benfit of the proviso in that section it is not necessary that a judgment-creditor should prove that the fraud of the judgment-debtor continued so as to prevent execution of the decree at any time. "Fraud" or "force" on the part of a judgment-debtor gives a new starting point for the period of limitation, and an application for the execution of a decree may be granted at any time within twelve years after the date on which a judgment debtor has by "fraud" or "force" prevented execution of a decree.

Venkayya v Raghava Charlu.

22 Mad 230.

(9) Fraud of judgment-debtor preventing execution-Fraud meaning of-Application for warrant of arrest and application for attachment of immoveable property different from each other.

896.—C P C S. 48, O 21 rr. 10, 21 (1908)= S. 230.-Execution after 12 years from date of decree.

In order to bring a case within the proviso to S. 230 Civil Procedure Code, it has to be proved -(1) that the judgment-debtor used stratagems designed to prevent execution of the decree, and (2) that the execution of the decree was by such means prevented.

(7) Where the judgment debtor has by fraud or force prevented execution—*Contd.*

It is not enough to prove fraud at some time during the 12 years. It must be proved that the non-execution of the decree was brought about by the fraud complained of.

Assuming that an application made before the expiration of the 12 years' period may, notwithstanding, S. 230, C P C be granted after the lapse of that period, still a decree-holder cannot, on account of the pending of a prior application for warrant of arrest be allowed, after the lapse of the 12 years to make another application for the attachment of immoveable property, inasmuch as the two applications are entirely different and distinct from each other.

Seshachalam Chetty v Rajam Chetty

See also 22 Mad 322=8 M L J 203.

(10) Judgment-debtor preventing by fraud execution of decree.

897.-C P C S. 48 (1908)=230 of 1882.

Upon a correct interpretation of cl 2 of s. 48 of the Code, the effect of the proviso embodied in that clause is that the bar to execution created by the first clause of the same section is removed for a period of twelve years from any date on which it is held that the judgement debtor has by fraud prevented the execution of the decree (7 Cal 536, Not Fol) **Moshin Ali v Masoom Ali**

8 A L J 1020.

(11) Preventing execution of decree by force or fraud—Limitation.

898.-C P C S. 48, O 21 rr. 10, 21 (1908)=S. 230.

Under the last paragraph of S. 230, C P C, 1882, if the judgment-debtor by force or fraud prevents the execution of decree against him at some time within twelve years immediately before the date of the application for execution, the

C P C (1908) S. 48=(1882, S.230)-*Contd.*

(7) Where the judgment-debtor has by fraud or force prevented execution—*Contd.*

application will not be barred under the preceding provisions of the section.

But to save limitation as aforesaid, there should be an express finding that there was either force or fraud. (32 Mad 320 Ref.)

Meesla Ramanna v Akkalaboto Chinna. 8 Ind Cas 805=9 M L T 182.

(12) Execution-Limitation-Fraud on the part of judgment-debtor—Continuation of proceedings within twelve years from the date of decree.

899.—C P C S. 48=(S. 230.)—Decree twelve years old.

The judgment-debtor preferring objections to the execution of a decree does not necessarily commit fraud within the meaning of S. 230 C P C 1882, unless in so doing he acts not *bona fide* and his object is to delay execution. An application to attach immoveable property cannot be regarded as made in continuation of proceedings started on a previous application for attachment of moveable property which was duly attached and sold though no formal order was passed striking the previous application off the file.(18 All 482 (F B); 21 All 155, 33 Cal 689, 27 P R 1905, 79 P L R 1905, 45 P R 1909 S. C 66 P L R 1909 dist.)

Hira v Gurcharn. 11 P L R 49=5 Ind Cas 815.

(13) Money decree-Application to execute after expiry of 12 years-Fraudulent conduct of judgment-debtor delaying execution—Frivolous application.

900—C P C S.48, (230)-S 108—Discretion of Court.

Where, pending execution of a money decree, the judgment-debtor made a frivolous application to set it aside under S. 108, C P C, with a view to delay the execution proceeding:—*Held*, that the conduct of the judgment-debtor was fraudulent within the meaning of the final clause of S. 230, C. P.C.The Court to which an application to execute a money decree is made more than 12 years after the date of the decree should exercise a sound discretion in deciding whether the execution should proceed or not.If the Court should find on evidence that the decree-holder had been diligent in proceeding with the execution from the date

C P C (1908) S.48=(1882-S. 230)-*Contd.*

(7) Where the judgment-debtor has by fraud or force prevented execution—*Contd.*

that the decree was passed and that the judgment-debtor's conduct was such that it caused unnecessary delay in levying execution, he or she having acted fraudulently or used force, the Court ought to allow execution. **Rai Sham Kisnen v Damar Kumari Debi. (1906)11 C W N 440.**

(14) Execution of decree, due diligence exercised by decree-holder in judgment-debtor, fraud and stratage of—Limitation, extension of

901—C P C S. 48=S. 230 of 1882.

Held that, if the decree-holder exercises due diligence in proceeding with the execution of decree, he cannot be deprived of the benefits of S. 48 of the Civ. Pro. Code. *Held* further, that it is not necessary to show that the fraud or obstruction of the judgment-debtor extended continuously for the whole of the period of 12 years allowed from the date of the decree. It is sufficient to show that the judgment-debtor, on various occasions within the aforesaid period, dishonestly prevented the execution of the decree against him by frivolous devices. Such devices clearly constitute fraud within the meaning of s. 48 of the Civ P Code. (11 C. W. N.440,Foll.) **Jogindra Nath Pal'ak v Mirsa Mohammad Husain. 14 C W N 93.**

(15) Limitation—Fraud-Execution of decree.

902A—C P C 1908 S. 48—Ex .

Where a judgment-debtor evaded arrest when subsequently arrested, spent two years pretending to prosecute insolvency proceedings without intending to press them.and thereby caused 12 years to elapse from the date of the decree, *held*, that he was guilty of fraud, and the application for execution was not barred by S. 48 of the Code.

Held,also,that, where unsuccessful applications had been made for the arrest of the judgment-debtor, and the last application was made for the attachment of his property, it was not necessary to mention the previous applications. (6 A L J 401, Ref.) **Mewa Lal v Ahmad Ali. 9 A L J 17.**

C P C (1908)-S.48=(1882 S.230)-*Contd.*

(7) Where the judgment-debtor has by fraud or force prevented execution-*Concld*

(16) To raise questions of fraud for the first time in appeal

902B—C P C O 21 rr 10 21 S 48=(1882 S 230)—Fraud or force within the terms of S 230 —Right to raise questions of fraud for the first time in appeal

Held, that applications for execution made on 10th March and 15th June 1905 praying for the attachment and sale of houses belonging to the judgment debtor, cannot be held to be in continuation of a prior execution application made on 11th May 1906, praying for the attachment and sale of *moveables* belonging to the judgment debtor even when the moveables were attached and sold but the money was not paid to the decree holder in consequence of an appeal filed by the judgment debtor and the application has not been formally consigned to the record room or struck off the file (18 All 482 (F P), 45 P R 1909 21 All 180 33 Cal 689, Dist 27 P L R 1905, Appl)

Where the judgment debtor was justified in obtaining an adjudication from the Courts in respect of the very difficult question of his relations with his father and where his appeal was thrown out merely on the ground of his failure to discharge the burden of proof that lay on him he cannot be held to be guilty of frivolous or vexatious obstruction to the execution of decree and his act did not constitute fraud within the terms of the last sentence of s 230 C P C 1882 (11 C W N 140 6 M L J 365, Dist) It is doubtful whether the decree holder can raise questions of fraud and claim the benefit of the last sentence of s 230 for the first time in appeal **Hiru v Garcharu 17 P R 1910= 22 P W R 1910=20 P L R 10=5 Ind Cas 815**

8 THIS SECTION DOES NOT AFFECT THE OPERATION OF ART 180 OF LIMITATION ACT 1877.

(1) Effect of section Decree of High Court—Revivor—Limitation Act

903—S 48, O 21 rr 10, 21 of 1908—S 230 of (1882)-Limitation Act, 1877, Art 180,

C P C (1908) S.48=(1882 S.230)-*Contd*

(8) This Section does not affect the operation of Art 180 of Limitation Act 1877 *Contd*

S 230 of the Code of Civil Procedure, 1882 cannot operate to cut down Limitation period allowed by Art 180 of Sch II of the Limitation Act, 1877 **Ganapathi v Balasundara. 7 Mad 540.**

Notes—Fol 20 Cal 551, 36 Cal 543=9 C L J 2 1 Ref 26 All 361, (1904) W N 51

904—C P C O 21 rr 10, 21, S 48=(1882 S. 230)—Limitation Act, Sch II, Art. 180—Construction.

S 230 of the Code of C P (Act XIV of 1882) ought not to be construed as to conflict with the provisions of Art 180 of the Second Schedule of the Limitation Act XV of 1877) The provisions of the two Acts ought not to be so interpreted as to contradict each other and that s 230 of the Code cannot be taken to limit Art 180 of the Limitation Act **Jogendra Chandra Roy v Sham Das 9 C L J 271=36 Cal 543= 1 Ind Cas 168.**

(2) Execution of decree—Limitation Act XV of 1877 Sch II Art 179.

905—C P C S 48 O 21, rr 10 21=S 230 of 1882

An application for execution of a decree having been made more than three years after the date of the last application the judgment debtor pleaded that it was time barred The District Judge held that Section 230 Civil Procedure Code, applied and as twelve years had not elapsed since the date of the decree, the application was within time

Held on appeal to the Chief Court, that the law of limitation for applications to execute decrees of mofussil Civil Courts is contained in Article 179 Schedule II, Act XV of 1877 Section 230, Civil Procedure Code, does not contain the law of limitation, but fixes a period after which

C P C (1908) S.48=(1882 S.230)-*Contd*

(8) This section does not affect the operation of Art 180 of Limitation Act 1877 *Could* an application for execution though not barred by the law of limitation shall not be granted The Code of Civil Procedure does not restore a right which the law of limitation prevents from being exercised

Held also, that Section 9 Limitation Act does not apply to applications but to suits only — **Behari Lal v Baness 109 P R 1889**

Notes -Fol 9 P R 1891 Ref 76 P R 1904=132 P L R 1904, Appl L B R 1893-1900 588

(3) Civil Pro Code (1882) S 230 Execution of decree—Limitation

906 —C P C S 48 O 21 rr 10 21=S 230. of 1882

Section 230 Civil Procedure Code 1882 does not contain the law of limitation for application to execute a decree but gives a period after which such an application though not barred by the law of limitation shall not be granted (27 P R 1888, and 109 P R 1889 fully) **Gholam Jilani v Ganga Ram 9 P R 1891**

Notes —Ref 76 P R 1904=132 P L R 1904.

9 MISCELLANEOUS CASES

(1) Law in force immediately before passing of the Code—Execution of decree

907 —Civil Procedure Code 1877 as amended by Act XII of 1879—Execution of a decree—Limitation

The words 'law in force immediately before the passing of this Code' in S 230 C P Code 1882 refer to and include Act X of 1877 as amended by Act XII of 1879 (6 All 189 dissented from) **Goluck Chandra Mytee v Haraprиah Debi. 12 Cal 559**

Notes.—Fol 9 Mad 454, 11 Bom 524 Ref 8 All 419

(2) Application barred before Act XIV of 1882 came into force

908 —C P C S 48, O 21, rr 10, 21=(1882) S 230

Held that the proviso to s 230 of the Code of

C P C (1908) S.48=(1882,S.230)-*Contd.*

(9) Miscellaneous cases—*Contd*

Civil Procedure applies only to applications which were barred at the date the Code came into force and not to those which had sometime to run on the date but became subsequently barred To these latter therefore the three years extension was not applicable.] **Tufail Ahmad v Sadho Saran Singh 5 W N 193.**

(3) Limitation—Twelve years rule prior to that Code—C P C Act X of (1877)

909 —C P C S 48 O 21 rr 10 21 of 1908= S 230 of 1882

In s 230 of the Code of Civil Procedure, 1882, the words law in force include the Civil Procedure Code of 1877 as well as the Limitation Act then in force *Held* therefore where an application for execution of a decree of 1872 had been made and granted in January 1882 and under s 230 of the Code of Civil Procedure 1877 further execution could not be barred before the date on which the Civil Procedure Code 1882, came into force and no application within three years from such date could be granted under s 230 of that Code **Kollu Shettati v Manjaya 9 Mad 454.**

Notes —Ref 11 Mad 132

910 —C P C S 48 O 21 rr 10, 21=S 230— Limitation Act 1877 Sch II Art 179.

In 1883 property was attached in execution of a decree of 1878 On S's application in 1891 the attachment was raised. A sued S for declaration that the property was liable to be attached and succeeded in appeal. In November 1894 plaintiff applied to have the *darkhast* of 1877 restored to the file and execution proceeded with. *Held* that this was not a subsequent application to execute the decree within the meaning of sec 230 of the Civil Procedure Code, nor an application within the meaning of the Limitation Act

Vishnu v Yeshwant 1896 P J 571.

(4) Application for execution—Limitation Act XV of 1877 Sch II art 179.

911 —C P C S 48 O 21, rr 10, 21=S 230 (1882) —

Held, that s 230 of the Civil Procedure Code does not lay down that every application for

C P C (1908)-S.48=(1882, S.230)-*Contd*

(9) Miscellaneous cases—*Contd.*

execution made within twelve years from the date of the decree shall be granted. *Held*, also, that the period allowed under Art 179, sch. II Act XV of 1877, for application for execution begins to run from the date of the last previous application, and not from the date on which the last previous application was consigned to the record room. **Gopi Singh v Sultan Singh S C 56.**

(5) Due diligence in execution—Execution of decree.

912.—C P C S 4 ; O 21 rr 10, 21 of 1908=S. 230, of 1882.

The concluding clause of this section refers to the question of limitation, not that of due diligence.

Where therefore, the decree-holder had not in the last preceding application under this section used due diligence to procure complete satisfaction of the decree and Act X of 1877 had not been in force three years, held that the provisions of the third clause of this section were applicable to a subsequent application under that section. **Sohan Lal v Karim Bakhsh 2 All 281.**

(6-7) Transfer of decree—Due diligence.

913-914.—C P C 48; O 21 rr 10, 21 of 1908=S 230 Application by transferee for execution—Order for notice—Failure to pay Court-fees—Subsequent application—Civ Pro Code 1887 ss. 230, 232.

The transferee of a decree applied while an application by the original holder of such decree to execute it was pending, to be allowed to execute it. The Court, in accordance with section 232, directed notice of the transferee's aplication to be given to the transferor and the judgment-debtor. The transferee failed to pay the Court fee leviable for the issue of such notice, and the Court dismissed his application. The transferee subsequently made a second application to be allowed to execute the decree. *Held* that such application could not be rejected with reference to section 230 on the ground that due diligence had not been used on the former application to procure complete satisfaction of the decree, because such application had not been granted, and therefore, the question whether "on the last preceding application" due diligence was used to procure such satisfaction did not arise.

Sadik Ali Khan v. Muhammad Husain Khan 2 All 384.

(8) Decree ordering the defendant not to let rain-water fall on the plaintiff's land.

915.—C P C S 48. O. 21 rr 10, 21 of (1908)=S 230 (1882).

The plaintiff applied on the 17th December, 1898, to execute a decree dated the 12th December 1895, which ordered the defendant to make such improvements in the roof of his building so that it should not project over nor let rain-water fall on the plaintiff's land.

The lower appellate Court held that the application was not time barred because the plaintiff could not have demanded immediate fulfilment of the decree and that time did not begin to run until the defendant had had reasonable opportunity of obeying the decree :

Held, that the application was time-barred, because there was nothing in the decree which postponed the period of its execution and it was evidently intended to come into force at once as the plaintiff could have demanded its immediate performance. **Shidlingappa v Durdundeppa. 2 Bom L R 199.**

(9) Decree—Execution—Minor—Extension of time.

916.—C P C S 48—Extension of time **14 Bom L R 387.**

(10) Appeal by some of the defendants against portion of decree.

917.—C P C S 48, O XXI, rr 10, 21.

Appeal by some of the defendants against portion of decree—Appeal dismissed—Limitation for executing remaining portion of decree.

32 P R 1907=8 P L R 1908.

C P C (1908) S.48=(1882.S.230) *Contd.*

(9) Miscellaneous cases—*Concld.*

(11) Execution against property—Amendment ordered—Fresh application—Res judicata.

917A—C P C S. 48, O 21 rr 10, 21=(1882—S 230)—Application for execution—Relief against person of judgment-debtor.

An application for execution of a decree by arrest of the judgment-debtor if subsequently amended by praying for execution against the properties of the judgment-debtor must be treated as a fresh application and as having been made with reference to the latter relief, on the date of the amendment. A decree for money was passed on 30th July 1891. After various applications, the decree-holder made an application for execution on 30th July 1903 praying for arrest of one of the judgment-debtors who were all members of a tarwad. In March 1904, the decree-holder applied to amend his execution application by inserting a prayer for the attachment of properties. This was ordered without notice to the judgment-debtors. Upon this amended petition, attachment and sale were ordered:—*Held* (1) that the amended petition must be treated as a fresh application and was, therefore, barred by the rule of 12 years under S. 230, C P C; (2) that the order for sale having been passed without notice, did not operate as *res judicata:* and (3) that execution against tarwad properties could not be proceeded with. **Cherathi Amma v Raman Nair. 15 M L J 243.**

C P C (1908) S. 48.

See C P C (1908) O 21 r 17. Case No. (2453).
12 M L J 435.

—S. 48—Court having jurisdiction to entertain application-Removal of the Court.

See C P C O 21 r 10. Case No. (2342).
4 C L J 473.

—S.48-Return for amendment-No saving of the period of limitation of twelve years.

See C P C O 21 r 10. Case No. (2343),
26 Mad 101.

—S. 48—Application to wrong Court—Limitation.

See C P C O 21 r 10. Case No. (2345).
A W N 1882, 91.

C P C (1908) S.48=(1882.S.230)—*Concld.*

—S. 48—Application for execution.

See C P C O 21 rr 10, 21. Case No (2339).
121 P L R 1908.

—S. 48-Nature of the decree—Whether executable.

See C P C O 21 r 10. Case No. (2340).
2 M L T 94

—S. 48-Applicability and scope of.

See C P C O 21 r 2. Case No. (2194).
28 Mad 473.

C P C (1908) S. 49=S. 233 of 1882.

—S. 49—Placing on record a respondent after time.

See C P C (1908) O 21 r 16. Case No. (2378).
7 M L J 227.

-S.49—Execution of decree procedure-Res-judicata—Ch. VII of the Code does not apply to execution proceedings.

See C P C (1908) S. 47 Case No (807).
7 Ind Cas 55.

918—C P C S. 49 (1908)——Civil Pro Code (XIV of 1882) S. 233. Transfer of Property Act Section 99—Transfer of Property Act (IV of 1882) s. 99—Assignor from mortgagee-Charge not assigned.

Where a usufructuary Mortgagee obtains a simple money decree (not in respect of the mortgage) against his mortgagor and assigns it to a third party, S. 99, Act IV of 1882, will not prevent the assignor from executing the same by attachment and sale of the judgment-debtor's equity of redemption. S. 233, Civil Procedure Code, will not help the judgment-debtor unless there has been an assignment of the mortgage too. (22 Cal 813 Dist). **Bank Bai v Manni Lal. 2 A L J 121=(1905) A W N 42=27 All 450.**

919—C P C S. 49=(1882 s. 233)-Sale of properties by one Company judgment-debtor to another.

S. 233, C P C is not applicable where one Limited Company, judgment-debtor, sells its properties to another Company, there being in the case no death of the judgment-debtor. **Harish Chandra Tewary v Chandpore Co. Ltd. 30 Cal 961.**

C.P.C. (1908) S.49=(1882, S.233)-*Concld.*

Notes—Fol: 31 Mad 464=4 M L T 190.

920—C P C S. 49=S. 233—Sale of decree—Transferee bound by the same equities which bound the original decree-holder—Law of *Res judicata* in execution proceedings.

This was an application for execution of decree by one Parmanand who purchased a decree obtained by Ramzan Ali against Khem Karan. Khem Karan prayed that he be allowed to set off a prior decree obtained by him against Ramzan Ali and three others, and the Court of first instance allowed the prayer, but the Lower Appellate Court reversed the order on the ground of *res judicata*. *Held*, that the law of *res judicata* does not apply to execution proceedings, and that s 233, Civil Procedure Code, clearly imposes upon the transferee of a decree the equities that bound the original decree holder, and inasmuch as Khem Karan was at liberty to have enforced his decree against Ramzan Ali alone, there was nothing to prevent Khem Karan from setting off his decree against Ramzan Ali's. **Khem Karan v Parmanand.** Oudh S C 131.

921-922 C P C S 49; O 21 r 18=(1882 Ss. 233, 246)—Equities—Cross decrees—Assignment, notice of.

The effect of sec 246 is that the decree for a smaller amount is not capable of execution and the decree for the larger amount less the decree for the smaller amount is alone capable of execution. S. 246 is applicable where the cross decrees are passed by the very Court whose duty it is to execute them and neither has been transferred for execution to another Court (L R 13, I A 106 dist.) Where a decree is assigned, the assignment takes effect against the judgment-debtor only on notice to the latter and is accordingly subject to all equities arising prior to the date of such notice: Where therefore, there was a decree against S and the decree-holder assigned it to the appellant but before the assignment was perfected by notice, S obtained a decree for a larger sum against appellant's assignor: *Held* (1) that the appellant took the assignment subject to the equity attaching to the decree under s. 246, C P C and (2) that the appellant could not execute the decree assigned to him against S.

Sinnu Pandaram v Santhoji Row.
26 Mad 428=13 M L J 398.

Notes—32 Mad 336=5 M T 144.

C P C (1908) S. 50=(1882 S. 234)-(1859 S. 210.)

Notes—This section corresponds with section 234 C P Code of 1882, with some modifications. The word "*where*" has been substituted for the word "*if*" in the beginning, and the word "*satisfied*" has been substituted for the word "*executed*" after the word "*fully*" in clause [1]; and the sentence "*where the decree is executed against such legal representative*" in the beginning of clause [2] has been added.

1 Scope of in section 923—924
2 Meaning of the term legal representative in this section 925
3 Extent of liability of representatives of deceased person. 926—935
4 Execution of injunction decree against legal representatives of deceased defendant 936
5 Legal representatives not brought under the record—Validity of execution proceedings 937—938
6 Determination of claims or objctions preferred by representatives of deceased persons 939
7 Jurisdiction of the Court to which a decree is transferred for execution to execute it against representatives 940
8 Miscellaneous Cases 941—946

---

(1) Scope of the Section.

1 Execution proceedings Commenced under the old Code—Effect of the new Code 923
2 Representation to proper Court after long delay 921

(2) Meaning of the term legal representative in this section.

1 "Legal representative" meaning of 925

(3) Extent of liability of the representatives of a deceased person.

1 Decree against karnavan—Tarwad property in hands of successors—Share of deceased father of joint family-Assest 926.
2 Execution of decree passed against deceased person 927
3 Decree obtained against father executed against his sons as his representatives 928

4 Decree for maintenance obtained against father 929

5 Liablity of son for father's debt—Decree against zamindar directing sale of land—Execution against son of zamindar 930

6 Execution of decree for money—Legal representative—Hindu Law, Mitakshara—Son taking by survivorship—Decree against father—Separate suit 931

7 Mortgage decree against father—Execution against son succeeding by survivorship—Mitakshara Law 932

8 Liability of son as representative of father for his debts 933

9 Execution against son as representing father-Liability of son's private property 934

10 Legal representatives of debtor, decree holder 935

(4) Execution of injunction decree against legal representatives of deceased defendant 936.

(5) Legal representatives not brought on the record - Validity of execution proceedings.

1 Person entitled to apply 937.

2 Death of judgment debtor-Transferee to be put on the record.

(6) Determination of claims or objections preferred by representatives of deceased persons.

1 Execution of decree against representative 939.

(7) Jurisdiction of the Court to which a decree is transferred for execution to execute it against representatives 940.

(8) Miscellaneous Cases.

1 Assignment, creation or devolution of any interest 941.

2 Representative of deceased person, order against—Resjudicata — Residuary legatee 942.

3 Property of deceased debtor claimed by heir as self acquired 943.

4 Question whether property attached is deceased judgment-debtor's 944.

5 Hindu Law—Decree against father—Execution against son — Separate suit 945.

6 Execution against representative — Decree in personam against a partner ——Death of partner——Execution against widow and undivided brother-Representative 946.

C P C (1908) S 50 — Auction purchaser—Representative—Appeal. See C P C (1908) S. 47. Case No. [500]. **87 P R 1887.**

C P C (1908) S. 50—Suit for administration by judgment-creditor against executor—Mal-administration. See C P C (1908) S. 47 Case No [618]. **12 C W N 614.**

C P C (1908) S. 50 - Decree against father—Execution against son—Assets—Separate suit against the son-Necessity of. See C P C (1908) S. 47. Case No. [662]. **6 C W N 223.**

See also cases under:—

(1) Execution of Decree Execution by and against Representatives.

(2) Representative of deceased person.

(3) Sale in execution of Decree—Decrees against Representatives.

C P C (1908) S 50=C P C (1882) S. 234 See Gujarat Talukdar's Act, S 29 (e). **34 Bom 142.**

C P C (1908) S. 50—Notice to show cause against execution in certain cases. See C P C O 21, r. 22. Case No. (2465). **13 O C 90.**

C P C (1908) S. 50—Heir's right to apply under this section. See C P C O. 9, r. 13. Case No. (1850). **28 Mad 361.**

C P C (1908) S 50—See Execution of decree—Execution by & against representatives. **(1909) 11 Bom L R 1358=34 Bom 142=4 Ind Cas 839.**

1 SCOPE OF THE SECTION.

(1) Execution proceedings commenced under the old Code-Effect of the new Code.

923—C P C (1908) Ss. 50, 52, 53 = Ss 234, 252—(Act V of 1908).

New Code enforced pending those proceedings

C P C (1908)-S.50=(1882,S.234)-*Contd*

(1) Scope of the section—*Concld.*

—Proceedings to be governed by the new Code—Objections under the New Code, parties to avail of. **Indarjit v. Sheik Arshad Ali, 4 Ind Cas 492.**

(2) Representation to proper Court after long delay.

924.—C P C (1908) S. 50—Non-averment of particulars required by S. 50—Endorsement of Court as to dates of receipt and return—Sufficient compliance. **9 Ind Cas 157.**

2 MEANING OF THE TERM "LEGAL REPRESENTATIVE" IN THIS SECTION.

(1) Lesgal Representative, meaning of

925.—C P C S. 50—(1882 S. 234)—"Legal representative," meaning of—Decree against life-holder when allowable—Holding a life estate with power to litigate on behalf of estate—Representation by agreement of parties and representation in law—Difference between.

Per Brett, J.—The term legal representative has been used in s. 234 to meet the circumstances of a certain event viz the passing of the property, the subject of the litigation on the death of the deceased judgment-debtor, to her successor to her estate or to the property in suit and to include such successor either. Per Woodroffe. J.—The term legal representative" is not limited to administrators and heirs and must on the authorities be held to include any person who in law represents the estate of a deceased judgment debtor. *Quære*, whether the principle of representation which exists by law in the case of decrees against Hindu widows and co-parceners can be extended to cases, such as the present, of agreement and conveyance between parties. A Hindu widow adopted *B* as her son under an *anumatipatra* of her husband, which provided that she was to hold and manage the properties left by him during her life time. Disputes arose between J and B as regards her right to hold the properties after the adoption and were ultimately settled by B executing in J's favour an *ekranama* which provided *inter alia* that J was to possess and enjoy the estate without power of alienation during her life time, with liberty to carry on litigations in her own name. *Held*,—that J did not hold a Hindu widow's estate, but an estate created by the *ekrarnama*, That a decree recovered by the Respondent against J for possession, with mesne profits and costs of some lands which J had been holding as an accretion to the estate, could, after J's death, be executed against B's widow succeeded to the estate on J's death as B's heiress, although B, was no party to the suit J having defended the suit in the interests of the estate and the authority of the *ekrarnama* which bound B and his heirs. Execution was prayed to recover only the costs awarded by the decree. *Held*,—that the lower Court had rightly substituted B's widow in the place of J, and execution ought to proceed against her.

C P C (1908) S.50=(1882 S.234)-*Contd.*

(2) Meaning of the term legal representative in this section—*Concld.*

Dinamoni Chaudhurani v Elahadut Khan, 8 C W N 843.

Notes:—Ref 34 Cal 642 F B; 11 C W N 593. F B; 9 C W N 346; 5 C L J 491 F B; Dist 6 C L J 462.

3. EXTENT OF LIABLITY OF THE REPRESETATIVES OF A DECEASED PERSON.

(1) Decree against Karnavan-Tarwad property in hands of successors—Share of deceased father of joint family—Assets.

926.—C P C S. 50=1882 S. 234,

In a suit by the trustees to remove the defendant from the management of certain temples, a decree for mesne profits was passed against the defendant, who was the karnavan of a Malabar trawad *Held* that the tarwad property in the hands of the deceased defendant's successor was not assets of the deceased in the hands of his successor liable to satisfy the decree under s. 234 of the Code of Civil Procedure, 1877. The share of a deceased father in an undivided Hindu family passes by survivorship to the sons, and is not assets in their hands to satisfy a decree against the father under s. 234 of the Code of Civil Procedure, 1877.

Ravi Varma v Koman. 5 Mad 223.

Notes:—Dist 11 C W N 163. Ex: 5 C L J 80.

(2) Execution of decree passed against deceased person.

927.—C P C S. 50=1882, S. 234.

When a decree has been passed against a deceased person, execution of such decree cannot be

C P C (1908) S.50=(1882, S.234)-*Contd.*

(3) Extent of liability of representatives of a deceased person—*Contd.*

had under the Civil Procedure Code against his legal representative.

Girendronath Tagore. 14 B L R 334 note. S. C. Girendronath Tagore v Huronth Roy. 10 W R 455.

(3) Decree obtained against father executed against his sons as his re-presentatives.

928—C P C S. 50 (1908)=S. 234 of (1882).

In an undivided Hindu family, although the interests of the sons in the ancestral estate are liable to satisfy the father's debt, the holder of a money decree against the father who has not attached the ancestral estate before the death of the father cannot execute the decree against the ancestral property as assets in the hands of the representatives of the judgment-debtor under s.234 of the Code of Civil Procedure 1877. (3 Mad 42 followed.)

Hanumantha v Hanumayya. 5 Mad 232.

Notes.—Fol 13 Mad 265; 27 Mad 106. Dist 20 Cal 895 11 C W N 163. Ref 7 Mad 328, 17 Mad 122; 16 All 442; 27 Mad 106; 8 C W N 843; 34 Cal 642 F B; Ex 5 C L J 80.

(4) Decree for maintenance obtained against father.

929—C P C S. 50 of (1908)=S 234 of (1882).

A maintenance decree directing an annual payment to the decree-holder during her life-time can be executed against the sons of the judgment-debtor after his death to the extent of the assets of the father in the possession of the sons but the share of the father in the family property is not included in their assets.

Karpakambal v. Subbayyan, 5 Mad 234.

Notes: Fol: 10 Mad 283 F B. Ref: 22 Mad 175; 27 Mad 106 8 C W N 843

(5) Liability of son for father's debt—Decree against zamindar directing sale of land—Execution against son of zamindar

930—C P C S 50 (1908)=S 234 (1882).

A suit was brought against a zamindar on a promissory note and was determined by a compromise whereby it was agreed that the debt should be paid as therein mentioned and that in default thereof the amount should be recovered by an issue of a warrant against certain land. And a decree was accordingly passed. After the death of the zamindar, the execution of the decree directing a sale of the hypothecated property, was asked for against the son. *Held*, that it was capable of execution against the son as representative of the deceased father. **Zamindar of Sivagiri v. Tiruvengada. 7 Mad 339.**

Notes:—Ref: 11 C W N 163: 8 C W N 843; 5 C L J 80; 9 C L J 239; 9 Bom 198 F B.

(6) Execution of decree for money-Legal representative—Hindu Law, Mitakshara-Son taking by survivorship—Decree against father- Separate suit.

931.—C P C Ss. 50, 47=1882 Ss. 234, 244.

Held—Per Maclean C. J. Brett and Mitra JJ. —A decree for money passed against a member of a joint Hindu family governed by the Mitakshara system of Hindu Law is capable of execution against his son and heir as his legal representative, though he left no self acquired property and the son took ancestral property by survivorship.

Held,-further that ancestral property in the hand of such legal representative may be sold in execution of the decree obtained against the father, and no separate suit need be brought against the son.

Per Harington and Geidt JJ contra—Where the son takes ancestral property by survivorship and the father had left no self-acquired property the decree against the father is not capable of execution against the son and the liability of the son must be determined by a separate suit. He is not the representative of his father within the meaning of section 241 of the Civil Procedure Code. **Amar Chandra Kundu v Sebak Chand 34 Cal 642=11 C W N 593=5 C L J 491 F B=2 M L T 207.**

(7) Mortgage decree against father-Execution against son succeeding by survivorship-Mitakshara law.

932.-C P C Ss. 50, 47=1882 ss. 234, 244.

A mortgagee is entitled to execute his mortgage decree against a successor of the judgment-

C P C (1908) S 50=(1882 S.234)-*Conta.*

(3) Extent of liability of representatives of a deceased person—*Contd.*

debtor even when he holds the property by survivorship under the Mitakshara Law without bringing a suit for a declaration that the property in his hands is liable to be sold in execution of the mortgage decree. It is open to the successor to take the very defences in execution proceedings which he might take in a fresh suit (1905 Mis App No 7 of 1905 by *Henderson* and *Mitra* JJ foll.)

Chandra Prosad v Sham Koer.
3 C L J 131=33 Cal 676.

Notes.—Ref 5 C L J 491 F B; 11 C W N 593 F B; 34 Cal 642 F B; 19 M L J 401; 32 Mad 429.

(8) Liability of son as representative of father for his deabts.

933.—C P C S. 50 = 1882 S. 234.

As the entire interest in an impartible zamindari passes upon the death of the father to the son, there is nothing in the estate itself which can be attached as assests of the father under a decree against him or which can be made available in execution of the decree against his son as his representative. Though a son is bound under Hindu law to pay his father's just debts from any property he may possess, yet, when he is made a party to a decree as representative of his deceased father for the purpose of executing it his liability is limited to the amount of assets of the deceased which may have come to his hands and have not been duly disposed of. **Zamindar of Sivagiri v Alwar Ayyangar. Sangili Virapandia. Chunnia Thambiar v Alwar Ayyangar.**
3 Mad 42.

Notes—Fol 5 Mad 232 F B; 13 Mad 265. Ref 9 Bom 198; F B; 16 All 449; 32 Mad 429; 19 M L J 401.

(9) Execution against son as representing father-Liability of son's private property.

934—C. P. C. S. 50 (1908)=S. 234 (1882).

The private property of a son inherited from his mother is not liable to be sold in execution of a decree passed against him as representative of his father. **Hirasing v Rupaji 1890 P J 166.**

C P C (1908) S.50=(1882, S.234)-*Contd.*

(3) Extent of liability of representatives of a deceased person—*Concld.*

(10) Legal representatives of debtor—Decree-holder.

935—C. P. C. Ss. 50,47 (1908)=Ss. 234, 244 (1882).

Sons of a deceased Hindu debtor can raise questions of illegality or immorality of their father's debt in execution proceedings—Separate suit not permissible.

There is no substantial distinction in regard to questions arising in execution, between the position of legal representatives added as parties to the suit before decree and legal representatives brought in after decree under S. 234 of the Civil Procedure Code. All questions between them and the decree-holder relating to execution must alike be disposed of under S. 244 of the Code. Where the sons of a deceased Hindu-debtor are added as legal representatives in the course of a suit and before the decree is pronounced, it is open to them to dispute in execution proceedings the liability of the ancestral properties for the debt of their father on the ground that the debt was tainted with immorality or illegality. They cannot insist on the decree-holder resorting to a fresh suit to enforce their pious obligation as Hindu sons to satisfy the debt out of ancestral properties because the question having arisen in execution proceedings between the decree-holder and themselves as parties to the suit a separate suit is rendered inadmissiable by the provisions of S. 244 of the Civil Procedure Code 1882. **Shiv Ram Dondu v Sakharam.**
10 Bom L R 939.
33 Bom 39.

4. EXECUTION OF INJUNCTION DECREE AGAINST LEGAL REPRESENTATIVES OF DECEASED DEFENDANT.

936--C P C S. 50=(1882 s. 234).

A decree containing an injunction can be enforced against the son of the original judgment-debtor, after his death, under s. 234 of the Civil Procedure Code. **Sakarlal v Parvatibai**
4 Bom L R 14=26 Bom 283.

Notes:—Ref: 33 Cal 306=10 C W N 297=3 C L J 112.

5 LEGAL REPRESENTATIVES NOT BROUGHT ON THE RECORD AND VALIDITY OF EXECUTION PROCEEDINGS.

(1) Person entitled to apply.

937—C. P. C. S. 50 (1882 s. 234).

S. 234 does not authorise any application by the representative of the deceased judgment-debtor to bring them on the record, but only authorizes the judgment-creditors so to apply.

Sambasiva Chetty v Veeruperumal Mudali 28 Mad 361.

(2) Death of judgment-debtor-Transferee to be put on the record.

938—C. P. C. S. 50=1882 S. 234.

Where, during proceedings in execution of a decree, the judgment-debtor dies, the transferee of his property should be put on the record in place of the deceased, or a regular suit should be brought against him. He should not be treated as a claimant under s. 246, Act VIII of 1859.

Shurfun Bibee v Collector of Sarun. 12 B L R 66 note: 10 W R 199.

6 DETERMINATION OF CLAIMS OR OBJECTIONS PREFERRED BY REPRESENTATIVES OF DECEASED PERSONS

(1) Execution of decree against representative.

939-C. P. C. S. 50 (1908)=Ss. 234, 244. Claim by personal representative of judgment-debtor.

Where it was sought to execute a decree obtained against a person who had died since the date of the decree, by attaching certain immoveable property in the possession of the personal representative of the deceased judgment-debtor, and such personal representative claimed to hold the property not in her representative character, but in her own right,—*Held* that her claim was not a claim under s. 246, Act VIII of 1859, but that the case came under ss. 210 and 211.

Ameerunnissa Khatoon v Mozuffer Hossein Chowdhry 12 B L R 65.

Mahomed Mozuffer Hossein Chowdhry v Ameerunnissa Khatoon. 20 W R 280.

7. JURISDICTION OF COURT TO WHICH A DECREE IS TRANSFERRED FOR EXECUTION TO EXECUTE IT AGAINST REPRESENTATIVES.

940—C. P. C. Ss. 50, 47 (1882 Ss. 234, 244).

Where, after a decree has been transferred, the judgment-debtor dies, an application against his legal representatives must be made under S. 234 C P C, to the court which passed the decree and not to the Court to which decree is transfered for execution. Per Arnold White C J:—S. 234 C P C contemplates the making of an order in general terms, viz "let the decree be executed against the personal representative. The canon of construction is that a statute ought to be so construed, that if it can be prevented, no clause, section or word shall be superfluous void or insignificant 4 Q B D 245 ref to S. 244 C P C, ought not to be construed as to cut down the powers given to the court which passed the decree under s. 234 C P C. Per *Davies* J.:—The first para of s. 234 C P C., is indirect conflict with s. 244 cl. (c) read with the last para of the same section. **Swaminatha Aiyar v Yathinatha Sastrial. 15 M L J 116 =28 Mad 466 F B.**

Notes—Ref: 17 M L J 300.

8 MISCELLANEOUS CASES.

(1) Assignment creation or devolution of any interest.

941—C P C-Ss. 50 (O XXII, r. 9 (1) (2)= (Ss. 234,372)—Transfer of interest pending suit—Execution against assignee of personal decree against assingor.

A & Co. were sued by B and pending the suit the business of A & Co. were sold to C, but A & Co. continued to manage the business of C as C's agent. A personal decree was obtained against A & Co. and execution was sought to be had against C as A & Co's representative. *Held* that neither S. 234 nor S. 372 applied, there having been no assignment, creation or devolution of any intersst," within the meaning of the section, the liability not being a proper subject of an assignment. 30 Cal.

C P C (1908) S. 50=(1882, S. 234)-*Contd.*

(8) Miscellaneous cases—*Contd*

961 foll The Arbuthnot's Indutrials Ltd v Mathu Chettiar. 31 Mad 464.

(2) Representative of deceased person, order against—Res judicata—Residuary legatee.

942—C P C—S. 50 (1882 s. 234)—Residuary legatee in possession no executor de son tort—Probate and administration Act Ss. 2, 14, 15, 19, 38, 82, 187.

An order in execution obtained after notice against the heir-at-law and the residuary legatee under the will of the deceased judgment debtor is binding upon the true legal representative. 4 C B 42; 14 Mad 454 approved. A residuary legatee entering into possession of the estate cannot be regarded as an *executor de son tort* so that his acts would not be binding upon the true legal representative. (17 Mad 186 dis). **Chunnilal Bose v Osmand Bebee. 30 Cal 1044.**

Notes.—Ref:8 C W N 842,Expl. 2 C L J 484. Ref: 19 M L J 671.

(3) Property of deceased debtor claimed by heir as self acquired.

943—C P C S. 50=1882, S. 234.

Where an application is made and granted under s. 210, Act VIII of 1859, and property is attached which is claimed by the heir as his self-acquired property,the Court should proceed under s 203,without requiring any fresh application to be made under that section. **Ram Chand Chuckerbutty v Madhub Narain Roy. 1 C LR, 359.**

(4) Question whether property attached is deceased judgment-debtor's.

944—C P C——Ss. 50, 47=(1882 Ss. 234, 244.

The question whether the property attached is the property of the deceased judgment-debtor in the hands of his representatives as such or belongs to them in their own right ought to be decided only under s.244(c)and not by separate suit. **Wahad Ali v Mussammat Jumma. 11 B L R 149.**

Vengapayyan v Karimpankal Paravti. 26 Mad 501

C P C (1908) S 50=(1882, S.234)-*Contd.*

(8) Miscellaneous cases—*Contd.*

(5)Hindu law—Decree against father—Execution against son-Separate suit.

945—C P C——S. 50, 47=(1882 ss 234,244) —Civil Procedure Code, ss. 234, 244.

The interest of the father in a Mitakshara family in the joint ancestral properties is not assets in the hands of the son when he dies, and consequently proceedings cannot be taken against the son as the legal representative of the father under s. 234, C P C. If after the death of the father,the creditor wishes to proceed against the son it must be not because he is the heir or the legal representative, but upon the ground of his obligation to pay his father's debts; but whether having regard to the character of the debt,the obligation can be enforced against the son cannot be determined in a proceeding either under s 234 or s.244 C P C, but ought to be determined by a separate suit. 20 Bom 385 dissented from 13 Mad 26> and 16 All 449 relied upon. The question whether the decree was obtained against the father in his representative capacity cannot be gone into in the course of the execution of the decree. **Juga Lal Chundhari v Audh Behari Prosad Singh. 6 C W N 223.**

Notes.—Fol:31 Cal 224; 3 A L J 663=(1906] W N 281. Dist; 33 Cal 676=3 C L J 131; 11 C W N 163. Ref: 8 C W N 843; 5 C L J 491 F B; 34 Cal 642 F B,11 C W N 593 F B: Ex: 5 C L J 80.

(6) Execution against representative—Decree in personam against a partner—Death of partner-Execution against widow and undivided brother—Representative.

946—C P C—S. 50 [1882 S. 234].

Where a decree *personam* merely was obtained by one partner against another and not as representing any property or the joint family and the judgment-debtor dies. *Held:*—that the decree cannot be executed against the undivided brother by attaching and bringing to sale joint family property which has come to him by survivorship whether as ordinary family property or as property acquired for the family by the partnership trade, 5 Mad 232.1b 234; 10 Mad 283 fol. Execution can proceed only against the widow as she

C P C (1908) S.50=(1882,S.234)-*Concld*

(8) Miscellaneous cases—*Concld.*

alone is the legal representative of the deceased. The separate property of the deceased may be attached in execution even in the hands of the brother or a stranger **Veerappa Chettiar v Ramaswami Aiyar. 27 Mad 106.**

C P C (1908) S. 51.

Notes—C P C—[1908] S. 51 "This clause states generally the powers of the Court in regard to execution, leaving the details to be determined by rules. It will be observed that the power to direct immediate execution is no longer restricted to one class of suit, but that it is now general in terms. Any limitation that may be found necessary will be imposed by rules."

'We have added a power to execute a decree by appointing a receiver, on suggestion of the Advocate General of Madras." Select Committee's Report.

C P C (1908) S. 51—Preliminary objection to hearing of appeal—Right to begin—Interlocutory order in execution proceedings—Receiver—Appointment, effective. **See** C P C (1908) S. 47 Case No. (401) **14 C L J 489.**

C P C (1908) S. 52=(1882 S 252).

Notes:-This section corresponds with section 252 of the C P Code, 1882. No material change has been made in this section except the alteration of a few words. The words '*in respect of which he has failed so to satisfy the Court*" have been substituted for the words "not duly applied by him" in the old Code.

C P C S. 52 (1908)=s 252 (1859 s. 203) See Representative of Deceased Person.

C P C (1908) S 52—Legal representatives of the judgment-debtor-Plea that the property survived to them by survivorship-Plea raised in execution proceedings. **See** C P C (1908) S. 47 Case No. [398]. **12 Bom L R 539**

C P C [1908] S. 52—Scope of the section—Execution proceedings commenced under the old Code-Effect of the new Code. **See** C P C [1908] S. 50 Case No. [923] **4 Ind Cas 492**

C P C [1908] S. 52—Applicability of provisions of s. 253 to realization of security under s. 336—Order directing security to be realized—Decree appeal. **See** C P C [1908] s. 55 Case No. [974] **13 M L J 484.**

C P C (1908) S.52=(1882,S.252)-*Contd*

C P C [1908] S. 52—Execution—Surety, order under s. 253 appellable as under s. 244 **See** C P C [1908] S. 47 Case No. [193].

13 M L J 484.

947—C P C S. 52=Civil Procedure Code, 1882 Section 252—"Duly applied such property of the deceased."—

Held, that a legal representative of a deceased person who had paid away to bona fide creditors all the property of the deceased, and so satisfied their claims in full has "duly applied" such property within the meaning of Section 252, Civil Procedure Code, even though there remain other creditors of whose claims he may have had notice when he satisfied the other debts. **Seth Kastur Chand v Mangal Sen. 68 P R 1895**

Notes.—Dist· 6 P R 1901=P L R 1900, 513.

948—C P C S. 52=Ss. 252, 268—Attachment of debts.

The decree sought to be executed was a decree against a partnership in which one P. deceased was a partner, P had certain partnership property which came into the hands of his son N. and after him into the hands of N.'s widow J. and his son E. The application was to attach the profits as debts due by N and J. and E. to the partnership. *Held* that the application should have been made under section 268 and not under section 252 Civil Procedure Code. The Managers of the firm of. **Varajdas Vithaldas v Erachshaw 1896 P J 670.**

949—C P C S. 52 [1882 S. 252]—Pro-note executed by deceased husband—suit against the widow—Decree against assets in the hands of the widow—Will subsequently established—Execution against legal representative.

Plaintiff brought a suit against the widow for money due on a promissory note executed by her husband and obtained a decree against the assets in the hands of the widow. Subsequently a daughter's son of the deceased husband obtained a decree establishing a will by his deceased grand-father and recovered the properties. Plaintiff sought to execute the decree in his favour against the daughter's son.

Held, [1] that the plaintiff was not entitled

C P C (1908) S.52=(1882, S.252)-*Contd.*

to execute the decree against the daughter's son because he was neither a party to the suit nor legal representative of the widow (11 Mad 408 Fol, 9 Mad 80, Dist. 28 Bom 215, (223), 13 M I A 270 (274), 15 B L R 318 (330) 9 Bom 169; 12 Bom 247, 1881 P R 337 Ref. **Kaliappan Servaikara v Yaradara Julu. 6 M L T 199=33 Mad 75=19 M L J 651=3 Ind Cas 737.**

Notes:—Fol: 33 Mad 465=7 M L J 157=5 Ind Cas 917.

950—C P C S. 52 [1882 S. 252]—Duty of heir and legal representative in the application of assets —Rateable distribution—Distinction between heir under Hindu Law and executor.—

The heir and legal representative of the deceased coming into possession of the deceased's assets is not bound to pay each and every creditor *rateably*. S. 252 C P C only provides that the representative can be proceeded against personally to the extent to which he has failed to apply the assets duly. An heir paying debts but not paying the creditors rateably has not failed to apply assets duly within the meaning of S. 252 C P C. Every payment on account of a debt is a perfectly lawful payment irrespective of its effect upon other creditors and will be a due application of the assets within the meaning of s 252. There is no analogy between the position of an executor governed by the special provisions of the Indian Succession Act and that of legal representative under the Hindu Law in respect of the distribution of assets. Where payments, have been made by the representative to the full value of the property that has come into his hands creditors cannot proceed against such property on the mere ground that the representative is still in possession of property originally belonging to the deceased. 12 W R C R 177 followed. Where certain jewels were pledged by the deceased and the representative redeemed them with his own money he is entitled as against the creditors to a lien with respect to the amount paid by him for redemption. The representative is not a mere volunteer in so redeeming with his own funds. Where a debt is due by the deceased to the representative the latter is entitled to pay himself out of the assests as he cannot sue himself. **Verasokkaraja v Papiah. 13 M L J 253=26 Mad 792.**

C P C (1908) S.52.=(1882, S.252)-*Concld.*

Notes—Fol: 30 Bom 270. 6 Bom L R 1135. Ref: 52 P L R 1908; 45 P W R 1908.

951—C P C S. 52=[1882 S.252]—Cutchi Memons—Administration of property—Hindu Law —Administration of deceased's property—Heirs—Unsecured creditors—Payment to same creditors —Executor de son tort.

The heirs of a deceased Hindu or Mahomedan are entitled to take possession of the property, and to pay debts without being liable to account to the Court, otherwise than as heirs.

The unsecured creditors of a deceased Hindu have no charge or lien on the inheritance If payments are not made by the heir rateably, it does not follow that he has failed to apply the assets duly. Every payment on account of a debt is perfectly lawful, irrespective of its effect upon the other creditors. **Haji Saboo v Ally Mahomed 6 Bom L R 1135.**

952—C P C S. 52=S. 252—Procedure to be followed in determining extent of liability.

The proper form of a decree against the legal representative is given in s.252. The section shows that the proper mode of determining the extent of the personal liability of the legal representative is by proceedings in execution and not by entering into the question during the progress of of the suit. **Jaichand v Jadavbai. 1896 P J 226**

C P C (1908) S. 53.

Notes:—" Section 53 has been introduced to settle a long mooted point upon which there is much diversity or judicial opinion, as to whether or not question as to the liability of ancestral property in the hands of a son of other descendant to whom it has come otherwise by descent for the payment of the debt for which the decree was passed, can be determined under section 47 of the present Code, corresponding with the section 244 of the old Code." *Report of the Special Committee.*

"Clause 53 has been added by the Committee in order to set at rest a question on which the High Courts are divided in opinion It is true that where a son or grandson takes any ancestral property by survivorship he is bound to pay out

C P C (1908) S.53-*Contd.*

of such property all debts of his ancestor not incurred for immoral or illegal purposes; but whether the creditor can follow the property in the hands of the son or grandson in execution, is a debatable point under the Code. The question is one merely of procedure, and the Committee have come to the conclusion that any controversy between the parties with regard to the liability of the son or grandson to pay the debts of his ancestor should be determined in execution, it being open to them to raise any objection or defence in such proceedings which they might have raised in a separate suit instituted by the creditor, the clause in question not imposing upon them a greater liability than that imposed by the Hindu Law." Report of the select Committee.

C P C (1908) S. 53—See C P C (1908) S 107. Case No (1248) **5 C W N 273.**

C P C. (1908) Ss. 53—Scope of the section—Execution proceedings commenced under the old section-Effect of the New Code **See** C P C (1908) s. 50. Case No [923]. **4 Ind Cas 492.**

953—C P C S. 53—Decree against legal representative—Ancestral property, whether liable to be attached.

Where a decree under S. 90 of the Transfer of Property Act, against the legal representative of a deceased person, directs that the amount thereof be realised from such property only as belonged to the deceased personally, the decree-holder cannot take advantage of S. 53 of the Code of Civil Procedure, 1908, and attach ancestral property which passed by right of survivorship to the son of the deceased. **Kalian Das v Bhawani Shankar, 9 Ind Cas 631.**

954—C P C S. 53—Order under old Code—New Code different rule—Appellate Court—Not to reverse.

Appellate Court cannot reverse an order of the lower Court passed under an old Code, on the ground that, since that, a different rule has been enacted by the New Code.

S. 53, Civ. Pro. Code, provides the course to be followed in such cases. (3 Mad. 42, Ref.)

Salem Town Bank v Varadarpa Chetti, [1911] 2 M W N 386.

C P C (1908) S.53-*Concld.*

955—C P C S. 53.

Powers of amendment under the old and new Codes. **11 Ind Cas 856.**

C P C S. 54=(1882 s. 265)=(1859 S. 225).

Notes.—This section corresponds with S 265 of the C P Code 1882, with some additions and alterations in the language and wording. The present section is merely an enlargement of the provisions of the section.

See Cases under:—

[1]—Collector.
[2]—Execution of Decree—Mode of Execution—Partition.
[3]—Partition.

956—C P C S. 54=[1882 S.265]-Jurisdiction—Collector—Oudh Land Revenue Act. s. 69.

A Civil Court which passed a decree for portion of estate paying revenue to Government has no power under s. 265, to order Collector to effect the partition: but the decree-holder should under s. 69 of the Oudh Revenue Act., apply to the Collector for the same.
Bhawani Din v Kewal Singh 8 O C 59.

957—C P C S. 54=(1882 S 265)—Collecter—Partition—Opening a partition—Application to the executing Court—Fresh suit.

When a Collector has once made a partition acting under S. 265 of the Civil Procedure Code, there is nothing to prevent him from revising the partition for mistake or other cause before he has passed final orders and returned the proceedings to the Civil Court.

If any party feels a grievance at the partition made by the Collector, his remedy is to approach the executing Court: it is not open to him to question the Collector's action by a separate suit. **Krishnaji v Damodar 5 Bom L R 648.**

Notes:—Ref: 28 Bom 238.

958—C P C S. 54=[1882 S. 265]—Decree—Execution—Collector—Partition—Collector, contravening the orders—Court's jurisdiction.

Where a Collector in partitioning an estate under a decree sent to him under S. 265 of the Civil Procedure Code, contravenes the decretal

C P C (1908) S.54=(1882 S 265)-*Concld.*

command of the Court or otherwise acts *ultra-vires*, his action is subject to the control and correction of the Court which barred the decree and sent it to him for execution.

Purshottam v Balkrishna.
5 Bom L R 949=28 Bom 238.

959—C P C S. 54 [1908]=(1882 S. 265)-Land Revenue Act [III of 1901], Section 107-Execution-Civil Court decree for partition of Revenue paying property—Decree-holder to obtain mutation of names.

A decree of a Civil Court for partition of a revenue paying property cannot be executed until the decree-holder applies to the revenue authorities and gets his name entered in the revenue papers on the strength of such decree.

Tulsidas v Sheo Narain 3 A L J 336=[1906] A W N 53=28 All 375.

C P C S 54 (1908)

See Execution of decree-Mode of execution-Partition.

C P C S. 55=(1882 S.336).

Notes-This section corresponds with section 336 of the C P Code, 1882 with several additions and alterations. The present section is an amplification of the provisions of the old section. Sub-section (2) is new.

"We have carefully considered the provision as to breaking open dwelling houses and have come to the conclusion that it should be limited to the dwelling-house in the occupancy of the judgment-debtor."—*See the Report of the Select Committee.*

Compare provisos 1, 2 and 3 with section 62.

C. P. C. (1908) S. 55=(1882 S.336.)

(1) Construction 960
(2) Arrest of judgment-debtor 961—964
(3) Liability of surety 965—974
(4) Appeal from orders 975
(5) Miscellaneous Cases 976

(1) Construction.

(a) Arrest and imprisonment 960

C P C (1908)-S.55=(1882 S.336)-*Contd.*

(2) Arrest of judgment debtor.

1 Arrest and imprisonment in execution of decree——Illegal confinement——Duress. 961
2 Procedure in insolvency and in execution——Punjab Government Notification 962
3 Order to furnish security in case of judgment-debtor, arrested in execution of a decree, but who has applied for insolvency 963
4 Release of judgment-debtor on furnishing security to apply to be declared insolvent within a month-Subsequent application—Maintainable 964

(3) Liability of surety.

1 Bound by surety—Dismissal of petition—Limitation 965
2 Sureties, execution against—Separate suit—Estoppel—Waiver 966
3 Execution against surety 967
4 Release of surety 968
5 Surety released on application by judgment debtor within time 969
6 Surety, liability under s. 336 (1882)-Application by judgment-debtor to be declared insolvent— Application returned by Court as defective 970
7 Surety—discharge—Death of judgment-debtor before terms of the security fulfilled 971
8 Surety for production of judgment-debtor—Death of judgment-debtor before time—Surety was discharged by judgment debtor's death. 972
9 Surety-Executing Court had no power to review its order releasing to surety 973
10 Applicability of provisions of s. 253 to realization of security under S. 336—Order directing security to be realized—Decree—Appeal 974

(4) Appeal from orders.

1 Order by execution Court for imprisonment of judgment-debtor—Appeal—Revision 975

(5) Miscellaneous Cases.

1 Execution of decree pending application—Refund 976

See also cases under.—

[1] Attachment—Attachment of person
[2] Surety—Liable of surety.
[3] Limitation Act 1908, Art 182.
[4] Provincial Insolvency Act S. 16.

C P C (1908) S. 55—Execution—Surety, order, under, S. 253 appellable as under s.244. See C P C [1908] S 47. Case No. [193].

13 M L J 484.

C P C [1908] S. 55—See C P C [1908] S. 38. Case No. [126]. **26 Mad 258.**

C P C [1908] S. 55—Order under appeal. See C P C [1908] S. 47. Case No. [386].

69 P R 1895.

C P C [1908] S. 55—See C P C [1908] S 145. Case No. [1391] **72 P R 1902.**

C P C [1908] S. 55—See C P C [1908] S. 145. Case No, [1388] **A W N [1900], 156.**

C P C S. 55 cl. [3]-Application for declaration of insolvency dismissed—Fresh application barred without leave of Court under Rule 11-Abuse of process. See C P P [1908] S. 151 Case No [1406]. **9 Ind Cas 121.**

C P C S. 55 cl [4]—Application for declaration of insolvency dismissed -Fresh application barred without leave of court under rule 11—Abuse of process. See C P C [1908] S. 151 Case No. [1406] **9 Ind Cas 121.**

1 CONSTRUCTION.

(a) Arrest and imprisonment.

960—C P C S. 55=S. 336 of 1882.

The last two clauses of this section are not a law of limitation. They merely enable the Court on the failure of the debtor to apply within a month to realize the security or to commit him to jail. The creditor interested ought to move the Court to take one of these steps, and pending this the debtor is not deprived of the facility otherwise given to him of taking the benefit of the insolvency provisions in Chapter XX of the Code. **Bhudar v Kala. 1883 P J 348.**

2 ARREST OF JUDGMENT-DEBTOR.

(1) Arrest and imprisonment in execution of decree Illegal confinement—Duress.

961—C P C S. 55=[1 08]=Ss. 336, 337—Subsequent application stating judgment-debtor's intention to apply to be declared an insolvent—Rejection of application.

Where a debtor on being arrested and brought before a Court in execution of a decree expresses his intention to apply to be declared an insolvent under section 336 of the Civil Procedure Code the Court must release him on his furnishing security to appear when called upon, and to apply within one month under Section 344 of the Code.

Where, however, the debtor did not apply under Section 336 on being first brought before the Court, but made such application after proceedings under Section 337 A had terminated, and it did not appear that he had furnished the requisite security.

Held, that, without holding that an application under Section 336 cannot under any circumstances be made after proceedings under Section 337 A, the Court in the present case was not bound to release the petitioner, and that his confinement in jail was not illegal by reason of such application.

Held, therefore, that a mortgage and bond executed by such debtor while in jail for the purpose of securing his release were not void on the ground of duress. **Daulat Ram v Rup Lal. 59 P R 1898.**

(2) Procedure in insolvency & in execution —Punjab Government——Notification.

962- C P C S. 55=[1882 S. 336].

Whenever a judgment debtor is arrested and brought before the Court, the Court is bound to inform him under s 336, Civ. Pro. Code, as notified in Notification No 3860 of the Chief Court's Rules and Orders, before any enquiry is made by it that he may apply under Chap XX to be declared an insolvent.

Procedure in insolvency is different from procedure in execution. **Ram Lal v Mackenzie 16 P R 1909=50 P L R 1909= 15 P W R 1909=1 Ind Cas 409**

C P C (1908) S. 55=(1882 S. 336)-*Contd.*

(2) Arrest of judgment-debtor-*Concld.*

(3) Order to furnish security in case of judgment-debtor, arrested in execution of a decree, but who has applied for insolvency.

963.—C P C S. 55 ; O 21, r, 38=[1882 Ss 336, 337, 344 and 357].

Held, per Wells, A J C,—that the mere fact that the judgment-debtor has made an application for insolvency in execution of one decree against him cannot debar other decree-holders even if their debts are scheduled from causing his arrest in execution of their decrees until he has been actually discharged by the insolvency Court under S. 357 of the Code.

Held, per Scott, J. C; that, when a judgment-debtor has already applied to be declared an insolvent under S. 344 of the Code, it becomes unnecessary to require him to furnish security except for his appearing before the Court when called upon. **Suraj Prasad v Babu Bishambhar Nath.** **9 O C 42 [B].**

(4) Release of judgment-debtor on furnishing security to apply to be declared insolvent within one month—Subsequent application—Maintainable.

964.—C P C S 55=(Ss 336, 344)—

A judgment-debtor, who had been arrested, was released under S 336 of the C P C on furnishing security that he would, within one month, apply to be declared an insolvent. He did not do so. He was not arrested again, and later on he applied under S 334 to be declared an insolvent. *Held*, that he was entitled to do so.
Alagappa Chetti v Sarathambal **12 M L J 438.**

3 LIABILITY OF SURETY

(1) Bound by surety—Dismissal of petition—Limitation.

965.—C P C S 55 (1882 S 336)—

Defendant No 2 was arrested in execution of a decree. Defendant No I stood surety for him and passed a bond that, if defendant No. 2 did not apply to be declared an insolvent or if the said application was rejected, he would produce defendant No 2 or pay Rs 500. Defendant No 2 applied but his application was dismissed. The plaintiff made a fresh application and the defendant No 1 failed to produce defendant No. 2. Then he sued to enforce the bond:

C P C (1908) S. 55=(1882 S. 336)-*Contd.*

(3) Liability of surety—*Contd.*

Held, that the bond was not opposed to public policy or without consideration, and was enforceable.

The defendant No. I was directed to produce the defendant No. 2 on September 27th, 1904. The time was subsequently extended to September 30th, on which date he failed to produce the judgment-debtor, and became liable on the bond: *held*, that, as the suit was brought within three years from that date, it was not barred by limitation. (16 All 37: 31 Cal 242; 19 Bom 694; 5 Cal 437, Rel.) **Mir Musar Ali Khondkar v Guru Charan Sen.** **7 Ind Cas 917 =12 C L J 419.**

(2) Sureties execution against—Separate suit—Estoppel—Waiver.

966.—C P C S 55=[1882 s. 336].

Where in execution of a decree the judgment-debtor was arrested and brought before the Court and some sureties put in a surety-bond convenanting to pay the money to the decree-holder in the event of the judgment-debtor not paying it within a given time and agreed that, in default the decree-holder would be at liberty to realize the money by auction-sale of their immoveable and moveable property and by arrest; and when the decree holder sought to execute his decree against his sureties, they came in and applied for and obtained time to pay in the money, which, however, they failed to do, and the decree-holder again applied for execution of his decree against the sureties.

Held, that the Court before which execution was applied for against the sureties had general jurisdiction over the subject-matter, and though the proper course of the decree-holder was to institute a separate suit to enforce his remedies against the sureties, still having regard to the agreement that was come to and the conduct of the sureties in the previous proceedings, it ought to be taken that they waived their right of insisting upon such separate suit being brought against them. (8 C W N 672; 2 I A 219 Rel:)
Kazimuddi Patari v Fauzdar Khan. **4 C L J 311=10 C W N 830.**

C P C (1908) S.55=(1882, S.336)-*Contd.*

(3) Liability of surety—*Contd.*

Note.—Under the New Code s. 55 the remedy against the surety is by execution only.

(3) Execution against surety.

C P C S 55=[1882 S 336]—

Where at the instance of a decree-holder execution has been used against a surety, any subsequent order between a transferee of the decree and the surety refusing execution as against the surety is invalid. **Chathoth Kunhi v Saidiudavide 26 Mad 258.**

(4) Release of surety

968—C P C S 55=[1882 s. 336].—

Where a surety undertook that the judgment-debtor should apply to be declared an insolvent, and the latter did so, but did not afterwards appear when called on to do so, and the petition was dismissed. *Held*, that the decree could not be executed against the surety. **Imbichunni Nayar v Lalji Ram Doss Sait. 24 Mad 560**

Note.—In the new s 55 the words "to appear" are added.

Notes.—Fol: 26 Mad 366; 13 M L J 484. Ref: 50 P R 1905=30 P L R 1905.

(5) Surety released on application by judgment-debtor within time.

969.—C P C S. 55=[1882 S 336]

A surety undertaking to produce the judgment debtor when called upon is entitled to a notice to do so. He does not undertake to produce the debtor when the latter was called upon to appeal. A surety will be released on the judgment-debtor applying within time for insolvency. The subsequent withdrawal of the application will not subject to any liability the surety once released. (24 Mad 560; 19 Bom 210; 15 Cal 171 followed). **Krishnaiyar v. Krishnasamy Ayyar 26 Mad 366.**

Notes.—Fol 13 M L J 484.

(6) Surety, liability under s. 336, C P C [1882]—Application by judgment debtor to be declared insolvent—Application returned by Court as defective

970.—C P C S 55=S 336 (1882]

C P C (1908) S.55=(1882 S.336)-*Contd*

(3) Liability of surety—*Contd.*

One R D having obtained a decree against B S, and R S and having applied for the arrest and imprisonment of B S., one T S offered security under Section 336 of the Civil Procedure Code, which was accepted, the condition of the bond being that B S should apply within one month under Section 344 of the Code, to be adjudicated an insolvent, otherwise the surety undertook to produce B S on any date fixed by the Court, or, if he failed to do so, to be responsible for payment of the decree with costs. Within one month B S put in an application under Section 344 of the Code, but the application was returned by the Court for an alleged defect, and B S was ordered to file another application within one week. No further application having been filed and the case having been struck off, B S and T S were summoned to appear on a certain date. T S alone appeared on the date fixed, and offered to produce B S on a specified date, but as he failed to do this, the Court ordered execution to issue against T S's property. T S applied to the Chief Court for revision, and it was

Held, that inasmuch as B S had applied within one month under Section 344, T S was released from his obligation, it being no concern of the surety's that the Court returned the application of the judgment-debtor for an alleged defect therein. (15 Cal 171; 100; 15 All, 183; 13 All 37, referred to). **Thakar Singh v Ram Das. 100 P R 1894.**

(7) Surety-discharge—death of judgment debtor before terms of the security fulfilled.

971—C P C S. 55=(1882 s. 336).—

Some money was deposited as security. One of the terms of security being that if the application of judgment-debtor for declaration of insolvency which he was going to make, was dismissed for any reason, the money will be paid to decree-holder. The judgment-debtor made the application but died before it could be disposed of. *Held*, that the application of the judgment-debtor was never rejected and the decree-holder was not entitled to the money deposited. (24 Mad 637 ref to.) **Ashiq Ali v Moti Lal. 4 A L J 437=1907 A W N 120 =29 All 486.**

C P C (1908) S.55=(1882,S.336)-*Contd*

(3) Liability of surety *Concld*

(8) Surety for production of judgment-debtor—Death of judgment-debtor before time—Surety was discharged by judgment-debtor's death.

972—C P C S. 55=(1882 Ss. 336, 349)—

A judgment-debtor was released on finding a surety for his production within a certain time. He died before the date. *Held*, the obligation could not be enforced as a decree against the surety and that the surety was discharged by judgment-debtor's death. **Krishnan Nayar v Ittinan Nayar. 24 Mad 637.**

(9) Surety—Executing Court had not power to review its order releasing the surety.

973—C P C S. 55 O. 21, r. 40=(1882 Ss. 336 and 337-A.)

On 10th July, 1908, judgment-debtor applied under s. 336, Civ. Pro. Code, and gave a surety. The judgment-debtor applied under s. 337-A instead of applying for insolvency. The Court heard the application in the presence of the judgment-debtor and postponed it to a date subsequent to the date originally fixed for the judgment debtor's appearance, but on this date the judgment-debtor remained absent T Court discharged the surety, but on review it made him liable.

Held, that under the circumstances the Executing Court had no power to review its order releasing the surety. **Bhagwan Dass v Bhagat Ram. 61 P W R 1910.**

(10) Applicability of provisions of s. 253 to realization of security under s. 336—Order directing security to be realized—Decree—Appeal.

974—C P C [1908] Ss. 55, 47, 52=[1882], Ss. 336, 244 252.—Security given under S. 336.—

An order against a surety under S. 253, C P C is appealable in the same manner as orders passed under S. 244, C P C in execution of decrees. S.336, C P C extends the provisions of S 253 C P C to the enforcement of the bond against the surety and an order against a surety under S. 336 is also, therefore, appealable. Where the judgment-debtor applies within one month to be declared an insolvent the surety under S. 336 is discharged. (24 Mad 560, and 26 Mad. 366 followed).— **Raja Ram v Bapu Chettiar. 13 M L J 484.**

C P C (1908) S.55=(1882,S.336)-*Concld*

4 APPEAL FROM ORDERS.

(1) Order by execution Court for imprisonment of judgment—debtor—Appeal—Revision.

975—C P C S. 55 [1908]=s. 336 of [1882] Chapter XIX [i], and Sections 2,244 [c] and 588 [29] —

Held, that an order passed by the Court executing a decree under Chapter XIX [i] of the Civil Procedure Code for the imprisonment of the judgment-debtor, though not appealable *as an order* under Section 588 (29), is appealable as a *decree* inasmuch as the question decided by such order is one relating to the execution of the decree within the meaning of Section 244 (c) of the Code. **Seva Singh v Dhaunkal. 69 P R 1895.**

5 MISCELLANEOUS CASES.

(1) Execution of decree pending application—Refund.

976—C P C (1908) s. 55=(1882) s. 336.—

An application to be declared insolvent by a judgment-debtor who has been arrested in execution of a decree made pending a suit against him by another creditor whose name he has entered in his schedule, will not protect him from execution being taken out against him by the latter on obtaining his decree. **Falloon v Hawthorne. 1883 P J 18.**

C P C S. 56.

Notes:—A woman may however be detained in the Civil prison in execution of a decree for restitution of conjugal rights. See Order XXI, rule 32.

C P C S. 57.

Notes:—As to the mode of payment of subsistence allowance, see Order XXI, rule 39 **and subsistence money**

C P C (1908) s. 58=(1882) s. 341 (1859) s. 278).

See Cases under:—

(1) Attachment—Attachment of person.
(2) Contempt of Court.
(3) Subsistence money.

C P C (1908) S 58=(1882, S.341)-*Contd*

977-979—C P C (1908) S.58=(1882) S.341 ——Release of judgment-debtor——Confinement in Court-house.—

Where the warrant of committal to jail has been made out, the discharge of the defendant whilst in confinement in the Court-house, for non-payment of the instalment of subsistence allowance, is a discharge from jail within the meaning of s 341 of the Code of Civil Procedure, Act XIV of 1882. **Timapa Shanbhog v Maneshvar Kashi. 9 Bom 181.**

980—C P C S. 58=(1882) s. 341-Imprisonment not to exceed six months—Debtor—Arrest—Imprisonment—Period, discretion to fix—Jurisdiction.

The Court cannot fix any term of imprisonment for a debt under s. 342, Civil Procedure Code, when committing a debtor to jail. (13 Mad 141 foll). **Sujan Bibi v Sagar Mandal. 5 C W N 145.**

981—C P C S. 58=(1882 s. 341)—Non-payment of subsistence money on first arrest—Re-arrest.

A judgment-debtor who was arrested in execution of a decree against him, but liberated owing to non-payment by the decree-holder of the subsistence money for the debtor can be re-arrested in execution of the same decree. (8 Mad 21 fol). **Habib-ul-Rahman v Ramsahai. 1904 A W N 22=26 All 317.**

982—C P C S. 58=(1882 s. 341)—Insolvency Act (11 and 12 Vic. 42), S. 13—Judgment-debtor—Interim protection order—Re-arrest under the same decree.

A judgment-debtor, who has been arrested and imprisoned in execution of a decree and has obtained an *interim* protection order under S. 13 of the Insolvency Act, is liable to be retaken, in execution of the same decree, under the provisions of the Civil Procedure Code. **Shamji v Poonja. 4 Bom L R 483=26 Bom 562.**

983.— C P C S, 58=1882 s. 341.

Default in payment of subsistence money—Discharge & re-arrest of judgment-debtor.

A judgment-debtor was discharged before imprisoment an account of the failure to pay subsistence money for the debtor; the discharge is no bar for re-arresting the debtor. **Subba v Venkata 8 Mad 21.**

Notes.—Fol. 23 Cal 128; 1904 A W N 22; 26 All 317.

C P C S 59=1882, S 342 (1859, S 278.)

984.—C P C S 59 (1908): O 21, r 37—Application for execution of decree by arrest of judgment-debtor—Discretion of Court to issue notice to show cause against the application.—Illness, whether ground for refusing application.

Held, that a Court is not bound in every case to issue a warrant for arrest, and that, if it has reason to believe that the judgment-debtor is not in a fit state of health to undergo confinement, it would act wisely in issuing a notice to him to show cause in the first instance. **Dip Chand v Sheikh Naushad Ali Khan. 14 O C 36=9 Ind Cas 746.**

See also cases under :—

(1) Contempt of Court—Contempts Generally.

(2) Execution of Decree—Effect of Change of Law pending Execution.

(3) Imprisonment.

(4) Subsistence Money.

C P C S. 60=(1882 s.266)=1859 s 205

Notes :— " We have omitted the words 'military and civil,' becaue the word *pensioners* covers every class of pensioners. The exemption has been extended so as to cover pensions granted out of any service family pension fund notified in that behalf by the Governor General in Council. ".— **Report of the Select Committee.**

1 Decree against the separate property of a married woman—Income of property subject to restraint upon anticipation 985—986.

2 Scope " Agriculturist " meaning of 987

C P C (1908) S.58=(1882, S.341)-*Concld*

3 Agriculturist's house—Sale in execution of decree on mortgage, whether legal 988

4 Objections under the section 989

5 Attachment-Debt-Monthly allowance of 'debt'—Contingent and existing debt—Debt payable in future 990

6 Wife's share in let-tet paw property—Alienability 991

7 Widow—Right of residence in family house—Whether alienable 992

8 Hereditary right to allowance for maintenance 993

9 Pensions—Zemindari granted as reward for services rendered to Government 994

10 Loan on security of pension—Liability of pension—Pension Act 995

11 Political pension— Attachment—A pension is a periodical allowance or stipend granted not in respect of any right, privilege, but on account of past services or particular merits 996

12 Right of personal service 997

13 Jagir revenue — Attachment—How to be realised—Collector—Land Revenue Act 998.

14 Execution of decree—Sanction of superior authority—Restriction attached to sale of land—Oudh, practice 999

15 Resulting trust—Expectancy 1000

16 Transfer of right of succession to accrual—Legality-Attachment 1001

17 Right to get profits in future years—Attachment 1002

18 Right to future maintenance if an annuity is attachable 1003—1003A.

19 Execution of decree—Attachment—confinement right-Right of pre-emptor under a conditional decree for pre-emption 1004.

20 Mortgagees not advancing the whole amount balance whether a debt attachment—Suit by purchaser-Cause of action 1005.

See cases under:—

1 Attachment—Subjects of Attachment.

2 Attachment.

C P C (1908) S 60—See C P C (1908) S 2. Case No. (8). **25 Mad 402.**

C P C (1908) S 60—Execution of decree—Power of Court executing transferred decree to implead representative of deceased judgment—debtor—Jurisdiction of Court to execute decree in excess of the limits of its pecuniary jurisdiction as an original Court. **See** C P C (1908) S 47. Case No 203. **70 P R 1897.**

C P C (1908) S 60—Saleable property—Sale of holding without consent of landlord—T P Act. **See** C P C (1908) S.47. Case No [446] **10 C L J 110.**

—C P C (1908) S 60—See C P C (1908) O 21 r 16. Case No (2449). **5 M L T 278.**

(1) Decree against the separate property of a married woman-Income of property subject to restraint upon anticipation.

985.—C P C S 60 (1908)=S 266 (1882) Rule 20—C P C S 260.—Attachment.

The income of property subject to a restraint upon anticipation accruing due after the date of the judgment cannot be attached in execution of a decree against the separate property of a married woman. S 8 of the Married Women's Property Act, 1874, was not intended to affect the operation of the doctrine of restraint upon anticipation by rendering property so restrained liable on contracts made by her as to her separate estate. Decrees passed in accordance with S 8 of the Married Women's Property Act against the separate property, if any, of a married woman in respect of a contract entered into by her cannot be considered as passed against property which she is restrained from alienating. Rule 220 of the Presidency Small Cause Court Rules (S 266 C P C) is only a rule of procedure, and the exemptions mentioned in the proviso are not stated in terms to be exhaustive. Such a rule cannot be taken as authorizing the attachment of property which by a rule substantively now embodied in S 10 of the Transfer of Property Act is incapable of being transferred or charged by the beneficiary. **Goudoin v Venkatesa Moodelly. 17 M L J 363=30 Mad 378.**

986.—C P C S 60=C P C 1882 S 266 (c)—Agriculturists, meaning and applicability of—

The terms 'agriculturist' in proviso (c) to the section does not refer to tenants only, but includes any person who is proprietor of his holding. (12 Bom 363 Dist; 7 Bom 530 ref).

Ganpat Ram v Lakshman Rao. 13 C P L R 30.

(2) Scope "Agriculturist" meaning of.

987.—C P C S 60 (=Old S 266).

The effect of this section is to confer an extraordinary privilege on certain classes of debtors and to trench on the ordinary rights of a creditor to realise his money from his debtor's property and, as such, this section should be construed very strictly. The word "agriculturist" in this section means not a mere owner of land, but a husbandman carrying on and making his living by tillage, **Bawa Gurbakhsh Singh v Ghulam Qadir. 47 P R 1897.**

(3) Agriculturist's house—Sale in execution of decree on mortgage whether legal.

988—C P C S. 60 [1] [c]—[1908]=S. 266 (1882]

Held per Richards, C. J., and Tudball, J., (*Banerji, J, contra.*) that the house of an agriculturist (which is not an appurtenance of his holding which he is forbidden by law to transfer,) is liable to sale in execution of a decree obtained on foot of a mortgage made by him there being nothing in S. 60, cl. I (c), of the Code of Civil Procedure to render such sale illegal.

Per Richards C. J.—The Code of Civil Procedure is an Act which deals entirely with matters of procedure; and *prima facie* it is very improbable that the legislature intended to deal with matters of substantive law. Where it was considered necessary for the protection of certain classes of tenants that their powers of transfer should be restricted, the legislature, by express provisions in the Tenancy Act, has so enacted. S. 60 and the proviso to it deal with simple money decrees and not with mortgage decrees.

Per Banerji, J—The legislature clearly intended that no Court should sell a house belonging to and occupied by an agriculturist, provided that the house is of the description mentioned in cl. (c) of the proviso to S. 60 Code of Civil Procedure, and it makes no difference in the powers of the Court, whether that house was mortgaged by the agriculturist for his debt or was not so mortgaged. The proviso forbids both attachment and sale, that is, where an attachment must precede a sale, it forbids attachment, as well as sale, and where attachment is not a preliminary step, it forbids sale. **Bhola Nath v Kishori. 8 A. L. J. 1045 (F. B)=11 Ind. Cas. 646.**

(4) Objection under the section.

989—C P C S. 60 (1908) = 1882 S. 266 [c]—Decree-Execution—Attachment—Sale—Possessing of the property.

In execution of a decree the house of the judgment-debtor (defendant) was attached and sold. The sale was confirmed by the Court. The plaintiff being obstructed in seeking its possession filed a suit to recover possession of the house. The defendant then contended that as he was an agriculturist and as the house was occupied by him the materials of it could not be sold having regard to S. 266 (c) of the Civil Procedure Code—*Held, (1)* that in the absence of proof the exemption from liability to attachment or sale of the house did not exist for the purpose of execution proceedings; therefore the executing Court had complete jurisdiction to make the order it did: and that, therefore, it was not open to the defendant to contend that there was no jurisdiction to order the sale of the house by reason of S. 266 (c) of the Code (2) that as 'strangers to a suit are justified in believing that the Court has done that which by the direction of the Code it ought to do', the plaintiff who was a stranger to the previous proceedings was justified in believing that the Court had authority to attach and sell the property.

In Courts of law only those facts can be taken to exist which are proved. **Pandurang v Krishna. 5 Bom L R 799=28 Bom 125.**

(5) Attachment—Debt—Monthly allowance of 'debt'—Contingent and existing debt—Debt payable in future.

990—C P C—S. 60; O, 21. r. 46=(1882—Ss. 266—268)—Attachment of part already accrued due.

A monthly allowance given in payment of an antecedent debt and acknowledged by the debtor as such is attachable in execution, being a debt accruing due and actually existing with a right to payment on and after the first of the following months. The decree-holder applied on the 21st December for the issue of a prohibitory order in respect of a half of the allowance for the month of December and the order was issued on the 23rd December:—*Held*, that the attachment was validly made, inasmuch as three weeks of the December allowance had already become an existing debt though payable on a future date (27 Cal 38; 14 Moo I A 40 ref to). **Maharani Dambar Koeri v. Rai Sham Kissen Das.** 9 C W N 703.

Notes.—Ref: 12 C W N 145=7 C L J 658.

(6) Wife's share in let-tet paw property—Alienability.

991—C P C S. 60—Wife's share in let-tet paw property—Alienability—Attachability, **Buddhist Law** (Divorce), 8 Ind. Cas 992.

(7) Widow—Right of residence in family house—Whether alienable.

992—C P C S. 60 [1908]=266 (1).

Held, that the right of a Hindu widow to reside in the family house is not alienable and therefore cannot be attached in execution of a decree. (12 Mad 260; 27 Mad 50 Ref). **Salakshi v Lakshmayee** 4 M L T 485.

(8) Hereditary right to allowance for maintenance

993—C P C S. 266, Cl. (1)—A hereditary right to an allowance for maintenance out of the melwaram of certain lands does not fall within the terms of Cl. (*l*) to S. 266, C. P. C.—**Vaidyanatha Sastrial v. Eggia Venkatrama Dikshitar.** 17 M L J. 373; 30 Mad 279.

(9) Pensions-Zemindari granted as reward for services rendered to Government.

994—C P C—S. 60 (1908]=S. 266. Pensions-Zemindari granted as reward for services rendered to Government:—A Zemindari granted, not revenue—free, by Government as a reward for services rendered is not a pension and an alienation by the grantee is not prohibited either by Act No. XXIII of 1871 or by S. 266 C P C. (4 Bom 132: 1902 A W N 161; 7 I A 181 foll.) **Lachmi Narain v Makind Singh.** 1904 A W N 144=1 A L J 338=26 All 617.

Notes.—Fol: 30 Mad 153; 31 All 382. Ref; 6 A L J 519.

(10) Loan on security of pension-Liability of pension—Pensions Act XXIII of 1871.

995—C P C S. 60(=Civ Pro Code, 1877, s. 266)

A person who pledges a political pension as an available asset in security for a debt cannot avail himself of the protection of s. 266, C P C 1877. But the decree cannot be executed by attachment and sale of the pensionary right, title and interest of the judgment-debtor, but under the procedure provided in other sections of part of Ch XIX of the C P C. **Damodardas v Khwaja Mir Muhammad.** A W N, 1881, 147.

(11) Political pension-Attachment—A pension is a periodical allowance or stipend granted not in respect of any right, privilage, but on account of past services or particular merits.

996.—C P C S. 60 (1908)=S. 266 of (1882)—Code of Civil Procedure, Act XIV of 1882, S. 266 [g]-Perquisite or office, or as compensation to dethroned princes, their families and dependants.

Where certain immoveable property was granted in lieu of a pension and it was provided in the *sanad* that upon the death of the original grantee the estate would be continued in perpetuity in the manner of an hereditary holding (zamindari *mauroosi*), and at the desire of the grantee revenue was assessed and the members of the family had treated it as an ordinary zamindari property subject simply to the payment of Government revenue, *held* that the zamindari so granted was not a penson within the meaning of s. 11 of the Pensions Act, and was liable to attachment and sale.

Amna Bibi v Najm-un-nissa. 6 A L J 519=5 M L T 388=31 All 382=2 Ind Cas 109

C P C(1908) S.60=(1882, S.266)-*Contd*

(12) Right of personal service.

997.—C P C S 60 =S 266 (f) Civ Pro Code, 1882—"Brit Mahabrahmani."—

A *brit mahabrahmani* or right to officiate as a priest at the funeral ceremonies of Hindus dying within a particular district, is a right of personal service within the meaning of S 266 (f) of the C P C, and, as such, it is not liable to attachment or sale in execution of decree. (16 W R 171and 10 Bom 395 Ref.) **Durga Prasad v Gerda**
A W N 1889, 169

Notes.—Ref 20 All 234.

(13) Jagir revenue—Attachment— How to be realized—Collector-Punjab Land Revenue Act 1887.

998.—C P C —S. 60 (=old s. 266)

The mode prescribed in s. 143 of the Punjab Land Revenue Act, 1887, is the only manner in which assigned land revenue could be attached. It can only be realised through the Collector, as the revenue thus attached is not a debt saleable under s. 266. **Nawab Abdullah Khan v. Kuddan Mal.** **4 P R 1894, Rev.**

(14) Execution of decree- Sanction of superior authority—Restriction attached to sale of land—Oudh, practice.

999—C P C S. 60=S 266 C P C 1882—Sale of land-Act XVIII of 1876, Oudh Laws s 20-Act IV of 1882-Transfer of Property Act ss. 88 & 89—Oudh, practice as regards sale of land in execution of decree in.

Under the provisions of s. 20 Oudh Laws Act XVIII of 1876, in Oudh a decree or order passed under ss.88 and 89 of the Transfer of Property Act IV of 1882 would be subject to the restriction attached to s. 266 of the Code of Civil Procedure and the sanction of the superior authority would be necessary for the sale of land in all cases of mortgage. A sale in pursuance of an order under s. 89 of Act IV of 1882 is a sale in execution of decree. **Syed Fida Hussain v Kailasa.** **3 O C 1.**

Notes.—Ref 8 O C 409.

(15) Resulting trust—Expectancy.

1000.—C P C S. 60 [=s. 266, Civ Pro Code, 1882].

C P C (1908) S.60=(1882, S.266)-*Contd.*

Resulting trust is not a mere expectancy or contingency under s. 266 [*k*] of the Civ Pro Code. 1882. **Antoo v Ardeshir Byramji,**
1 Bom L R 803.

(16).—Transfer of right of succession to accrual Legality.

1001.—C P C S 60=old s. 266-Transfer of Property Act 1882 s. 6.

Attachment in execution of a decree cannot under s,266 (k) Civ Pro Code 1882 be made of a transfer of or an agreement to transfer rights of succession in expectancy; but it is not unenforceable as being contrary to public policy. **Nizam-Ud-din v Mussammat Jannat Bibi,**
58 P R 1894.

(17) Right to get profits in future years -Attachment.

1002.—C P C S 60. 1908=1882 section 266.

The decree-holders applied for attachment of profits then due to their judgment-debtor from the lambardar as well as profits which would accrue at a future date. *Held* that in the profits of future harvest, the judgment-debtor had only a possible right to get a share, and this possible right was not liable to attachment having regard to the provision of section 266 of the Code of Civil Procedure. **Sher Singh v Sri Ram.**
4 M L T 10=5 A L J 251.=1908 W N 101=30 All 246.

(18) Right to future maintenance, if an annuity is.

1003-C P C S.60(1908)=(1882 S. 266)—Annuity if attachable.

An annuity given by will is not a right to future maintenance within the meaning of S. 266 of the Code and can be attached in execution of a decree.(10 C W N 1102 foot-note 1892 Fol.) **Gopal Lal Seal v F J Marsden.**
10 C W N 1102.

Notes:—Fol: 10 C W N 1102.

1003A-C P C S.60=(1882 S.266)—Execution of decree-Attachment of future salary of private servant.

C P C (1908) S.60=(1882 S.266)-*Concld*

Where a decree holder applied on the 18th November 1907 for attachment of the judgment debtor's salary for November and the succeeding months the judgment debtor being a lawyer's clerk, *held* that the unearned salary of a private servant in whole or in part was not liable to attachment in advance.

Semble.—Where a servant cannot sue his master for salary before it is earned such salary is not property nor even a debt payable in future. ((1893) I Q B 557 and 21 Mad 393 Ref; and fol; 23 All 164 Dist) **Debi Prasad v Lewis. 6 A L J 227=31 All 304=1 Ind Cas 186.**

(19) Execution of decree—Attachment—Contingent right—Right of pre emptor under a conditional decree for pre emption.

1004—C P C Ss. 60 (m)=(S 266 of 1882).

Held, that the interest in the pre-empted property of a successful pre emptor who has not yet paid the pre-emptive price fixed by his decree is an interest the attachment of which is prohibited by S. 266 (*k*), C.P.C.— **Gorakh Singh v. Sidh Gopal,** (1906) A W N 69= 3 A L J 183=28 All 383.

(20) Mortgagees not advancing the whole amount balance whether a debt—Attachment—Suit by purchaser—Cause of action.

1005.—C P C S 60=[1882 s 266]—

The unpaid portion of a loan does not constitute a debt due by a mortgagee to a mortgagor and could not be attached as such in execution of a simple money decree against the mortgagor. The purchaser of such a debt has no cause of action to bring a suit against the mortgagees. The South African Territories Limited. (1898 A C 309 Ref.)

Phul Chand v Chandmal 5 A L J 491. =1908 A W N 105=30 All 252.

C P C (1908) s. 60—Decree for money—Mortgage—decree, a decree for money.

See C P C (1908) O 21 r 53. Case No. (2530A) **5 M L T 278.**

C P C (1908) S. 62=(1882, S. 271).

Notes.—This section corresponds with section 261 of the C P Code, 1882, with some additions and alterations. In the old section there were only two paras. The first para has been divided into two clauses. Clause [1] corresponds with the first part of the old section, and clause [2] corresponds with the latter part of the old section with some additions. Clause [3] corresponds with the second para of the old section with some change of words and phrases.

C P C (1908)-S.62=(1882 S.271)-*Concld.*

This section has been amended by the insertion of the words "*unless such dwelling-house is in the occupancy of the judgment-debtor and he refuses or in any way prevents access thereto.*"

"The Committee have inserted a new provision to authorise the breaking open of the outer-door of a judgment-debtor's house. They do not think that it would be safe to extend the operation of this provision to the house of a stranger"—Notes on Clauses by the Committee.

C P C (1908) S. 63=(1882 S. 285)

Notes.—Clause 1 of this section is similar to section 285 of Act XIV of 1882. Clause 2 is new, and has been added to set at rest the conflicting decisions of the several High Courts. It has adopted the principle laid down in 12 Cal 333; 22 Bom 88, P 93; and 22 Mad 295, and rendered inoperative the following decisions of the Allahabad High Court, [4 All 359; 18 All 341; 26 All 538 and 27 All 56] by laying down that where the same property is under attachment by two Courts of different grades, a sale effected by the Court of a lower grade in execution of one of such decrees is not a nullity.

C P C S 63 [1908]

See cases under.—

Payment into Court.

C P C 1908 S. 63—Decree-holder also judgment-debtor—Right to appeal. **See C P C** [1908] S 47. Case No. 247 **1 Ind Cas 78.**

C P C 1908 S 63—Higher grade causing property to be put up for sale in execution. **See C P C 1908.** Case No. 560 **11 O C 41.**

C P C S 63, 1908=1882 S 285

See Cases under—Sale in execution of decree—Invalid Sales—Want of Jurisdiction.

1006.—C P C S 63=1882 *S* 285—Attachment by a superior and an inferior Court—Jurisdiction of inferior Court—Irregularity of sale—Sale by whom questionable.

Where a property is attached both by an inferior and a superior Court, S 285, Civil Procedure Code, does not take away the jurisdiction of the inferior Court to deal with the property. Any proceeding by the inferior Court in contravention of that section would be an irregularity which would vitiate such proceedings *only if* there were notice of proceedings in the superior court. Further, the proceedings in the inferior Court can be questioned only by the parties to the two proceedings and not by strangers.(25 Cal 46: 22 Bom 88, followed; 7 Mad 47 distinguished.) **Atiyandiyil v Lakshmi Amma 9 M L J 1.**

1007.—C P C S. 63=1882 s 285-Sale by Court of lower grade of property attached by a Court of higher grade—Sale invalid.

Where the same property is under attachment by two courts of different grades, a sale effected by the court of the lower grade is a nullity, whether such sale was effected in ignorance of the attachment imposed by the court of higher grade or not, and consequently, a purchaser at such sale has no *locus standi* to sue for a declaration that a subsequent sale held in persuance of the attachment imposed by the court of higher grade is not valid. (1904 A W N 95 foll.) **Har Prasad v Jagan Lal. 1904 A W N 161=27 All 56**

Notes:—Diss: 34 Cal 836.

1008—C P C Ss.63,73—[1882 Ss. 285,295]—Attachment before Judgment—decree before sale by another Court—Rateable distribution of sale proceeds—Decree in Munsiff's Court-Decree in Subordinate Judge's Court.

When an attachment has been taken out by the plaintiff before judgment if a decree is subsequently obtained in the suit the attachment already effected becomes operative.

Regard being had to the provisions of S. 285 and of s 295 of the Code of Civil Procedure, when a property attached in the Court of a Subordinate Judge is sold in an execution proceeding pending in Court of a Munsiff, the Court of the Subordinate Judge is the only Court competent to determine any claim for rateable distribution of the assets realised by the sale.

After the Subordinate Judge had called for [as he had full authority to do] the record of the execution case from the file of the Munsiff, the latter had no power to distribute the sale proceeds amongst the decree holders claiming rateable distribution in his own Court.

Quære:—Whether the Subordinate Judge had authority to order the decree-holders to refund the sums drawn by them in accordance with the order of the Munsiff in excess of what was legitimately due to them.(4 All 359 Ref:) **Bhagwan Chandra v Chandra Mala. 1 C L J 97 =29 Cal 773.**

1009—C P C—S. 63 =[1882, S. *285*].

Where the same property has been attached by two courts of different grades, a sale effected by the court of lower grade is not the less invalid, because it was effected in ignorance of the attachment imposed by the court of higher grade. (4 All 359 and 18 All 341 followed.)

Chiranji Lal v Jawahir Mal 24 W N 95. =26 All 538.

1010—C P C S. 63-O. 38, r. 11=(O C S. 490) S: 63 [O C. S 285] - Attachment before judgment - Effect of—sale by inferior court—Nullity—Where the property is placed under attachment before judgment it is not necessary to re-attach it after the passing of the decree.

Where property had been attached before judgment by the Subordinate Judge the decree being passed afterwards, and the property was sold in execution of a Small Cause Court decree by the Munsif to whom that decree had been transferred, *held* that a re-attachment by the Subordinate Judge being unnecessary the Munsif had no jurisdiction to sell the property pending attachment by a higher Court and the sale was a nullity. **Durpti Bibi v Ram Rach Pal. 6 A L J 703=31 All 527.**

1011—C P C Ss. 63, 73=[1882 Secs 285,295] Execution of decree simultaneously against same property—Rateable distribution.

C P C (1908) S.63=(1832,S.285)-*Concld.*

Condition precedent to the applicability of section 295 of the Code of Civil Procedure stated.

Although a decree may be executed in more than one Court,a decree cannot be executed simultaneously against the same property in more than one Court.

Court's power under section 285 of the Code of Civil Procedure stated.

An application for rateable distribution cannot be deemed to be an application for determination of any claim to attached property or of any objection to the attachment thereof.

Section 285 of the Code of Civil Procedure is governed by the immediately preceding section with which it must be read, and the word is "shall determine any claim thereto and any objection to the attachment thereof," mean any claim or objection of the sort which can be summarily enquired into and decided in execution proceedings as provided in the immediately preceding section or elsewhere in the Code, as in sections 278 to 281. (12 Cal. 333, 29 Cal. 773 = 1 C L J 97 fol.) **Ramjus Agarwala v Guru Charan Sen. 11 C L J 69=13 C W N 396= 3 Ind Cas 105.**

C P C S.64-(1882,S.276)-(1859,S.240)

Notes—The section corresponds with section 276, C P Code, 1882, with some additions and alterations. The word "*transfer*" has been substituted for the word "*alienation*," as the word *transfer* is more comprehensive and includes, sale, gift, mortgage &c. The words "*or any interest therein*" have been added. By additions and alterations the section has been made more concise.

The explanation to this section has been added in accordance with the principle laid down in 16 Bom 91, where it has been held that private alienation of property under attachment is void as against all claims enforceable under the decree, as well as against other creditors who apply for execution under s. 295, C P Code, 1882 (s. 73).

See Cases under Attachment—Alienation during Attachment.

C P C (1908) S. 64—General principles of—Re-opening question already decided. **See C P C (1908) S. 47. Case No (796). 9 C L J 356.**

C.P.C. (1908)S.64=(1882,S,276)-*Contd.*

C P C (1908) S. 64—Mortgage of decree by decree holder—Attachment of decree on same date by decree holdder's creditor—Subsequent attachment-Attachments by other creditors priority. **See C P C 1908 s. 47. Case No (603) 33 Mad 429.**

C P C (1908) S. 64—See Attachment-Alienation during attachmen t.

1012-C P C S 64 (1908)=(1882 s. 276)—Bequest —Heirs— Consent— Alienation—

To validate a bequest by a Mahomedan, of more than one-third of his property, to a stranger, the consent of the heirs required thereto by the Mahomedan Law, need not be express; it may be signified by conduct showing fixed and unequivocal intention.

Such a consent, even if given after the property is attached in execution of a decree against the heirs, does not amount to an alienation within the meaning of section 276 of the Civil Procedure Code. **Daulatram v Abdul Kayum. 4 Bom L R 132=26 Bom 497.**

1013—C P C S 64 (1908) = 1882 s. 276—When not applicable—Prior mortgages—Discharge by mortgagor from money raised on a fresh mortgage—Execution sale—Priority of mortgage to sale—Intention—Charge, extinguishment of:

S. 276, C P C does not render all alienations by the judgment-debtor void so as to confer a benefit on the judgment-creditor which he never had at the time of the attachment and which it was not intended he should have subsequent thereto, but only those which prejudicially affect the judgment-creditor. An attachment of property over which there is a mortgage subsisting affects only the equity of redemption. A payment of the mortgage by a person claiming under the judgment-debtor or by the latter on behalf of that other with the intention of keeping alive the old mortgage does not enure for the benefit of the execution-creditor just as a further advance or a subsequent mortgage in renewal of the prior mortgage will not affect him prejudicially under s. 276, C P C. When an owner of an estate pays charges on the estate for which he is not personally liable, the question whether such payment operates as an extinguish -

C P C (1908) S.64=(1882 S. 276)-*Contd.*

ment of such charges or otherwise, depends upon the intention of the parties An intention to keep alive the prior charges will be presumed when it is for the benefit of the person paying. Payment by a judgment-debtor of his own charges pending attachment for the benefit of a person who had advanced the money and under an agreement with him operates to keep alive such charges for the benefit of the person who has so advanced. Where a judgment-creditor, while the attachment on the equity of redemption was pending, mortgaged his estate to pay off prior charges created before the attachment and out of the mortgage amount paid off such charges and got a reconveyance from the holders of the prior charges and the re delivery of the title-deeds together with the documents creating the charges and delivered all such to the mortgagee in pursuance of an agreement with the latter who was to have the first charge on the property represented to be unincumbered: *Held*, that the judgment-creditor could not claim to have the benefit of this payment and a purchaser with notice of those facts in the execution sale could only take a title subject to the mortgage.

Dinobundhu Shaw-Chowdhury v Jagmaya Dasi 4 Bom L R 238=12 M L J 73=6 C W N 209=29 Cal 154=29 I A 9; P C.

Notes.—Fol: 29 Mad 37; 1 C L J 531; 2 C L J 202, 288. Ref: 36 Cal 193=5 C L J 611; 33 Cal 1133=10 C W N 1010=4 C L J 121; 1 M L T 183; 7 C L J 1; 10 C L J 150. Fol: 8 C W N 690.

1014—C P C S. 64 1908=1882 s 276—Alienation of property after attachment.

Where a party prosecuting a decree is compelled to take out another execution, his title should be presumed to date from the second attachment. A mortgage prior to that date is not void under S. 276. **Kishen Lal v Charat Singh 23 All 114.**

1014A—C P C S 64=S. 276 1882—Sale of a decree—Attachment pending—Validity of.

On the applicatirn of a decree holder the Munsif attached a decree of the Revenue Court in favor of the judgment-debtor, in the manner required by s. 273 of the Code of Civil Procedure and directed notice to be served on the judgment-debtor who was said to be in a certain jail. The authorities of such jail returned such notice unserved, reporting that there was no such person in such jail. The decree-holder though informed of the matter took no further steps and the Munsif in consequence on the 24th December 1878, ordered that the case should be struck off the file of pending cases. In May, 1879, the decree-holder sold his decree to R K S. *Held* that inasmuch as the order of the 24th December, 1878 declared in terms that no attachment had been perfected, the sale of the decree to R K S was not invalid and passed a good title.

Rao Karan Singh v Baqar Ali Khan. 1 W N 158.

1015—C P C S 64, 1908=1882 s. 276-Easement-Releasof, after attachment.

If an easement enjoyed by the dominant tenement is expressly released after the latter is attached under a decree, it is an alienation of a portion of that property within the meaning of s. 276, C P C and the transaction will be void.

Krishna Dhone Mitter v Nandaranee Dassee. 12 C W N 969=35 Cal 889.

1016—C. P. C. (1908) Ss. 64,73=(1882 ss.276, 295)—"shall be void as against all claims enforceabale under the attachment."-Claims of a creditor who has merely applied for rateable distribution.

The words "shall be void as against all claims enforceable under the attachment" in section 276 C P C cannot include the claims of a person who has not caused the property of the judgment-debtor to be attached, but has simply asked for a rateable share of the assets but include only the claim of the person who has obtained the attachment. Consequently where the attaching creditor's claim is satisfied by the purchaser the sale will be valid as against all who have not attached but have merely applied to the court for rateable distribution, (7 All. 702. 15 Cal 771 followed. 16 Bom. 91 not followed) **Manohar Das v Ram Autar Pandey 1903 A W N 92=25 All 431.**

Notes— Ref: 28 Mad 380= 15 M L J 202

1017—C P C (1908) S.64; S.47=(1882 Ss. 276, 244 cl. (c)-Representative—Parties, etc—Ijaradar of judgment-debtor is legal representative—Right of suit.

(1) An Ijaradar of a property of the judgment-debtor is his representative within the meaning

C P C (1908) S.64=(1882,S.276) *Contd.*

of S. 244, C P C. (2) A suit by a decree-holder against the judgment-debtor and his Ijaradar for a declaration that the ijara was null and void is not maintainable as that is a question which should be decided by the Court executing the decree, (19 All. 352, 16 All 286. 21 All 20; 24 Cal 62 ref. to.) **Mathewson v Gobardhan Tribedi. 5 C W N 654=28 Cal 492.**

Notes:--Ref: 17 M L J 331.

1018—C P C S. 64= S. 276—Attachment, effect of—Attachment does not effect equitable rights enforceable against the property on the date of the attachment.

An attachement of property under the Civil Procedure Code does not affect subsisting equitable rights which could be enforced against the property at the date of attachment.

The plaintiff contracted with A in August, 1891, to take a mortgage of his property and advanced money under the contract, but took no registered instrument for the same. In September 1891, the property was attached in execution of a decree against A. In December 1891, the plaintiff took a registered mortgage-bond for the sum he had already advanced in August. 1891.

Held: that as the plaintiff had at the date of the attachment an enforceable contract in respect of the attached property the rights enforceable under the attachment do not override his contract and that a purchaser of the attached property in execution takes it subject to the plaintiff's mortgage, although the registered instrument was actually executed pending the attachment.

Savithri Ammal v. Ramasami 8 M L J 266.

1019—C P C (1908) S. 64, O. 21 r.83=C P C Ss. 276, 305-Alienation during attachment.

S. 305 of the Civil Procedure Code is an enabling section, and qualifies the prohibition contained in S. 276. On compliance with the conditions of that section, a private alienation notwithstanding S. 276, becomes absolute even against all claims enforceable under the attachment.

Shivlingappa v. Chanbasappa 8 Bom. L. R. 16.=30 Bom 337=1 M. L T 46.

1020 C P C Ss. 64; 73 (1908)=(Ss.276; 295)—"Assets realized in execution" meaning of-Attachment by judgment—creditor—Private sale by judgment-debtor-Subsequent order is for rateable distribution by other creditors—Payment into court by purchaser.

S. 295, C P C should be construed strictly as against judgment-creditors who claim rateable distribution under the section. The words "wherever assets are realized by sale or otherwise in execution of a decree" do not mean simply "where assets are realized for the purposes of satisfying a decree." "In execution" in S. 295, C P C., means by execution, viz., by some process of Court. Where a judgment-debtor effects a private sale of property attached by his judgment-creditor and the purchaser pays the amount of the attaching creditor's decree into Court, the money so paid is not "assets realized in execution" **Vibudha Priya Thirthasami v. Yusuf Sahib.**

(1905) 15 M L. J 202=28 Mad. 380.

C P C (1908) s. 64—Fixing of the copy of the order and another to be sent.

See C P C (1908) O 21 r 46(2) Case No. **(2516) 9 C W N 693.**

C P C (1908) S. 65=(1882, S. 316).

Notes:—This section with its additions and alterations corresponds with the latter part of section 316 of the old Code. The first part of s. 316 is to be found in Or XXI, r 94. Under the present section the property shall vest in the purchaser on the date of the sale and not from the time when the sale is confirmed. The language of section 316 of the old Code was to the following effect. "*The title to the property sold shall vest in the purchaser from the date of such certificate and not before.*" In consequence of the ambiguity in the language of s. 316 there was some diversity of judicial opinions.

1 Protected interest—Darputni—Mortgage 1021
2 Certificate of sale granted—Determines date of vesting of property sold. 1022
3 Time from which the auction purchaser's title accrues 1023
4 Reversal of Sale, effect of 1024-1025.
5 Date of confirmation of sale—Starting of limitation for execution 1026-1029
6 Effect of attachment after sale—Placing attaching creditor in position of decree-holder—Confirmation of sale 1030
7 Sale not affected by the grant of a sale certificate to the auction purchaser 1031

See also Cases under:—

(1) Registration Act 1877 S. 17.
(2) Sale in execution of decree—Purchasers, title of—certificates of sale.
(3) Sale in execution of decree—Invalid sales—Decrees barred by limitation.

C P C S. 65 (1908)=S. 316 (1882). See Cases under—C P C (1908) S. 47.

C P C (1908) S. 65.—Defence if barred—Sale certificate no obstacle. See C P C (1908) S 47. Case No (597) **9 C L J 464.**

C P C (1908) S 65 —Appeal—Question relating to execution—Order refusing to grant a certificate—No appeal—No revision. See C P C (1908) S. 47. Case No. [539]. **7 C L J 436.**

(1) Protected interest—Darputni—Mortgage.

1021—C P C S. 65 (1908).

A mortgage of a darputni is not a protected interest within S. 160 (g) of the Bengal Tenancy Act. **Akkoy Kumar Soor v Bejoy Chand Mohatap.** **29 Cal 813.**

(2) Certificate of sale granted—Determines date of vesting of property sold.

1022—C P C S. 65 (1908).

A certificate of sale, granted under S. 316 of the Civil Procedure Code, 1882, is not conclusive as to the property sold. So far as regards the parties to the suit and those claiming through or under them, the certificate as determinative as to the date from which the property sold actually vests in the purchaser. The property sold is what is described in the proclamation of sale.

Balwant v Hirachand. **5 Bom L R 217=27 Bom 334.**

(3) Time from which the auction purchaser's title accrues.

1023—C P C S. 65, O 21 r 94=(1882 S. 316) —Execution of decree—Sale in execution.

When immoveable property is sold in execution of a decree, the title of the auction purchaser to mesne profits or possession does not accrue until the sale certificate has been obtained. (1887 A W N 217 and 15 Cal 546 foll.)

Amir Kazim v Darbari Mal. 1902 A W N 145=24 All 475.

Notes:—Ref: 7 C L J 1.

(4) Reversale of Decree—Effect of.

1024-1025—C P C S. 65=S. 316 of 1882.

Under this section the property sold vests in the purchaser after the sale becomes absolute. A sale becomes absolute after applications to set aside the sale are disallowed (*Vide* Or XXI r 92). A sale certificate will be granted after the sale becomes absolute (*Vide* Or XXI, r 94). It is therefore clear that if the decree under which the sale takes place is reversed at any time before a sale certificate is granted to the purchaser, the title of the auction-purchaser does not become absolute. **Ram Sukh v Ram Sahai. 29 All 591: 4 A L J 485: A W N (1907) 198.**

(5) Date of confirmation of sale—Starting of limitation for execution.

1026-1029—C. P. C. S. 65, O 21 rr 94, 95=(1882 ss. 316, 318)—Limitation Act (XV of 1887) Art 178.

S. 316 of the Civil Procedure Code provides that the certificate of sale is to bear the date of

C.P.C.(1908)-S.65=(1882, S.316)-*Concld*

the confirmation of sale and it must be deemed to have been granted on the date which it bears. Although the grant of a certificate is necessary to an application under S. 318, such an application will be barred by limitation under article 178 of the Limitation Act if not made within three years of the date which the certificate bears that is the date of the confirmation of sale. Dissenting judgment of Kemball J in. (3 Bom 433 Fol: 17 Bom 288. Diss: A W N (1883) 262 Ref:)

Ranjit Singh v Baldeo Singh. 5 A L J 516 =(1908) A W N 162=30 All 390.

(6) Effect of attachment after sale-Placing attaching creditor in position of decree-holder—Confirmation of sale.

1030—C P C—S. 65=S. 316—Attachment of decree after sale in execution thereof but before confirmation—Right of attaching creditor to have sale confirmed.

When a person who had obtained a decree purchased immoveable property at an auction-sale held in execution of the same, but before the sale was confirmed and satisfaction of the decree entered in the record, the decree was attached by a judgment-creditor of the decree-holder, *Held*—That the effect of the attachment was to place the attaching creditor in the position of the decree-holder so as to entitle him to have the sale confirmed under sec. 316, C P C, and to take out a certificate of sale.

Boharia Rudrani Koer v Ram Pertap Mull. 11 C W N 158.

(7) Sale not affected by the grant of a sale certificate to the auction purchaser.

1031—C P C S. 65=(1882 S. 316).

If a party to a suit is not put out of Court by S. 244 of the Code of Civil Procedure he is not affected by the grant of a sale certificate to the auction purchaser under *S.* 316 of the Code.

Chandramoni Saha v Halijennessa Bibi. (1908) 9 C L J 464.

C P C s. 65—Limitation was not applicable to application for the ground of a certificate under s. 316 of the C P C.

See C P C O 21 r 94 Case No. 2702.

3 W N 262.

C P C s. 65—Certificate of sale—Application for.

See C P C O 21 r 94 Case No. 2710.

13 Bom 670.

C P C s. 65=Certificate to a purchaser.

See C P C O 21 r 94 Case No. 2699.

1887 P J 180.

C P C (1908) S. 66=(1882, S. 317)

Notes:—This section has been made wider than sec 317 of the old Code. The language of the old section was that no suit shall be maintained against "*the certified purchaser.*" But in the present Code the following words have been substituted for the expression "certified purchaser," *viz.*, "*against any person claiming title under a purchase certified by the Court in such manner as may be prescribed.*" The above change has been introduced to set at rest the following conflicting decisions, viz, 14 M I *A* 496; 21 All 196; 26 Cal 950; 3 C W N 657; 5 C W N 341; 21 Mad 7. In these cases it was held that the expression '*certified purchaser*' means only the person who buys at the sale and obtains a certificate and does not include a person claiming through or under him, such as his heirs, representatives, assignees or mortgagees, &c. But according to the language of the present section, the expression '*certified purchaser*' includes the person who stands in the shoes of the Court purchaser. The Bombay High Court in 31 Bom 61: 8 Bom L R 873 has adopted the law as laid down in the present section. The rulings quoted above have been rendered inoperative by the change above referred to.

Another change introduced in this section is by the addition of the words "*or to interfere with the right of a third person to proceed against that property, though ostensibly sold to the certified purchaser, on the ground that it is liable to satisfy a claim of such third person against the real owner.*" The above change has been introduced in accordance with the principles laid down in 12 Cal 204; 21 Cal 519 and 18 All 461. In these cases it has been held that section 317, C P Code, 1882 (s. 66) contemplates a case between the certified purchaser and the beneficial owner and not a suit by a creditor of such person in which the creditor seeks to establish that the purchase was in reality made by his debtor and that the certified purchaser is only a *benamidar* of the debtor. There cannot be any doubt that if a creditor of a real owner of a property brings a suit for a declaration that it belongs to his debtor and not to the certified *benami* purchaser, it would not be precluded by this section. The section is intended to prevent and not to promote fraud.

C P C—S. 66.

See Mortgage—General.

8 A L J 184.

C.P.C.(1908)-S. 66=(1882, S.317)-*Contd*

C P C—S. 66=1882 S. 317.

See Cases under:—

(1) Benami Transaction—Certified Purchasers—Civil Procedure Code, s. 317

(2) C P C (1908) S. 47.

1032.—C P C S, 66=(1882 s. 317) object of—Plea that purchase was made on behalf of family—Whether section applies.

The object of s. 317 C P C 1882 is to check benami purchases. That section has no application to a case where the purchase was made in the name of one of the members of a Hindu family and it is alleged that he made the purchase on behalf of the family. **Harisingh v Sher-Singh. 6 A L J 174=31 All 282=2 Ind Cas 210.**

1033—C P C S. 66=(1882 S. 317)-Certified purchaser—Interpretation.

The words "certified purchaser" in s, 317 of Civil Procedure Code, include the person standing in the shoes of the Court purchaser (8 Mad 511; 21 All 196; 26 Cal 950; 14 M I A 496 Ref;) **Hari v Ramchandra 8 Bom L R 873=31 Bom 61.**

1034-C P C-S. 66=(1882 S. 317)-Suit against certified purchaser held barred—Certified purchaser suing for profits—Defence not barred.

G purchased some land in the name of B at a sale in execution of a decree against himself and remained in possession. After some time he brought a suit for a declaration that B was his *benamidar*. That suit was dismissed as barred by s. 317 of the Civ. Pro. Code, B thereupon brought this suit for his share of profits. G pleaded that B was not the owner but was his *benamidar*.

Ghazi-ud-din v Bishen Dial. 2 A L J 111—1905 A W N 39=27 All 443.

1035—C P C S. 66=(1882 s. 317)—Joint decree-Purchaser at sale in execution by one decree-holder—Suit for declaration that property purchased was joint.

In execution of a joint decree on a mortgage one of the decree-holders obtained leave to bid at the auction sale and purchased the mortgaged property for the exact amount of the decree namely the mortgage debt, interest and costs. Satisfaction of the decree was entered up and the purchaser took possession of the property. *Held*,

C P C (1908) S.66 = (1882, S. 317)-*Contd*

that S. 317 did not preclude the other joint decree-holder from suing for a declaration that the property so purchased was the joint property of himself and the actual purchaser. (12 B L R 317 ref. to). **Achhaibar Dube v Tapasi Dube 1907 A W N 166=29 All 557.**

1036—C P C S. 66=(1882 s. 317)—Certified purchaser at execution sale—Declaratory suit-Benamidar.

The kind of suit, that s 317, C. P. Code forbids, is one which cannot possibly succeed unless the purchaser at an execution sale is made party, and which, on his being made party can succeed only on proof that he is a benamidar for another person. To a suit which is not one to obtain a declaration the second clause of s. 317 Civil Procedure Code does not apply. **Khuda Bukhsh v Aziz Alam 1 A L J 647=1904 A W N 226=27 All 194.**

Notes:—Compare the new s. 65 cl. 2.

1037—C P C S. 66=C P C s. 317—Execution purchaser—Purchase in stranger's name—Suit by a co-parcener of the execution purchaser.

Under s. 317, C P C, it is not competent to a person to maintain a suit against a certified purchaser on the ground that the purchase was made on his behalf or on behalf of any other person through whom he claims. But it is open to the co-parcener of the real purchaser (who does not claim through him) to prove that the purchase made in the name of the certified purchaser was really made on behalf of the family to which he belongs and maintain a suit for the recovery of what, on that footing, may belong to him. (19 W R 556; 6 Mad 135, and 20 Mad 349, followed, and 16 Mad 290 referred to). **Krishna Aiyan v Raghavaiyan. 9 M L J 298.**

1038—C P C S. 66=(1882 s. 317)-Benami.

A mortgagee of the beneficial owner for whom a benami purchase has been made is barred from suing the benamidar on the mortgage by s 317 Code of Civil Procedure. **Ram Narain v Mohonia. 1903 W N 198=26 All 82.**

1039—C P C S. 66 (=Civ Pro Code 1882. s. 317)—Execution of decree—Certified purchaser buying benami.

In execution of a decree against the judgment-debtor, a certain house was sold and was purchased by the plaintiff who obtained the certificate

C P C. 1908 S. 66=(1882, S. 317)-*Concld*

of sale but failed to obtain the actual possession of the house. He brought a suit for possession of the house against the judgment-debtor who urged that the house was purchased by her at the auction in the name of the plaintiff. *Held*, that s. 317 of the Civ Pro. Code, should be construed literally and applied strictly and should not be applied so as to assist the certified purchaser to enforce his claim against the property in possession by relieving him from the necessity of showing the justice of his claim or excluding inquiry as to its fraudulent character

Raza Husain v Lidar Fatima 3 O C 229

Notes—Ref: 8 O C 306.

1040—C P C S. 66=S 317—Transfer of title by benami certified purchaser—**See 28 Cal 372 at 381.**

1041—C P C S. 66 (1908)=(1882 s. 317)—No bar—Purchase for plaintiff—Certified purchaser admitting plaintiff's title—Defendants claiming under independent title—"Suit against certified purchaser etc."

Where there is no contest between the plaintiff and the certified purchaser, and the defendants other than the certified purchaser claim under an independent title, s. 317 does not bar the suit of the plaintiff claiming the property on the ground that the purchase is benami for him. In such a case there is no "suit against the certified purchaser on the ground that the purchase was made on behalf of another person" within the meaning of s. 317 C. P. C. **Ramalinga Chetty v Pachaiappa Mudaly. 13 M L J 354.**

C. P. C. S. 67=S. 327 of 1882.

1042-C P C Ss. 67, 115=C P C Ss 327, 632—Validity of rules published with Punjab Government Notification No. 1297 S, dated 10th September 1885—Sale in execution without sanction required by rules—Such sale void ab initio—Chief Court's power to set aside void sale on revision.

Held, that the rules relating to sales of land in execution of decree made in modification of former rules on the subject by the Local Government and published in the Local Gazette under Notification No. 1297 S, dated 10th September 1885, were within the competence of the Local Government to make, with the previous sanction of the Governor-General in Council, and must therefore be held to be intra vires of the provisions of s. 327 of Act XIV of 1882.

C P C (1908) S. 67=(1882, S. 327)-*Concld*

Held further, that a sale in execution of decree of land paying revenue to Government, made and confirmed without the sanction required by the above rules having been previously obtained, is void ab initio and may be set aside by the Chief Court under the powers conferred by s. 622 of the Code of Civil Procedure. **Tara Chand v. Ala Baksh. 95 P R 1888.**

1043—C P C S. 67=S. 327 of 1882—Sale in execution—Sanction of Commissioner.

The special rule, which was in force under the 2nd clause of s. 327 of the Code of 1882, having become inoperative, as that section was not re-enacted in the Code of 1908, the sanction of the Commissioner of the Division is no longer required as a condition precedent to the sale in execution of decree of land applied to agricultural or pastoral purposes. **Girdhari Ram v Mehr Khan 4 P R 1910.**

C P C Ss. 68, 70, 71 (1908)=1882 s. 320

1 **Effect of the rules framed by the local Government under this section 1044-1045**

2 **Execution of decree—Transfer to Collector—Sale of anscestral land 1046—1048.**

3 **Suit for confirmation of sale held by the Collector, and period of limitation for such a suit 1049—1050**

4 **Appeal against orders of Collector under this and the following sections 1051-1053**

5 **Miscellaneous Cases 1054—1057**

---

1 Effect of rules framed by local government under this section.

1 Rule 16 of Rules under this section is always retrospective 1044

2 Notification No. 671 of 1880—Sale—Rule by the Local Government would not apply 1045

C P C (1908) Ss. 68, 70, 71 = (1882, S. 320) -Contd.

2 Execution of decree—Transfer to Collector— Sale of ancestral land.

1 Execution of decree Property to be sold anscetral in part only—Transfer to Collector (Local Government, Notification No. 671 of Aug 31. 1880). 1046

2 Anscestral Property—Execution of decree—Property taken under management of the Collector—Disabilities of proprietor pending terms of management. 1047

3 Sale of anscestral property—Rules framed by local Government—Application under r.17 (XIII A) 1048

(3) Suit for confirmation of sale held by the Collector and period of limitation for such a suit

1 Suit to confirm a sale—Powers of Assistant Collector to set aside his order—Irregularity in sale. 1049

2 Execution of decree—Civ. Pro. Code s. 320 et seq—Sale held by Collector, but afterwards set aside—Suit by auction-purchaser to have sale confirmed. 1050

(4) Appeal against orders of Collector under this and the following sections.

1 Appeal to the High Court—Execution of decree—Transfer to the Collector under—Land Revenue Code. 1051

2 Execution proceedings transferred to Collector—An order made by Collector—Revision or appeal against—To whom lies—Relation between Collector and Civil Courts in such cases pointed out 1052

3 Decree-Execution-Application by another decree-holder for rateable distribution—Proceedings transferred to the Collector—Sale of property by Collector—Refusal to set aside the sale—Appeal—Confirmed sale can be set aside. 1053

(5) Miscellaneous Cases.

1 Proceedings in execution by Collector 1054

2 Intervention of Collector — Absence of detailed scheme — Sanction of Civil Court. 1055

C P C (1908) Ss. 68, 70, 71 = (1882, S. 320) -Contd.

3 Talukdari Settlement officer setting a scheme in execution of decree-Action taken under the scheme-Consent of the Talukdari Settlement officer presumed to be given to the arrangement—Presumption. 1056

4 Suffering proceedings to go on is no estoppel. 1057

See also cases under—

(1) C P C (1908) Schedule III

(2) Collector.

(3) Rules made under Acts.

(4) Execution of Decree-Transfer of Decree for Execution and Power of Court etc.

C P C (1908) S. 68—Private—purchaser.

See C P C (1908) S. 47 Case No. 301

26 All 101

C P C (1908) S. 68—Decree—Execution—Application by another decree-holder under s. 295 for rateable distribution—Proceedings transferred to the Collector — Sale by Collector—Refusal to set aside sale. See C P C (1908) S. 47. Case No. 536. **31 Bom 207.**

C P C S. 68 [1908]—Execution transferred to Collector-Private sale Subsequent sale held by Collector—Remedy of purchasers at private sale.

See C P C [1908] S 47. Case No 792

26 All 101.

C P C [1908] S. 68—Finality of decision of executing Court as to property being non-ancestral. See C P C [1908] S. 47. Case No 798

28 All 273

C P C Ss. 68, 70 & 71.

See Attachment—Subjects of attachment.

1 EFFECT OF RULES FRAMED BY LOCAL GOVERNMENT UNDER THIS SECTION.

(1) Rule 16 of the rules under this section is always retrospective.

1044—C P C Ss. 68, 70, 71 = S. 320

Rule 16 of the rules published by Government on 16th January 1890 under the section is retrospective and apply to sale held before as well as after the passing of the rule, as alterations in

C P C(1908) S.68, 70, 71=(1882, S.320) -Contd.

(1) Effect of rules framed by Local Government under this section—*Concld.*

the form of procedure are always retrospective unless there be some strong reason against it.

Shah Jasraj v Chudasma Vakhatsang. 1891 P J 294.

(2) Notification No 671 of 1880—Rule 671 of 1880—Sale on the 1880—Rule by the Local Government would not apply

1045.—C P C S 68 (=C P C 1877, S 320)

Judicial Civil Department, dated the 30th August, 1880.-With effect from Ist October, 1880—In the case of an order of sale passed on the 11th September 1880, the Rules prescribed by the Local Government would not apply. **Gur Charn v. Gobind Prasad A W N 1882, 12.**

2. EXECUTION OF DECREE—TRANSFER TO COLLECTOR -SALE OF ANCESTRAL LAND.

(1) Execution of decree—Property to be sold ancestral in part only—Transfer of Collector—(Local Government notification No 671 of August 31 (1880)

1046.—C P C Ss, 68, 70, 71=(1882 *S.* 320).—

Held, that, where the Civil Court is satisfied that the land, which is ordered to be sold or any portion of it is ancestral, it should transfer the decree for execution to the Collector so far as regards ancestral land only. **Ahmad Ghaus Khan v Sri Bahadur Sahu Lalta Pershad. A W N (1906), 143=3 A L J 422=28 All 631**

(2) Ancestral property—Execution of decree—Property taken under management of the Collector—Disabilities of proprietor pending term of management.

1047—C P C Ss, 68, 71,=(1882 S, 320).—

In pursuance of the powers conferred upon him by rules framed by government under S, 320 of the Code of Civil Procedure, the Collector sanctioned a lease of certain zamindari property of the judgment-debtor for a period of seventeen years, the lease being executed in the name of the judgment-debtor, but with the permission of the Collector

Held, that the disabilities imposed by the first

C P C (1908) S.68, 70, 71=(1882, S.320) -Contd.

(2) Execution of decree—Transfer to Collector—Sale of ancestral land—*Concld.*

paragraph of S. 325 A of the Code affected the judgment debtor during the pendency of such lease; and semble, that such disabilities continued, so long as any of the debts, for the satisfaction of which the judgment-debtor's property was taken under management by the Collector, remained unpaid. **Ganga Prasad v Ganga Bakhsh Singh A W N (1907), 112=29 All 415.**

(3) Sale of ancestral property—Rules framed by local Government—Application under Rule 17 (XIII A):

1048—C P C S. 320 (Ss. 68,70, 71 N. C.)—One of several co-owners of ancestral property which had been sold by the Collector under the rules framed by the Local Government under S 320 of the Code of Civil Procedure applied under Rule 17 (XII) to have the sale set aside upon the ground of material irregularities in the conduct of the sale causing substantial loss. Another of such co-owners, whilst the first application was pending applied under Rule 17 (XIII-A) to have the sale set aside making at the same time the necessary payments into Court required by the rule *Held* that upon the presentation of the latter application under Rule 17 (XIII A) the Collector was bound to set aside the sale and was in no way precluded from so doing by the existence of the former application under Rule 17 (XII) [23 Cal 686 and 29 Cal 1 ref. to]. **Tulsiram v. Izzat Ali. 1908 A W N 77=5 A L J 253=30 All 192.**

(3) SUIT FOR CONFIRMATION OF SALE HELD BY THE COLLECTOR & PERIOD OF LIMITATION FOR SUCH A SUIT.

(1) Suit to confirm a sale—Powers of Assistant Collector to set aside his order—Irregularity in sale

1049—C P C Ss 68, 70, 71=(1882 S. 320). It is the duty of a Judge to set aside an order, which he would not have passed had he been informed of the true state of affairs. Where an Assistant Colletor was asked by a person, who alleged himself to be a decree-holder, to postpone a sale and did postpone it and a few hours latter on being informed that the applicant was not

C P C (1908) Ss. 68, 70, 71=(1882, S. 320 -Contd.

(3) Suit for confirmation of sale held by the collector & period of limitation for such a suit—Concld.

entitled to make the application, set aside his former order and held the sale. *Held*, that he was justified in setting aside his former order and the sale was not illegal merely for that reason.

Wazir Ali v. Janki Prasad. 3 A L J 458= A W N (1906)183—28 All 671.

(2) Execution of decree—S. 320 et seq—Sale held by Collector, but afterwards set aside—Suit by auction-purchaser to have sale confirmed.

1050—C P C S 68(1908), Art 14=Civil Pro. Code s. 320 et seq.

In execution of a decree which had been transferred to the Collector for execution under the provisions of s. 320 of the Code of Civil Procedure, certain immoveable property was sold by auction on the 22nd of September 1891. But the judgment-debtors applied to the Collector to have the sale set aside, and on the 30th of October 1891 the Collector set aside the sale and ordered a fresh proclamation of sale to be issued. The order of the Collector setting aside the sale was on appeal confirmed by the Commissioner on the 4th of May 1892. After the setting aside of the sale the Judgment-debtors on the 14th of December 1891, with the permission of the Collector, mortgaged the bulk of the property. The mortgage money was paid into Court in discharge of the decree, and the satisfaction of the decree was entered up, and on the 21st December 1891 the execution case was struck off on the 12th of September 1894, the auction-purchaser, who after the sale had been set aside, had withdrawn the purchase-money paid in by her, brought a suit to have the sale in her favour confirmed *Held*, that inasmuch as the Plaintiff's claim involved the setting aside of the Collector's order of the 30th October 1891 by which the sale to the plaintiff had been set aside, the suit was barred by limitation, having regard to Art 14 of the second schedule to Act XV of 1877) (25 Bom 337 and 22 All 168 ref to, 3 Mad 83) held not to be of effect since the Ruling of the Privy Council in (25 Bom 337 and 25 Cal 179 distinguished). **Raghunath Prasad v Kaniz Rasul 1902 A W N 116=24 All 467.**

C P C (1908) Ss 68, 70, 71=(1882, S 320) -Contd.

4 APPEAL AGAINST ORDERS OF COLLECTOR UNDER THIS & THE FOLLOWING SECTIONS.

(1) Appeal to the High Court—Execution of decree—Transfer of the Collector under Land Revenue Code.

1051—C. P. C. Ss. 68, 70, 71 (Bombay Act V of 1879), S. 320.

No appeal lies to the High Court from an order passed by the Collector in an execution proceeding transferred to him under S. 320 Civil Procedure Code.

Under S 320. Civil Procedure Code, and S. 203 of the Land Revenue Code, the Revenue Commissioner or the Government are vested with the appellate power in respect of such orders. **Mancherji v Thakurdas. 7 Bom L R 682.**

(2) Execution proceedings transferred to collector—Order made by Collector—Revision or appeal against—To whom lies—Relation between Collector and Civil Courts' such cases pointed out.

1052—C. P. C. Ss. 68, 70, 71=(1882 S.320)—An order made by Collector in such proceedings.

Held, that, against an order made by the Collector in execution-proceedings transferred to him by the Civil Court under the rules framed under S. 320, C P C 1882 (Ss. 68-71, C P C 1908), a revision or appeal lies only to the Chief Commissioner to whom the Collector is subordinate.

So far as the Central Provinces are concerned, the proper principles regulating the relations between the Collector and the Civil Court from which execution of a decree has been transferred to him, whether under S. 320 of Act XIV of 1882 or Ss 68-71 of Act V of 1908, would seem to be. —(1) that the Civil Court is precluded from interfering in any matter declared to be within the Collector's jurisdiction, but that it is not divested of its ordinary jurisdiction in regard to other matters, merely because the decree has been transferred to the Collector, and.

(2) that a civil suit will lie with respect to every order of the Collector, upon which, if it had been made by the Civil Court (acting within its jurisdiction) an action could have been maintained; but not otherwise. (11 C P L R 33, Fol: 3 All

C P C (1908) Ss.68, 70, 71=(1882, S.320) -Contd.

(4) Appeals against orders of collector under this & the following sections-*Concld.*

554; 18 All 437; 20 All 379; 26 All 101 and 18 Cal 481. Ref:). **Hardeo v Mt. Narbadi. 5 N L R 121.=8 Ind. Cas. 572.**

(3) Decree—Execution——Application by another decree-holder for rateable distribution—Execution proceedings transferred to the Collector—Sale of property by Collector-Refusal to set aside the sale-Appeal—Confirmed sale can be set aside.

1053—C. P. C. S. 68, S. 47; O, 21, r. 89; Ss. 73, 70, 71=(1882 ss, 320, 244, 310 A, 295).

Held, (1) that an appeal would lie from an order under S. 310 A of the Code, where the case fell under S. 244 (c) of the Code, 23 Bom 418, *qualified*).

(2) that the Code conferred no power on the Collector to set aside a sale under S. 301 A nor was there any rule vesting that power in the Collector. The power to act under S. 310A continued in the Court, notwithstanding the transfer of execution to the Collector;

(3) that there was nothing in S. 310A which precluded the Court from setting aside a sale, merely because it had been confirmed;

(4) that it is not incumbent upon the judgment -debtor to deposit in Court anything except that, for which S. 310A has made provision. **Pita Moti v Chunilal Hayakchand. 9 Bom L R 15=31 Bom 207.**

5 MISCELLANEOUS CASES.

(1) Proceedings in execution by Collector.

1054-1056—C P C (1908) S. 68—O. 21, r. 89; Ss. 70, 71=(1882—Ss. 320, 310-A,).

The general provisions of C. P. C., including S. 310-A, do not apply to proceedings held by the Collector in execution of decrees transferred to him for the purpose under S. 320.

Sheo Prasad v. Muhammad Mohsin Khan, 1902 A W N 225=25 All 167.

Notes:—Ref: 31 Bom 207; 9 Bom L R 15.

(4) Suffering proceedings to go on is not estoppel.

1057—C P C (1908) Ss. 68, 70, 71=S. 320—Application to transfer execution to Collector after sale.

An agriculturist plaintiff was ordered to pay a certain amount for redemption and on failure defendant was to recover by selling the land. The sale took place. The plaintiff then applied to set

C P C (1908) Ss.68, 70, 71=(1882, S. 320 -Contd.

(5) Miscellaneous cases—*Concld.*

it aside as the Sub-Judge had no power, the decree being one which under S. 320 of the Civil Procedure Code ought to have been transferred for execution to the Collector. *Held*, that the Sub-Judge was wrong in refusing to set aside the sale on the ground that the application was too late being made after the sale, *held*, that the application would have been too late if it was barred by limitation; *held*, that merely suffering the proceedings to go on does not operate as estoppel. **Ganu v. Malharrao, 1896 P J 661.**

C P C (1908) S. 68—Mortgagee is not a person entitled to have the sale set aside. **See** C P C (1908) O.21,r.89,Case No.(2627). **5 A L J 253.**

C P C S. 69-(1908).

Notes:—This section is new, the provisions of ss. 321, 322, 322A, 322B, 322C, 322D, 323, 324, 324A, 325, 325A, 325B, and 325C, of Act XIV of 1882, have been placed in the third schedule.

C P C (1908) S. 70=(1882, S. 320).

C P C (1908) S. 70—Decree—Execution—Application by another decree-holder under S. 295 for rateable distribution—Proceedings transferred to the Collector — Sale by Collector—Refusal to set aside sale. **See** C P C (1908) S. 47, Case No. (536). **31 Bom 207.**

C P C (1908) S. 70—Private purchaser. **See** C P C (1908) S. 47. Case No. (301). **26 All 101.**

C P C (1908) S. 70—**See** Cases under C P C (1908) S. 68.

C P C (1908) s. 70—Mortgagee is not a person entitled to have the sale set, aside.

See C P C (1908) O 21 r 89 Case No. 2627. **5 A L J 253.**

C P C (1908) s 70—Applicability.

See C P C (108) O 21. r. 89 Case No. (2614). **(1902) A W N 225.**

C P C (1908) S. 70—Execution transferred to Collector—Private sale—Subsequent sale held by Collector—Remedy of purchasers at private sale. **See** C P C (1908) S. 47, Case No. (792). **26 All 101.**

C P C (1908) S. 70—Finality of decision of executing Court as to property being non-ancestral. **See** C P C (1908) S. 47, Case No. (798). **28 All 273.**

C P C (1908) S. 71=(1882, S. 320).

C P C (1908) S. 71—**See** Cases under C P C (1908) S. 68.

C P C (1908) S. 71—Private-purchaser. **See** C P C (1908) S. 47, Case No. (301). **26 All 239.**

C P C (1908) S.71=(1882,S.320)-Concld.

C P C (1908) S. 71—Decree—Execution—Application by another decree-holder under S. 295 for rateable distribution—Proceedings transferred to the Collector — Sale by Collector—Refusal to set aside sale. See C P C (1908) S. 47, Case No. (536). 31 Bom 207.

C P C (1908) S. 71—Execution transferred to Collector—Private sale—Subsequent sale held by Collector—Remedy of purchasers at private sale. See C P C (1908) S. 47, Case No. (792). 26 All 101.

C P C (1908) S. 71—Finality of decision of executing Court as to property being non-ancestral. See C P C (1908) S. 47. Case No. (798). 28 All 273.

C P C (1908) s. 71—Mortgagee is not a person entitled to have the sale set aside.

See C P C (1908) O 21 r 89 Case No. (2627). 5 A L J 253.

C P C (1908) S. 71—Applicability.

See C P C (1908) O 21 r 89 Case No. (2614). 5 A L J 225.

C P C (1908) S. 72=C P C (1882). —S. 326 (1859, S. 244).

See (1) Execution of Decree—Execution by Collector.

(2) Execution of Decree—Stay of Execution.

1058—C P C S. 72=1882, S. 326-Arrangement leaving property in execution in possession of judgment-debtor—Act VIII of 1859, s 244.—

S. 244 of Act VIII of 1859 admits only of a temporary alienation of land, and not of an arrangement by which possession is left with the judgment-debtor, subject to a payment by yearly instalments. Kashee Lal v. Ameer Jan, 2 N W 347.

1059—C P C S. 72=1882, S. 326—Arrangement for instalments extending over twelve years.—

Where a Collector recommended that the lands of a judgment-debtor should be exempted from auction sale, and that the judgment-debt should be satisfied by money, instalments extending over a period of twelve years, and the Judge, on the matter being referred to the Civil Courts for sanction and approval, in sending the proceedings to the Munsif, intimated that the arrangement was a proper one, and the Munsif in his order referred to this opinion of the Judge.—*Held*, that the recommendation of the Collector should have been dealt with by the Court executing the decree in the exercise of its own judgment, and not in deference to the opinion expressed by the Judge, who exceeded his jurisdiction in interfering in the matter. The arrangement proposed by the Collector was not one which could be proposed or accepted under the terms of s. 244 of the Civil Procedure Code. Muttra Pershad v. Rampershad, 6 N W 39.

C P C (1908) S.72=(1882. S.326)-Concld

1060—C P C S. 72=1882, S. 326—Agricultural land—Order of Collector refusing to intervene after attachment of land—No appeal.—

Where a Civil Court by its order, after attachment of agricultural land, sent the record to the Collector, it amounts to an enquiry whether he wished to intervene, and where the Collector, by an order of his, refused to intervene, no appeal lies against the Collector's order. Raja Ram v. Durga Dut, 5 P R 1910=8 Ind Cas 391.

C. P. C. (1908) S. 73.

Notes:—This section corresponds with section 295 of Act XIV of 1882 with some modifications. The most important change made in this section, is the substitution of the words "*assets are held by a Court*" for the words "*assets realized by sale or otherwise in execution*", which occurred in the old section.

The change has been introduced in order to set at rest a question on which there was diversity of judicial opinions. In 28 Mad 380; 1 C W N 695; 30 Cal 262; 7 C W N 341; 13 Cal 225; 15 Mad 372 and in 16 Bom 588, it was held that the word "*realization*" means realization in execution under the process of the Court, or realization in one of the modes prescribed by the Code: and that money paid under s. 174, B. T. Act, or under s. 310A of the C. P. Code, 1882 (Or. XXI, r. 89) does not come within the meaning of the word *realization*. The language of the present section is wide enough to include assets realized under process of Court or voluntary payment or money paid into Court. Almost all the conflicting decisions regarding the interpretation of the words "*assets realized by sale or otherwise in execution*" (old Code), seems to have become obsolete, inasmuch as those words have been replaced by the words "*assets are held by a Court*".

1 Necessary conditions & scope 1060A —1060 C.

2 Assets available for rateable distribution 1060 D—1060 F.

C.P.C.(1908)-S.73=(1882, S.295)-*Contd*

3 Decrees must be for money & against same judgment-debtor 1060G-1060H

4 Applications made or transferred to the Court in which assets are held 1060 I.

5 Before the receipt of such assets 1060 J.

6 Limitation for a claim under S. 295 (1882) 1060 K.

7 Step-in-aid of execution 1060 L.

8 Appeal & revision 1060 M.

9 Miscellaneous 1060 N-1060 O.

---

(1) Necessary conditions and scope of

1 Scope of 1060 A.

2 Attachment by a judgment-creditor—Attachment, effect of 1060 B.

3 Rateable distribution—Refusal where has other property 1060 C.

(2) Asserts avaliable for rateable distribution.

1 Realized—Interpretation— Realization of assets 1060 D.

2 Application to be made to Court holding assets prior to their realization 1060 E—1060 F.

(3) Decrees must be for money and against same judgment-debtor.

1 Same judgment-debtor 1060 G.

2 Rateable distribution—Same judgment-debtor-Decree against a person for himself — Heir of Brother-Decree against him alone 1060 H.

(4) Applications made or transferred to the Court in which assets are held.

1 Sale by one Court-Application for execution pending in another Court—Transfer through the selling Court. 1060 I.

(5) Before the receipt of such assets.

1 Application for rateable distribution after money came into the hands of the Court—Whether see 225 a bar 1060J

(6) Limitation for a claim under s. 295 (1882)

1 Limitation 1060 K.

CP C (1908)-S.73=(1882,S.295)-*Contd.*

(7) Step in aid of execution.

1 Application to withdraw money rateably distributed if step in aid of execution 1060 L.

(8) Appeal and revision 1060 M.

(9) Mis-cellaneous.

1 Four suits against same defendant—Attachment of moveables before judgment in each suit—Distribution of sale-proceeds 1060 N.

2 Proportionate distribution of sale proceeds 1060. O

S. 73 of (1908)=s. 295 (1859, ss. 270, 271)

See (1) Cases under Sale in Execution of Decree-Distribution of Sale-proceeds.

(2) Small Cause Court, Mofussil—jurisdiction—Sale-proceeds.

C P C (1908) s. 73.—Decree-Execution-Application by another decree-holder for rateable distribution—Execution proceedings transferred to the Collector—Sale of property by Collector—Refusal to set aside the sale—Appeal—Confirmed sale can be set aside.

See C P C (1908) s. 68 case No. (1053).

31 Bom 207.

C P C (1908) s. 73—

See C P C (1908) s. 64 Case No. (1020.)

28 Mad 380.

C P C (1908) s. 73.—

See C P C (1908) s. 64 Case No. (1016).

25 All 431.

C P C (1908) s. 73—Decree—Execution—Application—Application by another decree-holder under s. 295 for rateable distribution—Proceedings transferred to the Collector—Sale by Collector—Refusal to set aside sale.

See C P C (1908) s. 47 Case No. (537).

13 Bom L R 1193.

C P C (1908)—s. 73—Decree—Execution-Application by another decree-holder under s. 295 for rateable distribution—Proceedings transferred to the Collector—Sale by Collector—Refusal to set aside sale.

See C P C (1908) s. 47 Case No. (536).

9 Bom L R 15.

C P C (1908) s. 73—An order passed on s. 295 between persons and decree-holders.

C P C (1908) S. 73=(1882, S 295)-*Contd.*

See C P C (1908) s. 47 Case No. (538).

36 Cal 130.

C P C (1908) s. 73—Mortgage of decree by decree-holder—Attachment of decree on same date by decree holder's creditor—subsequent attachments by other creditors—Priority.

See C P C (1908) s. 47. Case No. (603).

33 Mad 429

C P C (1908) s. 73—Decree for the payment of money.

See C P C (1908) s. 48. Case No. (828).

15 M L J 126.

C P C (1908) s. 73—

See C P C (1908) s. 63. Case No. (1011).

11 C L J 69.

C P C (1908) s' 73—

See C P C (1908) s. 63. Case No. (1008).

1 C L J 97.

C P C s. 73—Application for execution by the transferee.

See C P C O 21 r. 16. Case No. 2404.

25 All 443.

C P C s. 73—Applicability and scope of.

See C P C O 21 r 2, Case No. 2194.

28 Mad 473.

C P C 1908 s. 73—s. 295——Rateable. distribtion-Court to direct.

See C P C. O 21 r 53.

C P C s. 73=C P C (1882) s. 295.

See Multifariousness. **43 P R 1897.**

C P C (1908) S. 73—Decree holders buying without permission.

See C P C (1908) O. 21 r. 72. Case No. (2598)

13 M L J 251.

1 NECESSARY CONDITIONS & SCOPE.

(1) Scope of.

1060A—C P C S. 73 (S. 295)—Claims in execution of judgment-debtor's decree and not in execution of a decree of the decree-holder-Arrangement—Claims enforceable under the attachment:—It is essential to a valid claim for rateable distribution that the assets should have been realised in execution of the decree of the attaching decree-holder. Any arrangement entered into by an attaching decree-holder with the judgment debtor for making the money realized in execution of the judgment-debtor's attached decree available to the attaching creditor cannot avail the subsequent attaching creditors of the same judgment-debtor, who can only put forward claims enforceable under the attachment of the prior attaching creditor.

Venkatarama Aiyar V. Esumsa Rowthan. (1909) 20 M L J 33.

(2) Prior attachment by a judgment-creditor—Attachment, effect of s. 295.

1060B—C P C—S. 73 (1908)—Vesting order, effect of-Civil Procedure Code (Act XIV of 1882 Sec. 275—Civil Procedure Code (Act VIII of 1859), sec.270.

A judgment-creditor has no priority over the Official Assignee in respect of property attached by him previous to the passing of the vesting order. (15 Cal.202 (1888),approved. 5 C. W. N. 761: S. C. 28 Cal. 419 (1901), overruled 5 B. L. R 691; S. C. 14 W. R. (F. B.) 33 (1870), and 10 Cal.150 (1883), distinguished) An attachment does not confer any title, it merely prevents alienation. (25 Cal. 179 (1897), referred to.) **Fredrick Peacock v Madan Gopal (F.B.) 6 C W N 577.**

(3) Rateable distribution—Refusal where debtor has other property.

1060C.—C P C Ss. 73, 115=(1882 ss. 295. 622) —Power to revise such order—Interference by High Court where a party has a remedy elsewhere —The lower Court found that under s. 295, Civil Procedure Code the petitioner was entitled to rateable distribution, but refused the application on the ground that there was other property of the debtor which, though not yet realised by execution, may be made available for the satisfaction of his claim.

Held that sec 295, Civil Procedure Code, does not give such a discretion; it does not permit the Judge in his discretion to refuse to a party, who to his knowledge is entitled to relief, the relief to which he is entitled.

Held, also, that this order of the Judge is one which can be revised under sec. 622 of the Civil Procedure Code.

Where a party has a remedy elsewhere than in the High Court, the High Court should not except in special cases interfere under sec, 622 of the Civil Procedure Code. But where there is no doubt as to the rights of the parties and no remedy except by suit to which there can be no defence, the lesser evil is to interfere under sec, 622

C P C (1908) S.73=(1882, S 295)-*Contd.*

(1) Necessary conditions & scope—*Concld*

of the Civil Procedure Code (4 Mad 383, 15 Mad 373; 11 Mad 356 Con:) **Sri Krishna Doss v H. Chandook Chand.**

5 M L T 125=19 M L J 307=32 Mad 334

2 ASSETS AVAILABLE FOR RATEABLE DISTRIBUTION.

(1) Realized—Interpretation-Realization of assets.

1060D—C P C S 73=(1882 S 295)—Rateable distribution

The term "realized" as used in S 295 of the Civil Procedure Code prima facie means converted into cash or into a form whereby it becomes available for immediate distribution, and there is nothing in the word itself which requires that process should take place as the result of any ulterior proceeding in the course of execution **Manilal v. Nanabhai 6 Bom L R 31=28 Bom 264.**

Notes.—Dist 28 Mad 380=15 M L J 202 Ref 33 Cal 846

(2) Application to be made to Court holding assets prior to their realization

1060 E C P C Ss 73, 48, O 21 r 10, 21=(1882 Ss 295, 230)—

Execution of decree—Rateable share of sale proceeds—Application to be made to Court which passed decree or to Court to which decree sent for execution—S. 295 requires that the persons seeking a rateable share shall, prior to the realisation of the assets, have applied to the Court which holds the assets for execution of their decrees. Under s. 230 of the Code, an application of a decree can only be made to the Court which has passed the decree, or to a Court to which the decree has been sent for execution under Ss 223 and 224. **Sit Saing v. Maung Po Kaing. L B R 1900—1902 Vol I, 121**

1060 F—S. 295 Money realised on a personal decree and in execution Whether 'assets'

[1912] M W N 407

3 DECREES MUST BE FOR MONEY & AGAINST SAME JUDGMENT DEBTOR.

(1) Same judgment-debtor.

1060 G—S 73=(S. 295)—

The fact that two decrees are to be realized out of the family property is not decisive of the

C P C (1908) S.73=(1882, S 295)-*Contd.*

(3) Decrees against heir for money & against same judgment debtor *Concld*

question *against whom* the decree is made. Where a decree is obtained against one person and another decree against his legal representatives, the decrees are not against the "same judgment-debtor" (19 M L J 651 Fol) **Srinivasa Aiyangar v Kanthimathi Ammal, 33 Mad 465=7 M L T 157=5 Ind Cas 917.**

(2) Rateable distribution, same judgment-debtor-Decree against a person for himself—Heir of brother—decree against him alone.

1060 H 1—C P C S. 73=(1882 Section 295).

Where a decree for money is passed against a person for himself and as representative of another & another decree for money is passed against him alone and the judgment debtor's property is sold in execution of the second decree and money is realised from it and application is made by the first decree holder for a rateable share of the sale proceeds, *held*, that upon a true construction of s 295 of Civil Procedure Code he was entitled to a rateable share, and the decrees must be deemed to have been against the same judgment-debtor. (30 Cal 583 fol) **Gatti Lal v Bir Bahadur Sahe I A L J 562=1904 A W N 200=27 All 158.**

Notes: Fol 29 Bom 528=7 Bom L R 567.

1060 H 2—C P C—S 73=(1882 S. 295)—Civil Procedure Code Act XIV of 1882 Sec. 295—Rateable distribution—same judgment debtor.

Where A obtained a decree against X, Y and Z and B obtained a decree against X and Y only.

Held, that the case fell under sec 295 C P C, and B was entitled to a proportionate distribution of the moneys realized by the sale of the property of X, Y and Z so far as those moneys represented the share of his own judgment-debtors X and Y in that property. **Ram Dayal Bagria v Shiva Laksbman Bhakat. 7 C W N 414=30 Cal 583 F B**

Notes—Fol 27 All 158=A W N 1904, 200=3 A L J 562, 29 Bom 528=7 Bom L R 567 Expl. 36 Cal 130. Rel 10 O C 129; 8 O C 86.

4 APPLICATIONS MADE OR TRANSFERRED TO THE COURT IN WHICH ASSETS ARE HELD.

(1) Sale by one Court—Transfer through the selling Court.

1060-I—C P C—S 73=(1882 s 295.)

It is only those decree holders whose applications are pending in the Court which realizes the assets of the judgment debtor that can get rateable distribution. The fact that the decree-holder's application for execution was transmitted through a District Court to its subordinate Court does not make the application one pending in the District Court so as to entitle the applicant to rateable distribution. **Bejoy Singh v Hukum Chand.**
29 Cal 548.

5 BEFORE THE RECEIPT OF SUCH ASSETS

(1) Application for rateable distribution after money came into the hands of the Court—Whether S 295, a bar.

1060-J—C P C—s 73 O 0, r 13,—O, 38 r 12=(1882 ss. 295, 213 and 490)—Attachment—Application under sec 295

Held.—that where there was an attachment before judgment the attaching creditor is entitled to rateable distribution under sec 295 without any fresh application after decree and before realisation.(19 Mad 72, 7 C W N 216 Ref,) **Amara Jeelayya v Anumala Chetti Pichayya.**
4 M L T 348=31 Mad 502.

6. LIMITATION FOR A CLAIM UNDER S 295.

(1) Limitation.

1060-K—S. 73 (1908)=(s, 295).

The period of limitation applicable to a claim under S 295, Civil Procedure Code, 1882, is three years. **Haji Ibhram v Amolak**
1 Bom L R 795

7. STEP IN AID OF EXECUTION.

(1) Application to withdraw money rateably distributed if step in aid of execution.

1060-(L)—C P C s. 73 (1908).

Where upon application made by a decree-holder, an order for rateable distribution was passed under sec 295 of the Civil Procednre Code

(7) Stay in aid of execution—*Concld.*

without fixing the amounts due to the several decree holders, and then on a later date the decree-holder applied for an order to withdraw the moneys to which he was entitled upon such distribution *Held*—that the order applied for was not a merely ministerial order, but a judicial order to be passed after considering the claims of rival decree holders The application therefore was an application to take some step in-aid of execution within Art. 179, cl. (4) of Sch. II of the Limitation Act (8 Cal 89 (1881), 10 Cal 549, 11 Cal 227 and 23 Cal) 196(1895), distinguished.) **Baij Nauth Prosad v Ghanshyam Dass.**
8 C W N 382.

8 APPEAL OR REVISION.

1060-M—C P C—S 73, (1908) order under, whether open to revision by the Chief Court—Punjab Courts Act 1884 s. 70 (1)(a) **65 P R 1905=130 P L R 1905.**

9 MISCELLANEOUS.

(1) Four suits against same defendant—Attachment of moveables before judgment in each suit—Distribution of sale-proceeds.

1060 N—C P C—S 73, O. 38, rr 10, 11.

Some buffaloes were attached before judgment by the plaintiffs in four different suits against the same defendants, each of which ended in a decree The decree holders in three of the suits applied for rateable distribution of the proceeds of a sale of the buffaloes which had taken place during the pendency of the suits. Before the moneys were taken out, the decree-holders in the remaining suit applied for execution and a re-distribution of the sale-proceeds. The application having been rejected,

Held, in revision, that S 73 of the Civil Procedure Code did not apply to the case, and the lower Court was not justified in ordering a distribution of the sale-proceeds amongst the decree-holders in three of the suits in disregard of the order of attachment in the other suit, and the application of the decree holders in that suit, made whilst the money was still in Court, should not have been rejected. **Butloo Khan v Gomani Singh.**
13 C W N 1177.

C P C (1908) S.73=(1882, S.295)-*Concld.*

(9) Miscellaneous—*Concld.*

(2) Proportionate distribution of sale proceeds.

1060.-C P C—S.73=(1882 S. 295)—Execution of decree—Rateable distribution.

N and S obtained decrees against three judgment-debtors-A,M and B. *J* obtained a decree against A alone. Property belonging to the judgment-debtors A,M and B was attached and sold in execution of decrees obtained by N and S:

Held, that J was entitled under the provisons of S. 295 of the Code of Civil Procedure to a proportional distribution of the assets realized,so far as they represented the share of A in that property (16 Bom 683 overruled). **Chhotalal v Nabibhai. 7 Bom L R 567=29 Bom 528.**

C P C (1908) S 74=(1882, 330)

Notes—This section corresponds with section 330 of the C. P. Code of 1882, with some additions and alterations,as will appear on a comparison of the two, and it should be read with the provisions of Or.XXI,r.98,where the procedure to be followed in case of resistance to delivery of possession to decree-holder or purchaser, has been lain down.

C P C (1908) S 75

1061—C P C—S. 75—Scope of commission—Power to delegate judicial functions-Debtor and creditor. **15 C L J 17.**

C P C (1908) S 76=S.386 (1882)

1062.—C P C S 76, O 26 r 4=(1882 s 386) Ehaustive character of—Commission, issue of for examination of witnesses,—

S 386, C P C, is exhustive of the cases in which a Court can direct the issue of commission to examine a witness. (7 W R C R 349 a case under Act VIII of 1859 foll,) **Veerabadran Chetty v Nataraja Desikar, 14 M L J 329. =28 Mad 28.**

1063.—C P C,S.76, O 21, r 4=(Ss.386, 622)—Revision of order issuing commission as being beyond the scope of S 386. **31 Mad 60.**

C P C (1908) S 78.

Notes.—The general powers of Courts in regard to commissions have been summarised in sections 75—78 and the detailed procedure of commissions to examine witnesses, for local investigations, to examine accounts and to make partitions, have been placed in the First Schedule, Order XXVI, rr 1 to 18. Section 77, is new: it has been introduced, following the English practice.

C P C (1908) S. 79=S. 416 of 1882.

Notes:—Clause (1) of this section exactly corresponds with section 416 of Act XIV of 1882, clause (2) is new. The provisions of sections 417, 418, 419, 420, 421, 423, 426, and 427, C P Code, 1882 relating to suits by or against the Government have bsen placed in the First Schedule, Order XXVII, Rules 1 to 8.

C P C (1908) S 79 cl. 1—Notice of suit to the Railway Administration. **See C P C (1908) S 80, Case No (1080) 40 C 133.**

C P C (1908) S. 79—Suit by or against government.

See C P C (1908) O. 27 r. 1. Case No. (3829). **6 Bom L R 132.**

1064.-C P C S 79,=S 416 of 1882—Secretary of State, suit against :—

S 416, C P C does not enlarge or in any way affect the extent of the claims or liabilities enforceable by or against the Secretary of State for India in Council which must always depend on the provisions of 21 & 22 Vic., C 106. It only provides a means of affecting the revenues of India in cases where these revenues could have been affected when in the hands of the East India Company. No power is given by that section to Government to bind or otherwise affect the revenues. It gives no cause of action but only declares the mode of procedure when a cause of action has arisen. **Jahangir v Secretary of State. (1903) 6 Bom L R 132. 27 Bom 18.**

1065.- C P C S 79 (with XXVII)—Completeness of :—Chapter XXVII of the Civil Procedure Code, Act XIV of 1882, is exhaustive. **30 Cal 218.**

C P C (1908) S 80=(1882) S 424.

1 Persons who are and who are not Public officers 1066—1069.

2 Notice of suit against Government or public officer 1070—1078.

3 Notice of suit against Municipality 1079.

4 Notice of suit to the Railway Administation 1080.

5 Notice of suit to state the cause of action 1081—1884.

6 Liability of Public officer in actions for damages 1085—1086.

7 Miscellaneous cases 1087—1098.

C P C (1908) S. 80=(1882.S.424)-*Contd*

1 Persons who are and who are not Public officers.

1 Public servant—Cantonment Committee is a public servant—Notice of a claim—Notice compulsory-Actions exdelicto 1066

2 Official Assignee—Public officer—Notice 1067

3 Public officer-Administrator general-Cause of action—Statement of service of notice 1068

4 Suit against Ward of Court—Public officer—Notice 1069

2 Notice of suit against Government or public officer.

1 Suit against Government—Notice 1070

2 Notice of suit to Secretary of State—When necessary 1071

3 Notice—Suit against Government-Act of Government officers-Collectors declaration under the act 1072

4 Suit for injunction against public officer—Notice, whether necessary 1073

5 Notice when necessary—No notice under s 424 of the C P Code is necessary 1073A.

6 Suit against officer of Government 1074

7 Suit against the Secretary of State for India in Council—Notice—Public Demands-Recovery Act-Sale for default in payment of Costs of realizing Government revenue 1075

8 Suit against Public officer in respect of acts done by him in his official capacity—Notice of suit—Suit for damages against Public officers 1076

9 Suit against Public officer—Notice—Suit to recover articles seized by Police during a search 1077

10 Objection as to want of notice under s 424, to be taken only by Secretary of State 1078

3 Notice of suit against Municipality.

1 Local Government added as party—Notice necessary 1079

C P C (1908)S.80=(1882.S.424)-*Contd.*

4 Notice of suit to the Railway Administration.

1 Secretary of State to be sued as defendant in suit against State Railway—Amendment 1080

5 Notice of suit to state the cause of action.

1 Cause of action,—Notice,—Requisites and contents of 1081

2 Notice of action—Notice given by some plaintiffs—Object of notice—Contents of notice—Faslijasti 1082.

3 Suit against Public officer 1083

4 Notice of action C P C 1882, s 424. 1084

6 Liability of Public officers in actions for damages.

1 Government officer—Assault and use of insulting language—Notice if necessary—Damages—Public servant 1085

2 Notice, not necessary-Police Act sec 42—Suit against Police officer for damages for wrongful confinement 1086

7 Miscellaneous Cases.

1 Notice, contents of—Notice required 1087

2 Notice—Nature of plaint—Amendment of-Multifariousness 1088

3 Notice—Damages, suit for—Amendment 1089

4 Notice under S 424, C P C and s 52 of Land Acquision Act—Notice after amendment of plaint 1090.

5 Objection to sufficiency of notice after issues had been framed on the merits by consent of parties—Admissibility of such objection 1091

6 Notice of suit, sufficiency of, who can object-Notice, object of 1092

7 Notice—object-Waiver 1093

8 Secretary of State added as party—Want of notice—Dismissal of suit-Appeal of Court to treat it as one in revision 1094

9 Whether a fresh defendant can be substituted for a sole—Defendant against whom no cause of action is

C P C (1908) S.80=(1882,S.424)-*Contd*

found to exist—Notice under s 424 (1882) is necessary in case 1095

10 Notice by person under whom the plaintiffs claim, insufficiency of-Plaint, rejection of 1096

11 Construction of the words " delivered or left at "-Notice of suit 1097

12 Dismissal of prior suit for want of notice under 1098

C P C (1908)-S 80=(1882) S 424.

See Cases under:—

(1) Collector.
(2) Parties—Parties to suits—Government.
(3) Public Officer
(4) Subordinate Judge-Jurisdiction of.

—S 80—Suit barred by any law. See C P C O 7 r 11 case No (1673) **25 All 187.**

C P C (1908) S 80. See C P C (1908 s 2 cl 17). Case No (58) **12 Bom L R 615.**

1 PERSONS WHO ARE & WHO ARE NOT PUBLIC OFFICERS.

(1) Public servant—Cantonment Committee is a Public servant—Notice of a claim—Notice compulsory—Actions ex delicto.

1066.—C P C Ss 80; 2 (17),

The Cantonment Committee, constituted under the Indian Cantonments Acts, 1889, is, for the purposes of S 80 of the Civ Pro Code, 1908, a "Public officer" as defined in S 2 (17) of the C P Code.

S. 80 of the Civ Pro Code, 1908, applies to actions sounding substantially in tort, although those actions may, by operation of law, be treated, for certain purposes, as actions *ex contractu*. (20 Bom 697. Expl.) **Cecil Geay v The Cantonment Committee of Poona 12 Bom L R 615**

(2) Official assignee—Public officer - Notice

1067.—C P C S. 80=(1882 S, 424)

The official Assignee of the Insolvent Court is a Public officer as defined in S 2 of the Civil Procedure Code. Consequently a suit regarding acts done by him in the capacity of Official Assignee cannot be filed against him without giving him the notice prescribed by S 424 of the Code. **Joosub Haji v. N W Kemp 4 Bom L R 929 =26 Bom 809.**

(3) Public officer—Administrator General—Cause of action—Statement of service of notice.

1068.— C P C S, 80=(1882 s, 424)-Statement of service of notice in plaint—Administrator Generas' Acts III of 1847 and V of 1902).—

All estates in the hands of the Administrator General are held by him as Administrator General i. e. as a Public officer, and in any suit instituted against him in respect of any act purporting to be done by him in his official capacity he is entitled to notice under S 424, C P C. The phrase " cause of action " in S 424 C P C should not be too narrowly construed, the object of the section being merely to inform the defendants of the grounds of complaint. (24 Mad 279; 25 All 187 at 191 foll). The portion of S. 424, C P C relating to the plaint containing a statement that such *notice* has been left or delivered in the manner prescribed by the section is separable from the earlier portion which deals with the delivery of the notice two months before suit. It is only when notice is not given that the suit is liable to be dismissed. The suit however, may be proceeded with if notice has been given in the manner prescribed, and subsequently the plaint is amended in order to state that fact

Bhoiram Chowdhury v. Administrator General. 8 C W N 913.

Notes,—Ref: 28 All 600.

(4) Suit against Ward of Court—Public officer—Notice.

1069.—C P C S 80 1908= S. 424 of 1882.

Held, that a suit based on a bond executed by the father of the minor defendant, who at the time of the suit was a Ward of Court, is not one to which the provisions of Section 424, Civil Procedure Code, are applicable, so as to render it necessary for a previous notice to be served on the Court of Wards, as a preliminary to the plaintiff's right to come into Court. **Basant Singh v Indar Singh 24 P R 1889.**

C P C (1908) S.80=(1882 S.424)-*Contd*

2 NOTICE OF SUIT AGAINST GOVERNMENT OR PUBLIC OFFICER.

(1) Suit against Government—Notice.

1070—C P C S 80=(1882 s. 424)—

The notice of suits prescribed by s. 424 of the Civil Procedure Code, is necessary even when the remedy sought in the action is only an injunction. **Hari v Secretary of State 5 Bom L R 431=27 Bom. 4.**

(2) Notice of suit to Secretary of State—When necessary.

1071 C P C S 80=(1882 s 424)

When no relief is claimed against the Secretary of State, no notice under S 424 is necessary. **Jogendra Narayan Roy v. Crawford 32 Cal 1141**

(3) Notice—Suit against Government—Act of Government officers—Collectors declaration under the Act

1072 C P C—S.80=(1882 s. 424)—Notice—Suit against Government—Act of Government officers—Bhagdari Act (Bom Act V of 1862) S 8—Collector's declaration under the Act—The Collector of Kaira, acting under s.8 of the Bhagdari Act, 1862, declared that certain mortgages in favour of plaintiff were illegal and inoperative. The plaintiff filed a suit to have it declared that the order was null and void. The notice, required by s 424 of the Code of 1882 was not given.

Held that the notice was compulsary, for the declaration was a distinct act of the Collector, done in the exercise of a statutory power, and therefore in his official capacity.

The true test of an action for the purposes of S. 424 which is the same as s 80 of the new Code of 1908 is whether the wrong complained of as having been done by the public officer sued amounts, first, to a distinct act on his part and secondly whether that act purported to have been done by him in his official capacity Both these elements must combine to render necessary the giving of notice under s 424 as a condition precedent to suit. **Chhaggan Lal v Collector of Kaira. 12 Bom L R 845.**

C P C (1908) S.80=(1882.S.424)-*Contd.*

(2) Notice of suit against Government or Public Officer—*Contd.*

(4) Suit for injunction against public officer Notice whether necessary.

1073 C P C-S. 80=(1882 S 424)—Suit against a public officer for an injunction to restrain the commission of an act, not done but threatened to be done, is not a suit in respect of an act purporting to have been done by him, and so, this section does not render notice necessary, so far as a suit seeks relief by injunction. (36 Cal 28 Fol. Appeal No. 3 of 1903 referring to 11 Q B D 785 Dist) **Fandumal v Mahomed Sharif, 3 Sind L R 175.**

(5) Notice when necessary—No notice under s 424 of the Code of Civil Procedure is necessary.

1073A—C P C s 80=(1882 s. 424),

When public officers are sued not in their admitted official capacity but as individual trespassers, no notice under s. 424 of the Code of Civil Procedure is necessary. Even in case where such a notice would be otherwise necessary so far as the suit sought relief by an injunction to restrain the commission of an act, no notice under that section would be necessary. **Ganada Sundari Chaudurani v Nalini Ranjan Raha 12 C W N 1065=3 Cal 28=1 Ind Cas 514.**

(6) Suit against officer of Government.

1074—C P C S. 80=1882 S.424 Bombay Civil Courts Act (XIV of 1869), s. 32—Suit *ex contractu*—Notice of suit.

S. 424 of the Civil Procedure Code (Act XIV of 1882), which requires notice to be given to a Public officer two months before the institution of a suit against him, does not apply where the suit is one *ex contractu*. (7 Cal 499, and 19 Bom 407, referred to) **Rajmal Manikchand v Hanmant Anyaba. 20 Bom 697.**

(7) Suit against the Secretary of State for India in Council—Notice—Public Demands Recovery Act—Sale for default in payment of costs of realising Government revenue.

1075—C P C S. 80 (1908)=S. 424 (1882).

Plaintiff had instituted a suit against the Secretary of State for India in Council to set asi e

C P C (1908) S.80=(1882, S 424)-*Contd.*

(2) Notice of suit against Government or Public officer—*Contd.*

a sale of the plaintiff's property but had failed to give him a notice prescribed by s. 424. *Held* that whether or not the words "in respect of an act purporting to be done by him in his official capacity" relate only to a Public officer and not to the Secretary of State, no suit whatever is maintainable against the Secretary of State unless the notice prescribed by S. 424 has been given and that the present suit could not be maintained.

Secretary of State for India in Council v Rajlucki Debi. 25 Cal 239, 22 Cal 222, L R 21 I A 171, 11 Cal 17.

Notes—Ref: 30 Cal 36; 34 Cal 257; 5 C L J 148.

(8) Suit against Public officer in respect of acts done by him in his official capacity—Notice of suit—Suit for damages against Public officer.

1076—C P C S. 80 (1908)=S. 424 (1882)—Trespass—Misjoinder of causes of action-Amendment of the plaint.

Plaintiff sued the defendant a Public officer for damages for wrongful arrest and trespass illegally and maliciously done by the defendant on two different occasions, and claimed one lump sum as damages for both the acts Permission to amend the plaint was not asked for in the lower Court. Notice to the defendant was given only 33 days before the institution of the present suit. *Held* that plaintiff's arrest was clearly an act done in the official capacity and hence 2 months notice was absolutely necessary and in its absence the suit was rightly dismissed. (7 Cal 499 distinguished).—*Quære*—Whether the trespass was an act done in the official capacity and whether notice under s. 424 was necessary. *Held*—that as the two acts were mixed up together in the plaint and one lump sum claimed as damages for both, and as no permission to amend the plaint was asked for in the lower court so as to convert the suit into one for damages with reference to trespass only, the plaint ought not to be allowed to be amended on appeal to the High Court.

Jogendra Nath Roy v Price. 24 Cal 584.

Notes.—Ref: 26 All 220; W N (1907) 170. Rel: 29 All 567.

C P C (1908) S.80=(1882, S.424)-*Contd.*

(2) Notice of suit against Government or Public officer—*Contd.*

(9) Suit against public officer—Notice—Suit to recover articles seized by police during a search.

1077—C P C S. 80=(1882 S. 424).

The plaintiff sued to recover from the defendant three account books, which he alleged that the defendant, a Sub-Inspector of Police, had seized during a search, apparently in pursuance of the provisions of S. 165 of the Code of Criminal Procedure, of the plaintiff's house. *Held* that the defendant, if he seized the books, which was denied, did so in his capacity as a Police officer, and that the suit was not maintainable in the absence of the notice prescribed by S. 424 of the Code of Civil Procedure. (26 All 220 Dist: 24 Cal 584 Ref.) **Bakhtawar Mal v Abdul Latif. A W N 1907, 170=29 All 567.**

(10) Objection as to want of notice under s. 424 to be taken only by Secretary of State.

1078—C P C S. 80=[1882 s. 424]—Money supplied for litigation in a pre-emption suit by third person—Cost of improvement—Cost of stamp paper.

The Deputy Commissioner, as Manager, Court of Wards, sold to the defendant certain villages one of which was previously held by him under a usufructuary mortgage, the amount of which was deducted from the sale-price. The plaintiff claimed pre-emption. The Deputy Commissioner raised no objection for want of notice under S. 424.

Held, that the suit against the Deputy Commissioner was bad for want of notice under S.424, and should have been dismissed as against him. But the suit was not liable to be dismissed as against the vendee, inasmuch as, under the circumstances, the vendor was not a necessary party.

Held, also, that the objection as to notice could only be taken by the Secretary of State.

Held, further, that the suit was not liable to dismissal, simply because it was carried on with money supplied by a third person.

C P C (1908) S 80=(1882 S.424)-*Contd.*

(2) Notice of suit against Government or Public officer—*Concld.*

Held, also, that the pre-emptor was not liable to pay the cost of improvements or of the stamp for the sale-deed. The only thing, which the pre-emptor could be ordered to pay, was the sale-price.

Held, lastly, that the defendant, as purchaser of the equity of redemption, could not, in the absence of a special contract to the contrary, set up his own previous mortgage as still subsisting. (25 All 187, 3 All 20, 25 Cal 259, 9 O C 275, 25 All 549, 6 All 57; A W N [1903], 239, 80 P R 1888, 134 P R 1889, Ref: 1 C L J 542 Fol: L R 1 Ca D, 1896, 726 Ref:). **Bihdeshuri Singh v Panoit Balraj Sahai.** 10 O C 49.

3 NOTICE OF SUIT AGAINST MUNICIPALITY.

(1) Local Government added as party—Notice necessary.

1079—C P C S. 80 (1908)=S. 424 (1882).

Where a plaintiff in a suit brought under Act No XV of 1873 against a Municipal Committee not having made the Local Government a party defendant to the suit as originally filed, subsequently applied to have the Local Govt. made a party, it was *held* that such application to add the Local Government as a party should state that the notice required by s. 424 of the Code of Civil Procedure had been served as provided by that section. **Ram Dial v The President of the Municipality of Kalpi.** 16 W N 22.

4 NOTICE OF SUIT TO THE RAILWAY ADMINISTRATION.

(1) Secretary of State to be sued as defendant in suit against State Railway-Amendment.

1080-C P C Ss. 80, 79 (1)=(1882 Ss. 424, 416.)

In a suit for compensation against two State Railways the persons sued were the Traffic Superintendents of those railways *Held*, that the suit was one against the Government and should have been brought against the Secretary of State as provided in S. 416 of the Code. *Held*, further, that the suit would not lie as against the Secretary of State, nor could the plaint be amended by substituting the Secretary of State for the Traffic

11 C C 128

C P C (1908) S.80=(1882, S.424)-*Contd.*

(4) Notice of suit to the Railway Administration—*Concld.*

Superintendents until the notice required by s. 424 was given. **Traffic Superintendents. E B E I and O &R Railways v Hafiz Abdul Rahman.** 4 O C 133.

5 NOTICE OF SUIT TO STATE THE CAUSE OF ACTION.

(1) Cause of action—Notice, requisites & contents of.

1081—C P C S. 80, O 7 Rr 1, 2, 4, 5, 6 S. 80 (1882 Ss. 424 and 50).

The plaintiff is bound by law to state his cause of action not only in the plaint but in the notice required by S. 424 of the Civil Procedure Code. And where the plaintiff charges the publication of a libel by a Government Resolusion, which on the face of it purports to be an official document and a privileged communication addressed only to specified officials, he is bound to allege in his plaint, the publication on which he relies as giving him a cause of action in respect of such a communication. Per *Chandavarkar*, J—The notice under s. 424 of the Civil Procedure Code should state the relief which the plaintiff claims; it should be absolute in terms and not conditional. **Jehangir v Secretary of State.** 6 Bom L R 132

(2) Notice of action—Notice given by some plaintiffs—Object of notice—Contents of notice—Faslijasti.

1082—C P C S. 80=(1882 S. 424).

A notice issued by some of many joint plaintiffs is enough to satisfy the provisions of section 424 C P C the object of which is only to give the defendant an opportunity of setting the plaintiff's claim.

The phrase "Cause of action" in section 424 C P C is not used in its narrow sense the object of the section being only to give notice of the substantial ground of complaint.

Where in assertion of a right the Government collected Falsijasti from the plaintiffs and the plaintiffs after giving notice of action brought this suit to recover the illegal collection made as well after, as before the date of the notice.

C P C (1908) S.80=(1882, S.424)-*Contd.*

(5) Notice of suit to state the cause of action—*Contd.*

Held—that the object of the section having been achieved by the notice already issued, no fresh notice was necessary in respect of the claim for the refund of the subsequent collections.

Secretary of State for India v Venkatachala Perumal Pillai. 11 M L J 117=24 Mad 279.

Notes:—Fol: 8 C W N 913; Ref: 27 Bom 189, 14 M L J 350. Dist: 25 All 187.

(3) Suit against public officer.

1083—C P C *S.* 80 (1908)=S. 424 of 1882—Notice of action, Form of.

In a suit against the Deputy Magistrate of A and the Deputy Magistrate of B for damages for having in bad faith and maliciously caused the plaintiff to be confined in hujat, the plaintiff served a notice under s. 424 of the Civil Procedure Code on the defendants, to the effect that the Deputy Magistrate, acting in concert with the intention of oppressing that plaintiff, had wilfully, improperly and illegally kept him in hujat and hereby caused him injury. *Held* that the notice sufficiently stated the cause of action within the terms of s. 424 of the Civil Procedure Code, it not being necessary that a notice under that section should be read with the strictness with which a plaint should be read in regard to the statement of the cause of action. **Parbutty Churun Mozoomdar v Nobin Chunder. 13 C L R 195.**

(4) Notice of action-C P C (1882), S. 424.

1084—C P C—(1908) S. 80=(1882) S. 424—Joint suit by alleged partners in respect of leases made in the names of certain individual members of the alleged partnership—Joint undivided Hindu family—Omission in plaint to specify grounds entitling plaintiffs to sue jointly in respect of such leases—Evidence Act(I of 1872), Section 92.

Plaintiffs in their notice of action describe themselves as Toll Bar contractors, Dharmpur, and residents of Simla, and stated that they intended to sue the Secretary of State for India in Council for damages for breach of the terms of three several leases granted to them, and the plaint was in conformity with the said notice. The

C P C (1908) S.80=(1882, S.424)-*Contd.*

(5) Notice of suit to state the cause of action—*Concld.*

leases filed purported to be executed as follows:—(1) that for the first year by plaintiff III alone; (2) that for the second year by plaintiffs 1 and 11 alone; and (3) that for the third year also by plaintiffs 1 and 11 alone. The plaint contained no statement of the circumstances which entitled the three plaintiffs to sue jointly for damages in respect of each of the three leases, none of which purported to be granted to all of them but in answer to defendant's first plea that he had contracted, if at all, with plaintiff III alone in respect of the first lease and with plaintiffs 1 and 11 alone in respect of the two other leases, plaintiffs replied that the contract was with all three and all were entitled to sue because " they were then, and still are, members of a trading partnership and also of an undivided Hindu family." Defendant having thereupon rejoined that the notice of action was insufficient, the lower Court framed, *inter alia*, two preliminary issues,—(i) whether the notice of action was sufficient, and (ii) whether the mere fact that plaintiffs are partners or members of a joint Hindu family suffices in law to include them all in the contract, if any, so as to enable them to sue jointly—and, deciding both issues in favour of defendant, dismissed plaintiffs' suit. The plaintiffs appealed to the Chief Court.

Held, that there was no substantial variance in respect of the statement of the cause of action between the notice of action given and the suit brought in pursuance of the notice given, that the notice of action given was sufficient, and that the suit was not liable to dismissal in consequence of such variance as there was.

Held, further, that the fact that the lease for the first year was in the name of plaintiff III alone, and the two other leases in the names of plaintiffs 1 and 11 alone was not of itself conclusive proof that plaintiffs were not jointly interested therein, and that S. 92 of the Evidence Act, 1872, would not debar plaintiffs 1 and 11 from proving that they were interested in the first lease or plaintiff III from proving that he was interested in the two other leases.

Held, that, if after trial it should prove that there has been a misjoinder of plaintiffs, it would not by reason of Section 26 of the Civil Procedure Code, be necessarily fatal to the suit. **Tani Mahesha v Secretary of State for India. 67 P R., 1894.**

C P C (1908) S.80=(1882, S.424)–*Contd*

6 LIABILITY OF PUBLIC OFFICERS IN ACTIONS FOR DAMAGES.

(1) Government officer—Assault and use of insulting language—Notice if necessary—Damages—Public servant.

1085—C P C S. 80=[1882 S.424].

Where a public officer employs insulting language to and assaults his subordinate, he is not entitled to such notice of any action of his as is required by S. 424.

If a public officer exceeds his rights and uses defamatory language which is actionable, or assaults or beats a subordinate, he is responsible in damages as any ordinary person would be liable. **Mumtaz Husain v A E Lewis. 7 A L J 301=5 Ind Cas 467.**

(2) Notice not necessary—Police Act S. 42—Suit against Police officer for damages for wrongful confinement.

1086—C P C–S. 80=(1882 S. 424)—Action of Police officer malicious.

One P.L. brought a suit against a Sub-Inspector of Police claiming damages for wrongful confinement among other matters. It was found that the Sub Inspector did not purport to act in good faith in pursuance of the law, but that he took advantage of his position as a police officer to commit illegal and tortious act maliciously and without cause.–*Held*, under these circumstances the defendant was not entitled to notice of suit either under S. 424 C. P. C or under S. 42 of the Police Act, 1861, and the plaintiff's suit was not liable to dismissal for lack of such notice. (7 Cal. 499, 24 Cal 484 Ref.) **Mohammad Saddiq Ahmed v Ponna Lal. 1903 A W N 241=26 All 220.**

Notes.—Ref: 32 Cal 1130=1 C L J 542. 9 O C 275. Dist: 29 All 567=A W N 1907,170.

7 MISCELLANEOUS CASES.

(1) Notice, contents of–Notices required.

1087—C P C—S. 80=(1882 s. 424).

Notices required to be given under s 424, C P C should not be construed as if they were pleadings and need not set out all details and facts of the case which the plaintiff intends to prove. The notice should be considered sufficient if it substantially fulfils its object in informing the parties concerned generally of the nature of the suit intended to be filed. A notice not charging express malice but not inconsistent with which a suggestion is good when the cause of action is based on malice. (24 Mad 279; 1 *K* B 493; 3 C P C 423; 13 C L R 195, 196; 5 B & Ald 837 followed.) **Jehangir M Cursetji v Secretary of State. 5 Bom L R 30=27 Bom 189.**

C P C (1908) S.80=(1882, S.424)–*Contd.*

(7) Miscellaneous cases—*Contd.*

(2) Notice—Nature of plaint—Amendment of,—Multi-fariousness.

1088—C P C S. 80 (1908)=(1882) s. 424—

Notice need not be in technical form, but must be "sufficiently clear and explicit to show the ground of complaint, the cause of action." A notice, which informed the Collector of the nature of the plaintiff's complaint and of his intention to institute a suit to reverse the order and obtain such relief as he might be advised, was *held* to satisfy the above condition. **Lallubhai v The Collector of Kaira 1889, P J. 50.**

(3) Notice damages, suit for—Amendment.

1089—C P C S 80=[1882 S. 424]

No notice under S. 424 C P C. is necessary as regards acts not done in the official capacity but notice is necessary as regards acts done in official capacity even if they are done in pursuance of an illegal conspiracy.

Where plaintiff jumbled up both these kinds of acts as giving rise to a cause of action for a suit for damages and claimed one lump sum as damages for all the acts. *Held* that amendment cannot be allowed (7 Cal 499; 26 All 220 and 24 Cal 584 Ref.) **Brij Mohan v Ali Husain. 9 O C 275.**

Notes:—Ref: Dist: 10 O C 49.

(4) Notice under s. 424—C P C S. 52 of Land Acquisition Act—Notice after amendment of plaint.

1090—C P C Ss. 80, 115=[1882 S. 424, 622] –Land Acquisition Act (1 of 1894) S. 6, 18, 39, 40, 52–Its scope–Meaning of–" Public purpos ", ' enquiry, 'award' 'Court'–Effect of declaration under s. 6—Nature of Consent in s. 39—Competency of the High Court to question the validity of proceedings under s. 40–Jurisdiction and functions of a Land Acquisition Collector.

(7) **Miscellaneous cases**—*Contd.*

There is nothing in the law to show that in case of any amendment of the plaint necessitated by the alleged discovery of facts previously unknown to the plaintiff the Secretary of State should have a further notice of 2 months under s. 424 C P C when the relief asked for is not altered by such amendment and it only embodies certain further material in support of the plaintiff's contentions.

Where in an action already instituted against the Secretary of State a public servant is also afterwards joined as defendant who however is not sued for any act done by him independently of Government, and no separate relief is asked for against him, no notice of action under S. 424 C P C., is required in his case.

Ezra v The Secretary of State,
7 C W N 249=30 Cal 36.

Notes:—Ref: 34 Cal 257=5 C L J 148; 13 C W N 116. Appl: 32 Cal 605 P C=9 C W N 454=7 Bom L R 422=1 C L J 227. Appr: 11 C W N 430.

(5) Objection to sufficiency of notice after issues had been framed on the merits by consent of parties—Admissibility of such objection.

1091—C P C S. 80=1882, S. 424.

The notice in question was given on the 7th November 1887 and the suit threatened therein instituted on the 10th March 1888. On the 18th June 1888 a decree was given in plaintiff's favour for a portion of his claim on the strength of an admission made by a person who appeared for the defendant. On the 1st October 1888 an application for review of judgment was made on the ground that the admission above referred to was made by an unauthorized person and also on the merits It was granted and pleas recorded on the merits and issues framed by agreement of counsel on the 5th January 1889. The 22nd April 1889 was fixed for evidence. On this date exception was taken for the first time to the sufficiency of the notice contemplated by Section 424 of the Code.

Held, that the objection had been taken too late and ought not to have been allowed after the defendant had pleaded on the merits.

Secretary of State for India v Mahtab Singh 155 P R 1890.

(7) **Miscellaneous cases**—*Contd.*

(6) Notice of suit, sufficiency of, who can object - Notice object of.

1092—C P C S. 80=[1882 S. 424]

An objection as to the sufficiency of a notice under S. 424 cannot be taken by any defendant other than the Secretary of State for whose benefit the notice is intended. The object of a notice under S. 424 is to give the Government and to the servants of Government time and opportunity of making amends before the matter is brought into Court. - When therefore, relief is claimed on the ground of fraud, but no fraud is charged against the Secretary of State and no relief is claimed as against him on that ground, the suit is not bad because the notice has not been served on him within the time prescribed by S. 424 of the Procedure Code.

Raghubans Sahai v Fulkumari.
1 C L J 542=32 Cal 1130.

Notes.—Ref; 2 C L J 404; 504; 33 Cal 451=10 C W N 347=3 C L J 235; 5 C L J 240 F B; 696 F B; 34 Cal 811 F B; 11 C W N 745;34 Cal 787.

(7) Notice-Object—Waiver.

1093—C. P. C. S. 80=(1882 S. 424).

A notice under S. 424 of the Code is given for the benefit of the defendant and the intention of the Legislature is that the Secretary of State should have an opportunity of investigating the alleged cause of complaint and of making amends, if he thinks fit, before he is impleaded in the suit and there is nothing to prevent the defendant from waiving the notice or from being estopped by his conduct from pleading the want of notice at the trial. (14. M & W 199, 11 C B 568 and Ex. Ch. 401 ref to, 25 All 187, 45 Ch D 139 and 23 Cal 87 dist) If the provisions of law are waived in the course of a trial, they cannot afterwards be set up by way of objection to any step taken or about to be taken upon the footing of the waiver; when a litigant has, without mistake, induced by the opposite party, taken a particular position in the course of a litigation, he must act consistently with it, especially if to allow him to do otherwise would be to prejudice his opponent. **Manindra Chandra Nandi v The Secretary of State for India in Council. 5 C L J 148=34 Cal 257.**

C P C (1908) S.80=(1882, S.424)-*Contd.*

(7) Miscellaneous cases—*Contd.*

(8) Secretary of State added as party—Want of notice—Dismissal of suit—Appeal of Court to treat it as one in revision.

1094—C P C S. 80=1882, Ss 424, 588 cls. 2, 6.

The Subordinate Judge at the instance of the defendant Municipality directed that the Secretary of State should be added as a party. That being done he returned the plaint to be presented to the proper Court. Accordingly the plaint was then presented to the District Judge. *Held* that the District Judge was right in dismissing the plaint as there was no notice required by section 424 of the Code of Civil Procedure; *held* also that the plaintiff if dissatisfied with the order of the Subordinate Judge ought to have appealed under section 588 cls 2 and 6 and that in this appeal the Court refused under the circumstances of the case to treat the matter as one in revision, and determine whether the Sub-Judge was right in adding a party. **Maharana Shri Fatesingji v The Amod Municipality. 1896 P J 129.**

(9) Whether a fresh defendant can be substituted for a sole defendant against whom no cause of action is found to exist—Notice under S. 424 (1882) is necessary in case.

1095—C. P. C. S. 80, O. 1, rr. 8 (2) 10 (*2*).

Whether notice under s. 424 is necessary in case of adding a public officer as co-defendant in a case against Secretary of State—Act XVIII of 1850, **59 P W R 1908.**

(10) Notice by person under whom the plaintiffs claim, insufficiency of—Plaint, rejection of.

1096—C. P. C. S. 80=(1882 S. 424).

A notice given under the provisions of S. 424 by a party who dies before filing the suit, will not enure for the benefit of his representatives so as to entitle them to institute a suit without giving fresh notice. S. 424 is imperative and a plaint filed without giving the required notice is to be rejected under S. 54 (c) C. P. C; and cannot be cured by a subsequent notice.

Bachehu Singh v The Secretary of State for India. 1903 A W N 13=25 All 187.

Notes:—Fol: 8 C W N 913. Dist: 5 C L J 148. Ref: 5 C L J 270; 34 Cal 257; 305; 28 All 600.

C P C (1908) S.80=(1882, S.424)-*Concld.*

(7) Miscellaneous cases—*Concld.*

(11) Construction of the words "delivered to or left at"—Notice of suit.

1097—C. P. C. S. 80 (1908)=S. 424 (1882).

Held, that there is nothing in the language of Section 424, Civil Procedure Code, 1882, to prohibit the use of the post in delivering or leaving the notice of suit required by that section.

Held, also, that the defendant had failed to show that the words "delivered or left" used in the section have acquired a technical meaning or are used in any but their ordinary and popular sense; and that he had similarly failed to show any ground for holding that the Legislature intended to exclude the use of the post.

Held, further, that, assuming the plaintiff's case to be founded upon contract, and not upon tort, the Collector of the Simla District was the Collector within the meaning of Section 424 for the purpose of the present case. **Tani v Secretary of State in Council. 71 P R 1891.**

(12) Dismissal of prior suit for want of notice under.

1098—C. P. C. S. 80-Fresh suit after notice. —Period covered by prior suit whether can be excluded in computing limitation for second suit. **5 S L R 181.**

C P C (1908) S. 81

Notes.—The first part and clause (b) of this section correspond with section 428 of Act XIV of 1882. Clause (a) of this section is somewhat similar to s. 425 of the old Act. The language of s 425 was to the following effect;—"*No warrant of arrest shall be issued in such suit without the consent in writing of the District Judge,*" and on comparison of the above provisions of s 425 with clause (*a*) it would appear that material changes have been introduced by cl. (*a*). As the clause (*a*) now stands, it would not be necessary to obtain the sanction of the District Judge before issuing the warrant of arrest. But the defendant shall not be liable to arrest, nor his property shall be liable to attachment otherwise than in execution of a decree, that is he will not be liable to arrest nor his property shall be

C P C (1908) S 81=(1882,S.428)-*Concld.*

liable to attachment *before judgment*. This section must be read with section 82, in which the procedure has been laid down for execution of a decree against the Secretary of State or against a public officer.

C P C (1908)-S. 84=1882, S. 431

See (1) Foreign Court, Judgment of.
(2) Foreign State.

C P C (1908) S. 85=1882, S. 432

See Plaint-Verification & signature
41 P R 1902.

C P C—S 85.

See C P C O 3 r 2. Case No (1581)
165 P R 1889.

1099.—Suit by independent Prince in British India—Recognised agent to institute the suit—Signature & verification of the plaint.

An independent Prince is not prevented from instituting a suit in a Court in British India in his own name and through a recognised agent other than one appointed under S 432 of C P Code. **Beer Chunder Manikya v Ishan Chunder Burdhun** 10 Cal 136.
Maharaja of Bhartpur v. Kacheru 19 All 510

1100-1110.—C P C S 85 (1882 s. 432)-Recognized Agents—Applicability of section to suit, in Revenue Courts:—

Held, that s. 432, C P C, applies to suits filed in a Court of Revenue under the provisions of Act No XII of 1881. **Maharajah of Rewah v Swami Saran** 1903 A W N 189= 25 All 635.

1111.—C P C Ss 85; 86=1882 S. 432—Ruling Chief-Thakore of Umeta.

The Thakore of Umeta being the head of an ancient family which has long exercised hereditary jurisdiction and still continues to do so in some of his villages, *held* to be a ruling Chief The mere fact that his principal residence at Umeta is within British territory does not affect his position as section 432 refers to all Ruling Chiefs whether residing within or without British territory. **Hathisangji v Chhaganlal.** 1893 P J 295.

C P C (1908) S.85=(1882,S 432)-*Concld*

1112.—C P C S 85=S 432.—Suit by a chief in his own name.

In this case the Chief of Indore sued in his own name one Sipahi Singh. It was contended for the defendant-appellant that the Chief could not sue in his own name under s. 432 of the Code of Civil Procedure. *Held* that the section was an enabling provisiou and not prohibitory.

Sipahi Singh v The Chief of Indore
6 W N 133.

C P C Ss 85, 86=1882 Ss 432,433

See Jurisdiction of Civil Court—Foreign and Native Rulers.

C. P. C. S. 86=1882, S. 433.

Notes:—This section corresponds with section 433 of Act XIV of 1882; the only changes introduced in this section are, that the words "*it appears to the Government that*" have been added after the word "*unless*" in the latter part of clause (*2*), and the words '*a Secretary*' have been substituted for the words "*one of the Secretaries in clause* (1)."

C P C—S. 86=1882 s 433.

See (1) Jurisdiction of Civil Court—Foreign and Native Rulers. **10 P L R 130.**
(2) Res-judicata-Competent Court-General Cases.
(3) C P C S. 85. Case No (1111.)
1893 P J 295.

1113—Civ Pro Code S. 86=S. 433 (1882)—Ruling Chief—Suit against, along with other defendants—Scope and applicability of—Want of consent under—Effect-One cause of action—Suit upon—Against several defendants—Bad as against one defendant—Maintainability as against other co-defendants—S. 373,—C P C (1882)—Applicability to appeals—*Held*, (1) that the Raja of Poonch was Ruling Chief.

(*2*) That the provisions of S. 433 C P C apply both to suits in which the Ruling Chief is sued in his public capacity and to those in which he sued in his private capacity, that consent under S. 433 C P C must be obtained prior to the institution of the suit, and that the suit, having been admittedly instituted without such consent fails.

(3) That the provisions of S 373 C P C permitting the withdrawal of suits with liberty to bring fresh suits, are as applicable to appeals as to proceedings in original Court, and that the present case was a fit one for the exercise of such powers.

There is no warrant in S. 433 C P C for the contention that the Court had neither the jurisdiction nor the power to entertain a suit in which one of the defendants is a Ruling Chief.

The Ruling Chief may not be subject to the jurisdiction of the Court, but it is going much too far to argue from this that the Court cannot take cognizance of the claim in so far as it affects persons who cannot plead that they are Ruling Chiefs.

(4) *Held*, that the suit in which there is only one cause of action does not fail as against the other defendants, merely because it fails against the Raja of Poonch for want of consent under S. 433 C P C.

Assuming there is but one cause of action it cannot be said that the suit, if found to be bad as against one defendant, must *ipso facto* be held bad as against all other defendants, quite irrespectively of the grounds upon which the suit is held bad as against one defendant. There may be only one cause of action, but the defences raised by the various defendants may be entirely different, and it does not follow, because one defendant succeeds in escaping liability by reason of a defence peculiar to himself, that the claim as a whole falls to the ground. (L R (1894) 1 Q B 149 and L R 1900 Ch 811 Ref. 3 C L R 417 Ref: 2 C L J 163 Appr. 31 Bom 351 Fol. 5 M H C R 298 ; 8 All 82 ; 20 W R 163 ; 17 All 97 Ref and Fol. 19 P R 1892 ; 25 P R 1900 Ref.)

Dayal Singh v Uttam Kaur.
21 P R 1909=32 P L R 1909=
27 P W R 1909=1 Ind.Cas 604.

1114—C P C Section 86 (1908)=s. 433 of (1882)-Jurisdiction—Suit against ruling chief—Institution of suit without obtaining the consent of Governor-General in Council—Waiver by defendant of objection to consent—Effect of such waiver.

Held, that the exemption from being sued in the Civil Courts in British India without the sanction of the Governor-General in Council conferred on independent ruling chiefs by Section 433, Civil Procedure Code, is a purely personal privilege capable of waiver and does create a defect of jurisdiction in the Courts, and that a defendant who is such a chief but who does not take the objection at the proper time waives his privilege thereby and cannot raise it for the first time in further appeal in the Chief Court. (2 Bom H C R A C 396), 1 Q B (1894) 149, (9 Calc 535, 21 Bom 351, (L R 13 I A 134), cited.

The Maharaja of Faridkot v Ball Hobson.
40 P R 1903=69 P L R 1903.

1115—C P C S. 86=(1882 S.433)-Suit against a ruling prince for arrears of pay—Sanction by Government of India—Maintainability.

Held that a suit for alleged arrears of salary against a ruling Prince, was not one of the suits for which the Government of India could grant sanction under s. 433 of the Code of Civil Procedure, and such a suit, though instituted with the sanction of the Government of India could not be maintained, and must be dismissed.

Maharajah of Jaipur v Lalji Sahai.
4 A L J 358=(1907) A W N 95=
29 All 379.

1116—C. P. C. S 86—Suit against Sovereign as Ruler of State—Act XVII of 1877, Sections 4 9, 30—Act XIV of 1875, Section 3—Jurisdiction of Court of Judicial Assistant—Subordination to District Court—Jurisdiction of Court to consider validity of certificate granted by Government under Section 433 of the Code—Sovereign Prince "trading" within jurisdiction of Court—Ground for second appeal.

Held, that the Court of a Judicial Assistant constituted under the powers conferred by Section 3 of Act XIV of 1875, and Section 9 of Act XVII of 1877, is not subordinate to the Court of the Deputy Commissioner, within the meaning of Section 433, Civil Procedure Code.

Held also, that where a certificate of the sanction of Government to a suit being brought against a Sovereign Prince has been granted under Section 433 of the Code, the Court is not only at liberty, but bound to consider, when the question is raised, whether the conditions laid down by the section have been fulfilled, under

C P C (1908) S. 86=(1882, S. 433)-*Contd.*

which alone the Legislature has empowered Government to grant such certificate,

The question whether it can be held on certain facts which are undisputed, that a Prince trades within the local limits of the jurisdiction of a Court within the meaning of Section 433 of the Code, is a question of construction, not of fact, and can be considered by a Court sitting in second appeal.

Held, on the facts found in the present case that the Maharaja of Kashmir could not be said to trade within the jurisdiction of the Lahore Court. **Maharaja of Kashmir v Mohan Lal. P R 51 of 1886.**

1117—C P C S. 86 (1908)=S. 433 (1852)—Suit against ruling Chief—Sanction under Sec. 433 of the Civil Procedure Code—Suit to recover Chouth—Onus of proof.—

A sanction of Government granted under Sec 433 of the Civil Procedure Code, which authorized the plaintiff to sue the defendant in respect of the *Chouth* of a village, entitles him to maintain a suit, so far as the jurisdiction of the Court is concerned, if he can show that he is legally entitled to some *Chouth*, *i. e*, some annual payment out of the village, even if he does not succeed in affirmatively establishing that his right to receive such payment originated in the manner and under the circumstances stated by him in his application to Government.

In a suit by plaintiff to recover arrears of *Chouth Hak* and for a declaration of his right to receive the same every year, defendant pleaded that the *Hak* was of the nature of "*Pal or Wol*" or blackmail levied by plaintiff's ancestors from defendant's ancestors, and that the payment being from its nature unlawful ought not now to be enforced by Courts of justice. Defendant, however, admitted that the *Hak* had been paid for many years prior to 1824, *i. e*, prior to the establishment of British rule in the place, that it was paid without any objection whatever up to 1857, and that from 1857, it was paid up to 1881, though not without some objection.

Held (1) That under the circumstances the onus of proving that the *Hak* originated in violence and wrong and was, therefore, illegal or unenforceable lay on the defendant. (2) That the defendant who failed to show by any evidence whatever how the payment really originated or anything more than that the payment was from the beginning called '*Pal or Wol*" had not negatived a perfectly legal origin of the *Hak*. (3) That if the *Hak* was really " *Pal or Wol* " it might yet have been paid in consideration of services rendered and protection afforded by the plaintiff's ancestors which would make it perfectly legal and enforceable in Courts of justice, and that if on the other hand the *Hak* was "*Pal*" of an unlawful and illegal character, *i. e.*, it was first extorted by threats of violence and plunder the legality of the *Hak* could not now after its recognition for so many years be called into question, so that even assuming that the true nature of the *Hak* was "*Pal or Wol*", it was not necessarily illegal or unenforceable on that ground.

The meaning of words "*Chouth*" and " *Pal or Wol*" discussed. **The Thakore Saheb of Limbdi v. The Darbar of Jasdan, P J 1897, p. 121.**

C P C—S. 87=1882 s. 434.

See Foreign Court, Judgment of.

C P C S. 88.

Notes:—This section corresponds with section 470 of Act XIV of 1882. Some important changes have been made in the language of this section. The words "*same debt, sum of money or other property, moveable or immoveable* ", have been substituted for the words "*same payment or property*", and the words "*other than for charges or costs* " have been substituted for the word "*stake-holder*".

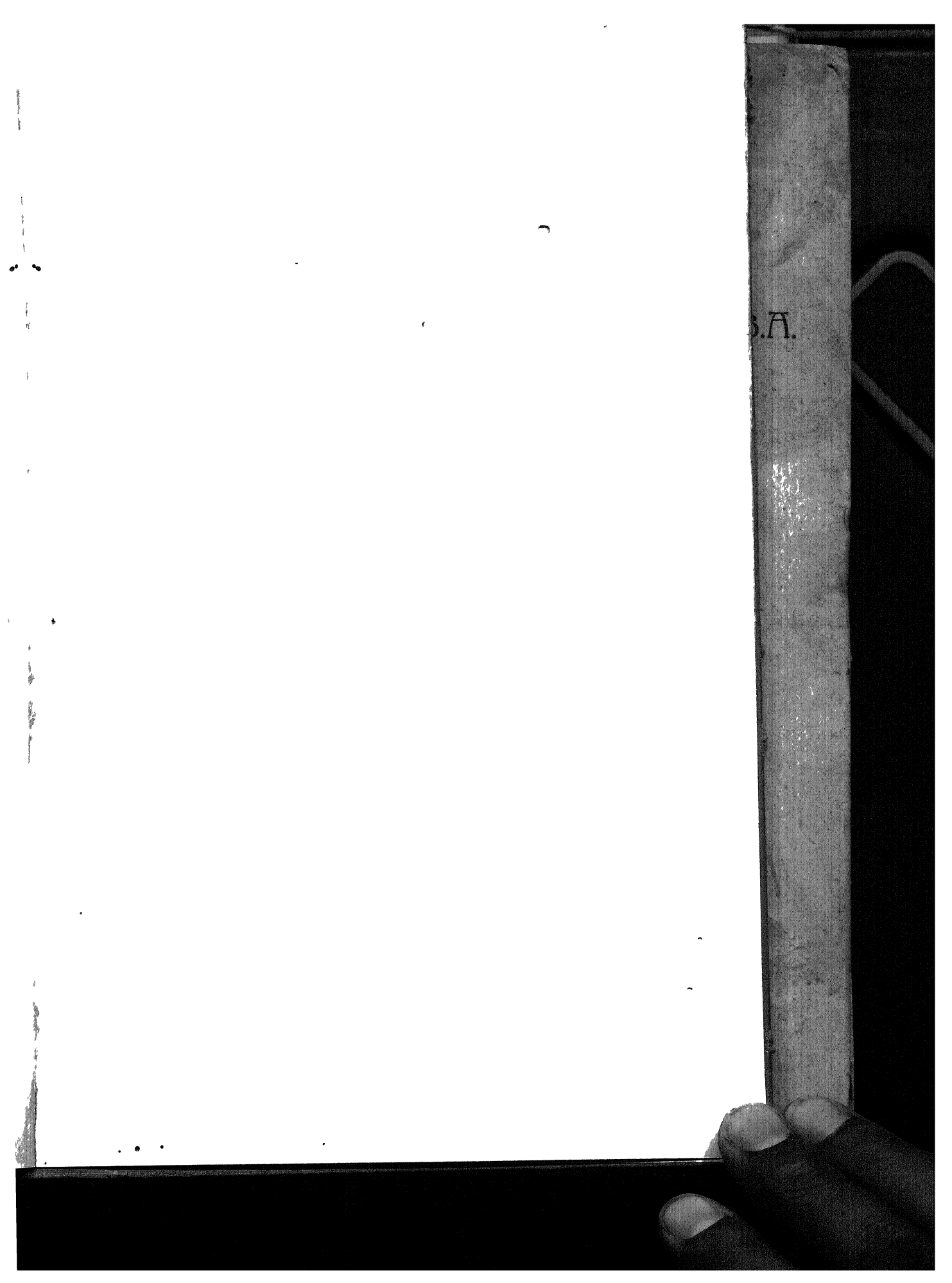
The other provisions of the Interpleader-suits, contained in sections 471, 472, 473, 474, 475 and 476 of Act XIV of 1882, have been placed in the First Schedule. See Order XXXV, Rules 1 to 6.

—S. 88 O. 35 r. 5=C P C (1882) Ss. 470-474.

See Cases under Interpleader suit.

1118—C P C S. 88—Suit by tenant to determine who is landlord—Maintainability. **13 Ind Cas 40.**

End of Vol. II.


.A.